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No. 07-440

IN THE
Supreme Court of the United States

WALTER ALLEN ROTHGERY,
Petitioner,
v.
GILLESPIE COUNTY, TEXAS,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTION PRESENTED

The Sixth Amendment right to counsel attaches when "adversary judicial proceedings have been initiated." *Kirby* v. *Illinois*, 406 U.S. 682, 688 (1972). This Court has held that when a defendant is arrested, "arraigned on [an arrest] warrant before a judge," and "committed by the court to confinement," "[t]here can be no doubt . . . that judicial proceedings ha[ve] been initiated." *Brewer* v. *Williams*, 430 U.S. 387, 399 (1977).

In this case, petitioner was arrested and brought before a magistrate judge who informed petitioner of the accusation against him, found probable cause that he had committed the offense based on a police officer's sworn affidavit, and committed him to jail pending trial or the posting of bail. The question presented is whether the Fifth Circuit correctly held—in a decision that conflicts with those of other federal courts of appeals and state courts of last resort—that adversary judicial proceedings nevertheless had not commenced, and petitioner's Sixth Amendment rights had not attached, because no prosecutor was involved in petitioner's arrest or appearance before the magistrate.

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The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 491 F.3d 293 (5th Cir. 2007) (Pet. App. 1a-12a). The opinion of the United States District Court for the Western District of Texas is reported at 413 F. Supp. 2d 806 (W.D. Tex. 2006) (Pet. App. 13a-31a).

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The Court of Appeals entered its judgment on June 29, 2007. The petition for a writ of certiorari

was filed on September 27, 2007, and granted on December 3, 2007.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

U.S. Const. amend. VI. The Sixth Amendment's Assistance of Counsel Clause is applicable to the States through the Fourteenth Amendment. *See Gideon* v. *Wainwright*, 372 U.S. 335, 342-345 (1963).

PRELIMINARY STATEMENT

As this Court has repeatedly held:

> Whatever else it may mean, the right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him—"whether by way of formal charge, preliminary hearing, indictment, information, or arraignment."

Brewer v. *Williams*, 430 U.S. 387, 398 (1977) (quoting *Kirby* v. *Illinois*, 406 U.S. 682, 689 (1972) (plurality opinion)).

In *Brewer*, this Court held that "[t]here can be no doubt . . . that judicial proceedings had been initiated," and the Sixth Amendment right to counsel had attached, when a defendant was arrested, made an initial appearance before a judge, and was committed to confinement in jail pending trial. 430 U.S. at 399. Subsequently, in *Michigan* v. *Jackson*, 475 U.S. 625 (1986),

the Court reaffirmed that such an initial court appearance "signals 'the initiation of adversary judicial proceedings' and thus the attachment of the Sixth Amendment" right to counsel. *Id.* at 629 (citation omitted); *see also id.* at 629 n.3. As *Jackson* explained, it is at that time—when a court has confronted a defendant with the accusation against him and imposed restrictions on his liberty to ensure that he answers that accusation—that he is transformed from a mere "suspect" to an "accused" within the meaning of the Sixth Amendment, "'faced with the prosecutorial forces of organized society.'" *Id.* at 631-632 (citation omitted).

In this case, petitioner Walter Allen Rothgery was arrested on suspicion of being a felon in possession of a firearm—a charge of which he was innocent, because he was not, in fact, a felon. Rothgery was brought before a magistrate, who informed him of the accusation against him and committed him to custody pending posting of bail or the disposition of the accusation. In short, Rothgery underwent precisely the type of initial court appearance that this Court held in *Brewer* and *Jackson* initiated adversary judicial proceedings and triggered the right to counsel. Rothgery repeatedly requested counsel, but was not appointed an attorney until some six months later, after he had been indicted, rearrested, and jailed. Once appointed, Rothgery's counsel procured the documents that proved his innocence of the charge against him, which was dismissed—but not before he had spent some three weeks in jail on the erroneous charge.

In the decision below, the Fifth Circuit recognized that, in *Brewer* and *Jackson*, this Court had held—without any mention of prosecutorial involvement—that the right to counsel attached at an initial post-arrest appearance before a magistrate. The Fifth Cir-

cuit nevertheless held that Rothgery's right to counsel did not attach at his initial appearance before the magistrate because there was no evidence that any prosecuting attorney was involved in Rothgery's arrest or initial appearance. That "prosecutorial involvement" test cannot be reconciled with this Court's precedent, will prove unworkable in practice, and disserves core Sixth Amendment values. This Court should reverse the decision below.

STATEMENT OF THE CASE

On July 15, 2002, petitioner Walter Allen Rothgery was arrested without a warrant for unlawful possession of a firearm by a felon, a felony under Texas law. *See* Tex. Penal Code § 46.04(a), (e). The police made the arrest on the mistaken belief that Rothgery had been convicted of a felony in California. In fact, the California charges against Rothgery had been dismissed after he completed a diversionary program. SJ Opp. Ex. 2.[1] Rothgery had no felony convictions, and he was thus innocent of the offense for which he was arrested.

The police booked Rothgery into the Gillespie County jail, where he immediately made a written request for the appointment of counsel. SJ Opp. Ex. 3, at 70. Rothgery spent the night in jail. The following morning, he made an initial appearance before a magistrate judge, pursuant to the Texas Code of Criminal Procedure. *See* Tex. Code Crim. Proc. art. 15.17. At that appearance (commonly referred to in Texas as "magistration" or an "Article 15.17 hearing"), the mag-

[1] The record materials submitted to the district court in support of Rothgery's opposition to Gillespie County's motion for summary judgment (Docket No. 33) are cited as "SJ Opp. Ex. ___."

istrate is required to "inform . . . the person arrested . . . of the accusation against him and of any affidavit filed therewith," along with his rights, including his right to counsel. *Id.*

At Rothgery's magistration, the magistrate was presented with an "Affidavit of Probable Cause" sworn to by the police officer who had arrested Rothgery, "in the name and by the authority of the state of Texas." Pet. App. 33a. The affidavit described the factual basis for the accusation against Rothgery and concluded as follows: "I charge that . . . on or about the 15[th] day of July, 2002, . . . Defendant, Walter A. Rothgery did . . . commit the offense of unlawful possession of a firearm by a felon—3rd degree felony [Penal Code §] 46.04 against the peace and dignity of the state." *Id.* The magistrate signed the affidavit, stating, "I hereby acknowledge that I have examined the foregoing affidavit and have determined that probable cause existed for the arrest of the individual accused therein." *Id.*

As required by Article 15.17, the magistrate informed Rothgery of the accusation against him, telling him: "You are accused of the criminal offense of: unlawful possession of a firearm by a felon which will be filed in . . . District Court." Pet. App. 35a. The magistrate also informed Rothgery of his rights, including his right to have an attorney appointed if he could not afford to hire one. *Id.* at 35a-37a. The magistrate certified that he had communicated that information to "the accused," and Rothgery acknowledged receiving it, by signing a form entitled "Warning by Magistrate." *Id.*

Rothgery had recently lost his job, and although he received veteran's disability and unemployment benefits, he could not afford an attorney. SJ Opp. Ex. 3, at 93-94. He therefore again requested that an attorney

be appointed for him. The magistrate told Rothgery, however, that if he wanted to proceed with the hearing and have his bail set that morning, he would have to waive his right to an attorney for purposes of the hearing. Otherwise, Rothgery would have to wait in jail until an attorney was appointed. *Id.* at 66-67. Rothgery agreed to waive his right to counsel for the limited purpose of allowing the hearing to continue and permitting the magistrate to set bail. *Id.* The magistrate recorded Rothgery's temporary waiver, underlining the words "at this time" on the relevant form to document that Rothgery was waiving only his right to have counsel present at the hearing. *Id.*; Pet. App. 36a.

The magistrate set bail at $5,000, Pet. App. 35a, thus requiring Rothgery to remain in jail pending the posting of bail or the disposition of the accusation against him. *See* Tex. Code Crim. Proc. art. 15.17 (directing magistrate to admit the arrestee to "bail if allowed by law"); *id.* art. 17.27 (providing that if bail is not paid, "the magistrate shall make an order committing the accused to jail to be kept safely until legally discharged").

Following his magistration, Rothgery remained in jail until later that day, when his wife was able to post a surety bond to obtain his release. The surety bond stated that Rothgery "stands charged by complaint duly filed in the Justice of Peace Court" with the felony of unlawful possession of a firearm by a felon, and was conditioned on Rothgery's personal appearance in court. Pet. App. 39a. The bond was "examined" and "approved" by the Sheriff of Gillespie County and was signed by a deputy sheriff. *Id.* at 40a.

After Rothgery was released on bond, he repeatedly inquired about the status of his request for

appointed counsel. SJ Opp. Ex. 3, at 69-70, 81-82. Gillespie County employees informed Rothgery that they could not locate his request. *Id.* at 70-72. On July 24, 2002, Rothgery submitted a new written, notarized request to Gillespie County jail officials for appointment of counsel. *Id.* at 72-74, 76-78. He also made telephone calls—including to employees at the jail, courthouse, and police department—every day for two weeks inquiring about his request. Thereafter, he continued placing calls, but with less frequency. *Id.* at 81-82, 86-87. Despite these efforts, no counsel was appointed. Unbeknownst to Rothgery, Gillespie County followed a policy of not appointing counsel for indigent defendants released on bond until after their first court appearance following information or indictment. SJ Opp. Ex. 7, at 15-17.

On January 17, 2003, a grand jury indicted Rothgery on the charge of being a felon in possession of a firearm. SJ Opp. Ex. 9. Rothgery's bail was increased to $15,000, he was rearrested due to the bail increase, and he was brought before the magistrate, where he renewed his request for counsel. SJ Opp. Ex. 3, at 92-93. Again, no counsel was appointed. Unable to post bail, Rothgery was once more committed to the Gillespie County Jail. Three days later, still with no lawyer, he was transferred to the Comanche County Jail, where he completed another written request for counsel. *Id.* at 95-96.

On January 23, 2003, a lawyer finally was appointed to represent Rothgery. The attorney secured an order reducing Rothgery's bail, which eventually allowed his release after he had served approximately three weeks in jail due to his second arrest. SJ Opp. Ex. 3, at 97-98. The attorney also contacted California authorities and obtained the relevant California records establishing

that Rothgery did not, in fact, have a felony conviction. SJ Opp. Exs. 2, 13. Accordingly, the district attorney moved to dismiss the indictment, and the court dismissed the charge. SJ Opp. Ex. 14.

Rothgery sued respondent Gillespie County under 42 U.S.C. § 1983 on the ground that the County's policy of not appointing counsel for defendants released on bond until after indictment violated his Sixth Amendment right to counsel. Rothgery argued that, under this Court's precedent, his right to counsel attached following his initial appearance before the magistrate, at which he was informed of the accusation against him and required to post bail or be committed to jail. While Rothgery did not contend that he was entitled to counsel at the initial appearance itself, he argued that if counsel had been appointed promptly after that appearance, the mistake underlying his arrest would have been discovered at that time, and he would not have been subject to bond for a lengthy period and wrongfully rearrested and jailed for nearly three weeks.

The district court granted Gillespie County's motion for summary judgment, holding that Rothgery's initial appearance before the magistrate did not constitute the initiation of adversary judicial proceedings and therefore did not trigger his right to counsel. Pet. App. 29a-31a.

The Fifth Circuit affirmed. It observed that this Court has held that the Sixth Amendment right to counsel attaches once "'adversary judicial proceedings have been initiated . . . whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'" Pet. App. 5a (quoting *Kirby* v. *Illinois*, 406 U.S. 682, 688-689 (1972) (plurality opinion)). Noting that "the ultimate Sixth Amendment conse-

quence[] of certain state procedures is a matter of federal law," *id.* at 6a n.6, it stated that "we do not rely formalistically on the label given to a particular pretrial event when determining the point at which adversary judicial proceedings have been initiated," *id.* at 5a. Drawing on language from this Court's decision in *Kirby*, the Fifth Circuit opined that the inquiry focuses on the time at which "'the government has committed itself to prosecute'" and "'a defendant finds himself faced with the prosecutorial forces of organized society.'" *Id.* at 5a-6a (quoting *Kirby*, 406 U.S. at 689).

The Fifth Circuit noted that it had previously held—in a decision predating this Court's ruling in *Michigan* v. *Jackson*, 475 U.S. 625 (1986)—that the inquiry as to when adversary judicial proceedings commence turns on "'the sometimes elusive degree to which the prosecutorial forces of the state have focused on an individual.'" Pet. App. 6a (quoting *Lomax* v. *Alabama*, 629 F.2d 413, 415 (5th Cir. 1980)). Adhering to that line of reasoning, in another pre-*Jackson* decision, it had held that "a warrantless arrestee's . . . appearance before a magistrate for Article 15.17 warnings did not initiate adversary judicial proceedings, as prosecutors were unaware of and uninvolved in" the arrest and magistration. *Id.* (citing *McGee* v. *Estelle*, 625 F.2d 1206 (5th Cir. 1980)). Following the reasoning of its prior decisions, the Fifth Circuit found no evidence that "prosecutors were . . . aware of or involved in Rothgery's arrest or appearance before the magistrate" and therefore held that Rothgery's appearance before the magistrate did not commence adversary judicial proceedings. *Id.* at 7a.

The Fifth Circuit acknowledged that, in *Brewer* and *Jackson*, this Court had "found adversary judicial proceedings to have been initiated" by an initial post-

arrest appearance before a magistrate "without mentioning whether prosecutors were involved," Pet. App. 7a, but purported to distinguish those cases. As to *Brewer*, it opined that "while the extent of prosecutorial involvement in *Brewer* was unaddressed, it does not appear that the state . . . raised the issue." *Id.* at 8a. And, as to *Jackson*, it reasoned that "the state supreme court opinion preceding *Jackson* establishes that the prosecutor's office approved and issued the complaints and warrants that led to" the defendants' initial appearances—although this Court's opinion in *Jackson* never mentions that fact. *Id.* Accordingly, it concluded that nothing in this Court's decisions in *Brewer* and *Jackson* provided reason "enough for us to ignore our binding authority." *Id.*[2]

SUMMARY OF ARGUMENT

This Court has repeatedly held that a defendant's initial appearance before a magistrate, who informs him of the accusation against him and commits him to custody to ensure that he answers that accusation, marks the commencement of adversary judicial proceedings

[2] The Fifth Circuit went on to reject the argument that its prior holding in *McGee* was distinguishable because the police officer's affidavit presented at Rothgery's initial appearance before the magistrate constituted a "complaint" or other "formal charge" that itself initiated adversary judicial proceedings. Pet. App. 8a-12a. The Fifth Circuit declined to resolve the issue whether the affidavit was a "complaint" as a matter of state law, instead concluding that, regardless of the answer to "the formalistic question of whether the affidavit here would be considered a 'complaint' or its functional equivalent under Texas . . . law," *id.* at 11a, it could not initiate adversary judicial proceedings, because no prosecutor was aware of or involved in the preparation of the affidavit or the ensuing appearance, *id.* at 12a.

and thus the attachment of the Sixth Amendment right to counsel. That settled principle controls this case. Rather than applying that principle, however, the Fifth Circuit held that the right to counsel attaches following such an initial appearance only if the defendant can show that a prosecutor was aware of or involved in the appearance or the underlying arrest. That holding cannot be reconciled with this Court's precedent.

In *Kirby* v. *Illinois*, 406 U.S. 682 (1972), this Court set out a clear test to determine when a "criminal prosecution[]" within the meaning of the Sixth Amendment begins, and the right to counsel attaches: upon "the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Id.* at 689 (plurality opinion). Applying the test articulated in *Kirby*, this Court held in *Brewer* v. *Williams*, 430 U.S. 387 (1977), that there could "be no doubt . . . that judicial proceedings had been initiated" where the defendant had been arrested, "arraigned on [the arrest] warrant before a judge," and "committed by the court to confinement." *Id.* at 399. This Court reaffirmed *Brewer* in *Michigan* v. *Jackson*, 475 U.S. 625 (1986), unequivocally holding that an initial post-arrest "arraignment" at which the defendant is informed of the accusation against him and committed to custody "signals 'the initiation of adversary judicial proceedings.'" *Id.* at 629.

Rothgery's initial appearance before a magistrate was identical in every meaningful way to the initial "arraignments" in *Brewer* and *Jackson*. Rothgery was brought before a magistrate, who informed Rothgery that he was "accused" of the "criminal offense" of unlawful possession of a firearm by a felon, informed him of his statutory and constitutional rights, and re-

quired that he post bail or remain in jail to ensure that he appeared to answer that accusation. Pet. App. 33a, 35a. There can be no doubt that, as in *Brewer* and *Jackson*, following that initial appearance, Rothgery was transformed from a mere "suspect" into an "accused" whose Sixth Amendment right to counsel had attached. *Jackson*, 475 U.S. at 632.

The Fifth Circuit purported to distinguish *Brewer* and *Jackson* on the ground that no prosecutor was aware of or involved in Rothgery's arrest or initial appearance before the magistrate. While acknowledging that neither *Brewer* nor *Jackson* made any mention of prosecutorial involvement, the Fifth Circuit nevertheless construed this Court's holdings to depend on that factor. But neither case even hinted that a prosecutor's involvement was relevant to the analysis; rather, both focused squarely on the nature and consequences of the judicial proceedings at issue—neither of which is affected in any way by the involvement of a prosecuting attorney. Under this Court's reasoning in *Brewer* and *Jackson*, the involvement of a prosecutor can make no practical, or constitutional, difference to the attachment of a defendant's right to counsel.

Nor is the Fifth Circuit's prosecutorial involvement test consistent with the reasoning of *Kirby*. While the Fifth Circuit invoked *Kirby*'s statement that the initiation of judicial criminal proceedings is significant because it is at that time that the accused faces "the prosecutorial forces of organized society," Pet. App. 5a-6a (quoting *Kirby*, 406 U.S. at 689), neither *Kirby* nor any subsequent decision of this Court has indicated that the initiation of judicial criminal proceedings require the involvement of a prosecutor. Like *Brewer* and *Jackson*, *Kirby* focused on *whether* such proceedings had been initiated, not *by whom*. The Fifth Cir-

cuit's fact-dependent prosecutorial involvement test thus cannot be reconciled with *Kirby*'s clear and objective rule. Once a defendant has been brought before a judge who has informed him of the accusation against him and committed him to jail or bail pending resolution of that accusation, the defendant is confronted with "the prosecutorial forces of organized society" in every meaningful sense of the phrase, and judicial criminal proceedings have plainly commenced.

The Fifth Circuit's prosecutorial involvement test is not only inconsistent with this Court's precedent, but unworkable in practice. The straightforward, objective test set out in *Kirby*, *Brewer*, and *Jackson* looks to the nature of the proceedings that have taken place—an easily ascertainable matter of public record. By contrast, the Fifth Circuit's approach requires a fact-intensive inquiry into what prosecutors knew, when they knew it, and the extent of their involvement in pretrial proceedings. Having the attachment of the right to counsel turn on such an inquiry would unnecessarily tax judicial resources, put an unfair burden on an uncounseled defendant to prove his entitlement to counsel through an evidentiary showing, and require intrusive investigation into prosecutorial communications and deliberations that may be subject to statutory and common-law privileges.

Finally, the Fifth Circuit's rule would work substantial injustice to indigent defendants—particularly those who, like Rothgery, are innocent of the charges against them. Under that rule, such defendants could spend months in jail, awaiting indictment, solely because they lack the skill to demonstrate their innocence and the funds to hire counsel to assist them. That outcome offends the core guarantee of the Sixth Amendment.

ARGUMENT

I. THIS COURT'S PRECEDENT ESTABLISHES THAT ROTHGERY'S RIGHT TO COUNSEL ATTACHED FOLLOWING HIS INITIAL APPEARANCE BEFORE THE MAGISTRATE

A. The Sixth Amendment Right To Appointed Counsel Attaches Upon The Commencement Of Adversary Judicial Proceedings

This Court has long recognized that the right to appointed counsel is a cornerstone of our criminal justice system. As long ago as *Powell* v. *Alabama*, 287 U.S. 45 (1932), this Court held that it would violate due process to try an indigent defendant, at least in a capital case, without providing counsel to assist in his defense. As the Court there observed:

> Even the intelligent and educated layman has small and sometimes no skill in the science of law. . . . Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence . . . . He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.

Id. at 69. Focusing on these same concerns, in *Johnson* v. *Zerbst*, 304 U.S. 458 (1938), this Court held that the Sixth Amendment "withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel." *Id.* at 463.

In *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), the Court held that the Sixth Amendment right to counsel is binding on the States through the Fourteenth Amendment's due process clause, observing: "[I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth." *Id.* at 344. As the Court explained, the fundamental guarantee of our criminal justice system that "every defendant stands equal before the law" "cannot be realized if the poor man charged with a crime has to face his accusers without a lawyer to assist him." *Id.* Indeed, as the Court subsequently observed, "[o]f all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have." *United States* v. *Cronic*, 466 U.S. 648, 654 (1984) (citation and internal quotation marks omitted).

It has also long been settled that the right to appointed counsel necessarily arises prior to the trial itself. *See, e.g.*, *Maine* v. *Moulton*, 474 U.S. 159, 170 (1985). In *Powell*, for example, counsel was appointed to represent the defendants on "the very morning of the trial." 287 U.S. at 56. The Court held that such delay violated the fundamental requisites of due process:

> [D]uring perhaps the most critical period of the proceedings . . . from the time of their arraignment until the beginning of their trial, when consultation, thorough-going investigation and preparation were vitally important, the defendants did not have the aid of counsel . . . although they were as much entitled to such aid during that period as at the trial itself.

Id. at 57. Indeed, "to deprive a person of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself." *Moulton*, 474 U.S. at 170.

In *Kirby* v. *Illinois*, 406 U.S. 682 (1972), this Court articulated a clear, objective test to determine when the right to counsel attaches: following "the initiation of adversary judicial criminal proceedings." *Id.* at 689 (plurality opinion).[3] Because state criminal procedures vary, such proceedings can commence in a variety of ways—"by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Id.* But, whatever terminology a State employs, and however judicial criminal proceedings begin in a particular case, the right to counsel attaches as soon as they do. *See id.*

Under *Kirby*, the attachment of the right to counsel thus turns not on a State's characterization of the proceedings the defendant is required to undergo, but on the very fact that judicial proceedings have commenced, placing the defendant in an adversarial relationship with the State:

> The initiation of judicial criminal proceedings is far from a mere formalism. It is the starting

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[3] *Kirby* used interchangeably the phrases "adversary judicial proceedings," 406 U.S. at 688, "adversary judicial criminal proceedings," *id.* at 689, and "judicial criminal proceedings," *id.* Subsequent cases citing *Kirby* have also used those phrases, and similar phrases, interchangeably. *See, e.g.*, *Brewer* v. *Williams*, 430 U.S. 387, 398, 399 (1977) ("judicial proceedings"); *Michigan* v. *Jackson*, 475 U.S. 625, 629 n.3 (1986) ("formal legal proceedings"). The import of all these phrases, however, is the same: as the Court subsequently put it, the "right to counsel attaches at the first formal proceeding against an accused." *McNeil* v. *Wisconsin*, 501 U.S. 171, 180-181 (1991).

> point of our whole system of adversary criminal justice. For it is only then that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.

406 U.S. at 689. It is at that point, *Kirby* held, that a "criminal prosecution[]" within the meaning of the Sixth Amendment begins, and the protections of the Sixth Amendment therefore apply from that point forward. *See id.* at 689-690.[4]

Despite *Kirby*'s clear language indicating that the right to counsel attaches prior to indictment if the defendant undergoes pre-indictment judicial proceedings such as a preliminary hearing, some courts interpreted *Kirby* to hold that the right attached only upon indict-

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[4] By contrast, when the police are merely investigating a crime and "judicial criminal proceedings" have not yet commenced, the right to counsel has not attached. Thus, because the suspect in *Kirby* had merely been arrested and taken to the police station for a show-up identification, and had not yet undergone any judicial proceedings, his right to counsel had not yet arisen. *See* 406 U.S. at 684-685, 690. Similarly, in *United States* v. *Gouveia*, 467 U.S. 180 (1984), the Court held that the right to counsel did not attach prior to the initiation of adversary judicial proceedings simply because prison inmates were held in administrative detention while prison authorities investigated allegations that they had committed offenses while in prison. *See id.* at 182-184, 187; *see also Moran* v. *Burbine*, 475 U.S. 412, 415-418, 432 (1986) (post-arrest interrogation that concededly took place before initiation of judicial criminal proceedings did not violate Sixth Amendment right to counsel).

ment. In *Moore* v. *Illinois*, 434 U.S. 220 (1977), this Court rejected that reading of *Kirby* and reaffirmed that the right to counsel attaches as soon as judicial criminal proceedings begin, even if that is prior to indictment. *See id.* at 228 (holding that the defendant's right to counsel had attached by the time of his first court appearance, a preliminary hearing to determine probable cause to bind defendant over to a grand jury and set bail).

Indeed, as discussed further below, this Court has never subsequently questioned *Kirby*'s holding that "the initiation of judicial criminal proceedings" is a bright line after which the right to counsel attaches. Rather, the Court has consistently affirmed that the "Sixth Amendment right to counsel attaches at the first formal proceeding against an accused." *McNeil* v. *Wisconsin*, 501 U.S. 171, 180-181 (1991). In every case it has considered in which a court has informed the defendant of the accusation against him and imposed restrictions on his liberty to ensure that he answers that accusation—whether the defendant's court appearance was an arraignment upon an indictment or information, a preliminary hearing, or an initial appearance or "arraignment" following arrest—the Court has found that the right to counsel attached at least as early as that judicial proceeding.[5]

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[5] *See Brewer*, 430 U.S. at 399 (initial arraignment following arrest); *Moore*, 434 U.S. at 222, 228 (preliminary hearing that was first court appearance following arrest); *Moulton*, 474 U.S. at 162, 170 (arraignment on indictment); *Jackson*, 475 U.S. at 629 & n.3 (initial arraignment following arrest); *see also McNeil*, 501 U.S. at 173, 175 (accepting as undisputed that right attached at initial appearance before county court commissioner following arrest).

As this Court has explained, that rule comports with both the language and purpose of the Sixth Amendment. It recognizes that a "criminal prosecution[]" commences, and a person becomes an "accused," within the meaning of the Sixth Amendment as soon as "the government's role shifts from investigation to accusation." *Moran* v. *Burbine*, 475 U.S. 412, 430 (1986). That shift unquestionably has taken place by the time that a court has confronted the defendant with the accusation against him and imposed restrictions on his liberty to ensure that he answers that accusation. Once that has occurred, a defendant requires the assistance of counsel in order to negotiate the criminal process and understand and invoke his rights. *See Cronic*, 466 U.S. at 654. And, at that point, a defendant requires counsel to ensure, not only that he is not wrongly convicted, but also that he is not detained and "put on trial without a proper charge." *Powell*, 287 U.S. at 69.[6]

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[6] This Court has held both that the right to counsel attaches upon the commencement of adversary judicial proceedings, *see, e.g.*, *Brewer*, 430 U.S. at 398 ("Whatever else it may mean, the right to counsel . . . means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him."), and that once the right has attached, the defendant is entitled to have counsel present at all "critical stages" of the proceedings, *see, e.g.*, *United States* v. *Wade*, 388 U.S. 218, 226-227, 236-237 (1967) (post-indictment, pretrial lineup is a "critical stage" at which "[t]he presence of counsel" is required "to assure that the accused's interests will be protected"). This Court has made clear that these two inquiries are separate: "The question whether arraignment signals the initiation of adversary judicial proceedings" and thus the point in time after which the right to counsel attaches "is distinct from the question whether the arraignment itself is a critical stage requiring the presence of counsel." *Jackson*, 475 U.S. at 629 n.3. The question presented by this case and decided by the Fifth Circuit is the former: whether

B. This Court Has Held That Adversary Judicial Proceedings Commence When A Defendant Appears Before A Judge Who Informs Him Of The Accusation Against Him And Commits Him To Custody

In applying the test set out in *Kirby*, this Court has repeatedly made clear that adversary judicial proceedings commence, and the Sixth Amendment right to counsel attaches, when—as occurred here—an arrested person makes an initial appearance before a judge who informs him of the accusation against him and requires him to remain in jail or post bail to ensure that he answers that accusation.

"All jurisdictions require that an arrestee held in custody be brought before the magistrate court" for an initial appearance "in a fairly prompt fashion," generally within 24 to 48 hours. Wayne R. LaFave et al., 1 *Criminal Procedure* § 1.3(k), at 114 (2d ed. 1999) ("LaFave"). The term for this first court appearance varies: jurisdictions variously call it a "first appearance," "initial appearance," "preliminary appearance," "initial presentment," "initial arraignment," "preliminary arraignment," "arraignment on the warrant," or "arraignment on the complaint." *Id.* at 113; Joshua Dressler, *Understanding Criminal Procedure* § 1.03, at

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Rothgery's initial appearance before the magistrate marked the commencement of adversary judicial proceedings, after which his right to counsel attached. Rothgery does not contend here that he was entitled to the presence of counsel at the initial appearance itself. *See also* Pet. App. 5a n.5 (noting that Gillespie County had not raised any critical-stage argument and declining to consider any such argument).

8 (3d ed. 2002) ("Dressler").[7] As noted above, in Texas such an initial appearance is commonly referred to as "magistration" or an "Article 15.17 hearing."

At this initial appearance or "arraignment," the magistrate will provide the defendant with notice of the accusation against him and advise him of his rights. LaFave, § 1.3(k), at 114. In felony and serious misdemeanor cases, the magistrate will typically inform the defendant of the right to court-appointed counsel if he is indigent, and if the defendant requests counsel, the magistrate will generally initiate the process of appointing counsel. *Id.* at 114-115. At the initial appearance, the magistrate will also determine whether to set bail, and, if so, what conditions to impose to ensure that the defendant will make court appearances through the completion of the proceedings. *Id.* at 116-117; Dressler, § 1.03, at 8; *id.* § 30.01, at 635.

In *Brewer* v. *Williams*, 430 U.S. 387 (1977), this Court held that such an initial appearance marked the commencement of adversary judicial proceedings under *Kirby*. There, the defendant, Williams, turned himself in to the police after a warrant was issued for his arrest. The next day, he was "arraigned" before a judge on the arrest warrant, advised of his *Miranda* rights, and committed to jail. *Id.* at 391.[8] After that initial

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[7] This type of initial "arraignment" must be distinguished from a later proceeding, also termed an "arraignment," that occurs after an indictment or information is filed, and at which the defendant is required to enter a plea. LaFave, § 1.3(k), at 113 & n.176, 124.

[8] In *Brewer*, Williams had not yet been indicted and was not asked to enter a plea when he made his initial appearance before the court. *See* 430 U.S. at 391-393; *see also State* v. *Williams*, 182 N.W.2d 396, 398-399 (Iowa 1970) (noting that Williams was not

proceeding, the police elicited incriminating statements from Williams during a long automobile ride, although Williams had indicated that he did not want to speak to the police until he saw his attorney. *See id.* at 391-392. Those statements were introduced at trial, and the jury found Williams guilty of murder. *See id.* at 394.

This Court held that those incriminating statements were admitted in violation of Williams' Sixth Amendment right to counsel. *See Brewer*, 430 U.S. at 397-398, 406. It explained that the defendant has a "vital need at the pretrial stage," no less than at trial, for the assistance of counsel. *Id.* at 398. Reiterating the rule of *Kirby*, the Court declared that it was "well established" that "[w]hatever else it may mean, the right to counsel . . . means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him." *Id.*

Applying that rule to Williams' case, the Court held that his initial court appearance marked the commencement of judicial proceedings against him and triggered his right to counsel:

> There can be no doubt in the present case that judicial proceedings had been initiated against Williams before the start of the automobile ride . . . . A warrant had been issued for his arrest, he had been arraigned on that warrant before a judge . . . , and he had been committed by the court to confinement in jail.

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indicted until February 1969, well after his initial "arraignment" took place in December 1968). This Court noted in *Brewer* that Williams was arraigned on a "warrant," 430 U.S. at 391, 399, indicating that the term "arraignment" referred to the same type of initial court appearance that occurred in this case.

Brewer, 430 U.S. at 399.

This Court reached the same conclusion in *Michigan* v. *Jackson*, 475 U.S. 625 (1986), which consolidated two cases (*Jackson* and *Bladel*) from the Michigan Supreme Court. In both cases, the defendants were arrested, arraigned before a judge, and committed to jail pending further proceedings. *See id.* at 627-628. As in *Brewer*, the arraignments at issue were initial appearances before a magistrate. At such an appearance, a defendant is informed of the accusation against him and his constitutional rights, including the right to counsel, and is committed to jail or released on bond.[9]

The nature of the arraignments in *Jackson* was discussed in the State's brief in *Bladel*. The State noted that "arraignment" was an ambiguous term, and it took pains to clarify that defendant Bladel's arraignment was an "initial arraignment," which was required to take place promptly after arrest, and was distinct from a "second arraignment" in Michigan procedure, "at which time defendant has his first opportunity to enter a plea." Brief for Petitioner, *Michigan* v. *Bladel*, No. 84-1539, 1985 WL 669876, at 24-26 (July 10, 1985). The

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[9] *See* 1A Glenn C. Gillespie, *Michigan Criminal Law and Procedure* § 16:1 (2007) (explaining that "arraignment on the warrant [in Michigan] . . . is the first appearance by the defendant in the case" and provides "formal notice of the charge against the accused; the magistrate informs the accused of the right to counsel and inquiry is made to determine whether the defendant is in need of appointed counsel . . . and the arraigning judge may fix bail"); *see also Owen* v. *State*, 596 So. 2d 985, 989 & n.7 (Fla. 1992) (noting that when this Court stated in *Jackson* that the right to counsel attaches at "arraignment," it was using the term in the "initial appearance" sense).

State argued that the right to counsel should not attach at such an "initial arraignment."

This Court flatly rejected that argument, terming it "untenable." *Jackson*, 475 U.S. at 629 n.3. Rather, it held unequivocally that such an initial "arraignment," at which a defendant is informed of the accusation against him and committed to jail or bail, "signals 'the initiation of adversary judicial proceedings' and thus the attachment of the Sixth Amendment." *Id.* at 629. As the *Jackson* Court explained, it is at that time that "a person who had previously been just a 'suspect' has become an 'accused' within the meaning of the Sixth Amendment," *id.* at 632, and therefore "'finds himself faced with the prosecutorial forces of organized society,'" *id.* at 631 (quoting *Kirby*, 406 U.S. at 689).

Since its decision in *Jackson*, this Court has never questioned the proposition that, once a defendant has appeared before a magistrate, has been informed of the accusation against him, and has been committed to jail or bail, adversary judicial proceedings have commenced. In *McNeil*, for example, the Court reiterated that the "right to counsel attaches at the first formal proceeding against an accused," 501 U.S. at 180-181, and noted that it was undisputed that petitioner's initial appearance before a county court commissioner, who set bail and scheduled a preliminary hearing, triggered his right to counsel, *see id.* at 173, 175.

Lower courts and commentators have likewise read *Brewer* and *Jackson* to establish that such an initial appearance—regardless of the name the State gives it—marks the commencement of adversary judicial proceedings. As the Florida Supreme Court explained: "[T]he [U.S. Supreme] Court and commentators are in agreement that [adversary judicial] proceedings clearly

have begun when an accused is placed in custody, haled before a magistrate on a warrant or formal complaint, and then tentatively charged with a particular crime at this initial appearance or 'arraignment.'" *Owen* v. *State*, 596 So. 2d 985, 988-989 (Fla. 1992) (footnotes omitted); *see also* 1 Kenneth S. Broun et al., *McCormick on Evidence* § 154, at 622-623 (6th ed. 2006) ("In *Michigan* v. *Jackson*, the Court held that an 'arraignment,' by which it apparently meant an arrested person's post-arrest appearance before a judicial officer, does trigger the Sixth Amendment right. In most situations, this post-arrest appearance will be the definitive point.").

The Sixth Circuit reached the same conclusion in *Mitzel* v. *Tate*, 267 F.3d 524 (6th Cir. 2001), holding that, as in *Brewer*, there could be "no doubt" that adversary judicial proceedings had commenced when the defendant "had been placed under arrest, the police had issued a complaint against him detailing the essential facts of the offense with which he was charged, and he had appeared before a state judge" who "ordered that his confinement in jail continue." *Id.* at 532. Similarly, in *Fleming* v. *Kemp*, 837 F.2d 940 (11th Cir. 1988), the Eleventh Circuit expressly rejected the argument that an initial post-arrest appearance before a justice of the peace, who informed the defendant of the accusation against him and committed him to custody, did not trigger the right to counsel because it was not a "formal arraignment." Rather, *Fleming* held, under *Jackson*, the initial appearance commenced adversary judicial

proceedings and triggered the right to counsel. *Id.* at 948.[10]

The holding of *Brewer* and *Jackson* makes eminent sense. As the Court in *Jackson* observed, the defendant's initial court appearance marks the point at which he is no longer merely a suspect under investigation by the police, but an accused against whom the full authority of the State has been brought to bear. Such a defendant is subject to all the deleterious consequences of pending criminal charges, including state-imposed deprivation of liberty, potentially for extended periods, while the accusation against him is resolved. At that point—once a court has informed the defendant that he is accused of a crime and has restricted his liberty to ensure that he answers the accusation against him—his right to counsel has attached.

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[10] *See also, e.g., Matteo* v. *Superintendent, SCI Albion*, 171 F.3d 877, 893 (3d Cir. 1999) (holding that defendant's right to counsel attached when he was arrested, brought before a judge for "preliminary arraignment," and committed to jail); *Stokes* v. *Singletary*, 952 F.2d 1567, 1579 (11th Cir. 1992) (relying on *Brewer* and *Jackson* to hold that defendant's right to counsel had attached after arrest and an initial appearance before a magistrate); *Bradford* v. *State*, 927 S.W.2d 329, 333-335 (Ark. 1996) (finding that, under *Jackson*, the right to counsel attached after a defendant was arrested, was brought before a municipal court judge, and had bond set); *State* v. *Barrow*, 359 S.E.2d 844, 846, 848 (W. Va. 1987) (relying on *Jackson* to hold that the right to counsel attached when the defendant was arrested and made an initial appearance before a magistrate who committed him to custody).

C. Rothgery's Initial Appearance Before The Magistrate Was Functionally Identical To The Proceedings In *Brewer* And *Jackson*

Under this Court's precedent, there can be no doubt that adversary judicial proceedings commenced, and Rothgery's Sixth Amendment right to counsel attached, following his initial appearance before the magistrate on July 16, 2002. At that hearing, the magistrate apprised Rothgery of the accusation against him and committed him to custody pending the posting of bond or resolution of the accusation. It was thus precisely the type of initial court appearance that *Brewer* and *Jackson* held marks the initiation of adversary judicial proceedings.

1. The initial appearance before the magistrate prescribed by Texas law, and which Rothgery underwent on July 16, 2002, is substantially the same kind of initial appearance that takes place across the country. As discussed above, *see supra* pp. 4-6, the Texas Code of Criminal Procedure sets out the requisites of that initial appearance. The magistrate must "inform . . . the person arrested . . . of the accusation against him and of any affidavit filed therewith." Tex. Code Crim. Proc. art. 15.17(a). The magistrate must also inform the arrestee of his rights, including his "right to request the appointment of counsel if [he] cannot afford counsel," and his right to request an "examining trial." *Id.*[11]

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[11] An "examining trial" is the name Texas gives to what other jurisdictions typically call a "preliminary hearing." Tex. Code Crim. Proc. art. 16.01. In almost all jurisdictions, a felony defendant is entitled to such a hearing before the magistrate, held after the initial appearance but prior to indictment. LaFave, § 1.3(*l*), at 118-119. Under Texas procedure, if a defendant invokes the right to an examining trial—an evidentiary hearing at which the defen-

In addition, Article 15.17 directs the magistrate to "admit the person arrested to bail if allowed by law," *id.*; if the defendant cannot pay the bail set, he is committed to jail, *see id.* art. 17.27.

At Rothgery's initial appearance, the magistrate was presented with a sworn "Affidavit of Probable Cause," executed by the police officer who arrested Rothgery "in the name and by the authority of the state of Texas," "charg[ing] that . . . Rothgery . . . commit[ted] the offense of unlawful possession of a firearm by a felon." Pet. App. 33a. Based on the affidavit, the magistrate informed Rothgery that he was "accused of the criminal offense of unlawful possession of a firearm by a felon." *Id.* at 35a. He also informed Rothgery of his right to appointed counsel and his right to an examining trial. *Id.* Finally, he set bail of $5,000 to ensure that Rothgery answered the accusation against him. *Id.*; *see* Tex. Code Crim. Proc. art. 17.01 ("'Bail' is the security given by the accused that he will appear and answer before the proper court the accusation brought against him[.]").

The consequence of Rothgery's initial appearance before the magistrate, accordingly, was that he stood accused of a felony offense (an offense he had not committed). A court had formally apprised him of that accusation and had imposed restrictions on his liberty to ensure his appearance at subsequent proceedings to answer that accusation. Rothgery's status as an "ac-

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dant may call and cross-examine witnesses, Tex. Code Crim. Proc. arts. 16.06, 16.07—the magistrate will "examine . . . the truth of the accusation made," *id.* art. 16.01. If the magistrate finds no probable cause for the accusation, the defendant is discharged. *Id.* art. 16.17.

cused" was made plain not only by the magistrate's informing him in clear terms that he was accused of a crime, but also by the rights that, under Texas law, accrued to him following magistration—for example, the right to an examining trial to contest the validity of the charge against him. From this point forward, he required the assistance of counsel to navigate the criminal proceedings (for instance, to make an informed decision whether to assert his right to an examining trial, something he could hardly be expected to do without the assistance of counsel, *see Cronic*, 466 U.S. at 654) and to prove his innocence of the erroneous accusation against him.

Rothgery's initial appearance before the magistrate was thus substantively identical to the arraignments that took place in *Brewer* and *Jackson*. At each of those hearings, the defendant was brought before a judicial officer who informed him of the accusation against him and committed him to custody to ensure that he would answer that accusation. *See Brewer*, 430 U.S. at 399; *Jackson*, 475 U.S. at 629 & n.3; *see also supra* note 9 (explaining procedure for Michigan initial arraignments at issue in *Jackson*). Accordingly, as in *Brewer* and *Jackson*, the initial appearance before a judge transformed Rothgery from a "suspect" to an "accused," marked the initiation of adversary judicial proceedings, and triggered his right to counsel.

2. The Fifth Circuit purported to distinguish *Brewer* and *Jackson* in part on the ground that the defendants in those cases were "arraigned on an arrest warrant," while Rothgery was arrested without a warrant. Pet. App. 7a. But Rothgery's warrantless arrest does not make his initial appearance before the magistrate any different from the arraignments at issue in *Brewer* and *Jackson*.

As an initial matter, one of the two defendants in *Jackson*—like Rothgery—was arrested *without* a warrant. *See People* v. *Bladel*, 365 N.W.2d 56, 70 (Mich. 1984) ("[D]efendant [Jackson] was arrested for a felony without a warrant[.]"). While the police obtained the prosecutor's approval for a warrant after Jackson's arrest and just before his initial court appearance, *see id.* at 72, that appearance was nonetheless substantively identical to Rothgery's: it served to validate Jackson's arrest, as well as to inform him of the charges against him and commit him to custody.

In any event, the constitutional significance of a defendant's initial appearance cannot turn on the happenstance of whether he was arrested with or without a warrant. The only difference between the two situations is that, in the case of a warrantless arrest, in many jurisdictions the magistrate will also determine at the initial appearance whether probable cause existed for the arrest. As this Court has held, the Fourth Amendment requires, as a "prerequisite to extended restraint of liberty" pursuant to a warrantless arrest, a prompt determination by a magistrate that probable cause supported the arrest. *Gerstein* v. *Pugh*, 420 U.S. 103, 114 (1975). Absent exceptional circumstances, that determination must take place within 48 hours of arrest. *See County of Riverside* v. *McLaughlin*, 500 U.S. 44, 56 (1991). Many jurisdictions—including Texas—combine the *Gerstein* probable-cause determination with the initial appearance for the sake of convenience. *See* Tex. Code Crim. Proc. arts. 14.06(a), 15.17 (requiring that a person arrested without a warrant be brought before a magistrate within 48 hours for the same magistration that occurs when a person is arrested with a warrant); *see also* LaFave, § 1.3(k), at 114 & n.179; Dressler, § 1.03, at 7-8; *Riverside*, 500 U.S. at

54 (noting that the 48-hour limit allows States to combine *Gerstein* determinations with other pretrial proceedings, such as an "arraignment" or a "bail hearing").

But the incorporation of a *Gerstein* determination into an initial appearance in no way alters the function or effect of the initial appearance itself: to inform the arrestee of the accusation against him and impose whatever restrictions on his liberty are necessary to ensure that he answers that accusation. Because that occurred here, there can be no question that—just as in *Brewer* and *Jackson*—Rothgery's initial appearance before the magistrate transformed him from a mere "suspect" to an "accused" within the meaning of the Sixth Amendment, *Jackson*, 475 U.S. at 632, and his right to counsel had attached.

II. THE COURT OF APPEALS' PROSECUTORIAL INVOLVEMENT TEST CANNOT BE RECONCILED WITH THIS COURT'S PRECEDENT

The Fifth Circuit did not dispute that, in both *Brewer* and *Jackson*, this Court held that adversary judicial proceedings commenced when a defendant was arrested, made an initial appearance before a judge who informed him of the charges against him, and was committed to confinement. And the Fifth Circuit acknowledged that neither *Brewer* nor *Jackson* mentioned "prosecutorial involvement," let alone suggested that such involvement was necessary to this Court's holdings in those cases. Pet. App. 7a. It nevertheless concluded that, as a matter of federal constitutional law, pre-indictment judicial proceedings cannot trigger the right to counsel absent a prosecutor's awareness or involvement. *Id.* at 6a-8a. That rule cannot be reconciled either with this Court's precedent on the specific

question here or with the more general Sixth Amendment principles this Court has articulated.

A. The Fifth Circuit's Analysis Cannot Be Squared With *Brewer* And *Jackson*

The Fifth Circuit's efforts to distinguish *Brewer* and *Jackson* do not bear scrutiny. *Brewer* expressly held, without any mention of prosecutorial involvement, that "[t]here can be no doubt . . . that judicial proceedings had been initiated," pursuant to the rule in *Kirby*, when the defendant had been arrested, "arraigned on [the arrest] warrant before a judge," and "committed by the court to confinement in jail." 430 U.S. at 399. The Fifth Circuit commented that "it does not appear that the state contested [in *Brewer*] that adversary judicial proceedings had begun." Pet. App. 8a. But this Court did not rest its decision on a concession by the State; rather, it explicitly held that adversary judicial proceedings had in fact commenced and the Sixth Amendment right to counsel had in fact attached—while making no mention of any prosecutorial involvement in the arrest or arraignment. 430 U.S. at 399. The dispositive fact in *Brewer* was not that a prosecutor was involved in the arrest or arraignment—again, the decision nowhere states whether that was the case—but that the defendant had made an initial appearance before a court, which committed him to confinement to ensure he answered the accusation against him.[12]

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[12] As one treatise on criminal procedure has observed, "[I]t is noteworthy that at no point [in *Brewer*] does the Court deem it necessary to discuss the circumstances behind the issuance of the complaint and warrant[.]" LaFave, § 6.4(e), at 487. Rather, *Brewer* apparently reasoned that, "whatever the reasons underly-

In *Jackson*, this Court again held that it was "clear" that adversary judicial proceedings had been initiated after the two defendants in that case were arrested and made initial appearances before a judge that were functionally identical to Rothgery's initial appearance before the magistrate. *See* 475 U.S. at 629 & n.3 (citing, among other cases, *Kirby* and *Brewer*). Like *Brewer*, *Jackson* nowhere suggested that a prosecutor was aware of or involved in the arrests or initial appearances, or that such involvement carried any weight in the Court's determination that adversary judicial proceedings had commenced. While the Fifth Circuit stated that the "[Michigan] supreme court opinion preceding *Jackson* establishes that the prosecutor's office approved and issued the complaints and warrants that led to the arraignment," Pet. App. 7a-8a (citing *Bladel*, 365 N.W.2d at 71-72), this Court never mentioned—let alone relied on—this fact in reaching its holding that the defendants' "arraignment 'signal[ed] the initiation of adversary judicial proceedings.'" 475 U.S. at 629 (citation omitted). The only reasonable conclusion is that *Jackson*'s holding that adversary judicial proceedings had commenced depended not on a prosecutor's involvement, but instead on the factor the Court *did* identify—the defendants' initial arraignments before a magistrate, at which they were informed of the accusations against them and committed to custody.[13]

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ing the complaint-warrant process, at least from the time [the] defendant is brought into court and arraigned on the warrant . . . the Sixth Amendment right to counsel applies." *Id.*

[13] In *Moulton*, this Court rejected the mode of analysis employed by the Fifth Circuit here, making clear that this Court's opinions—not those of the courts below—set out the facts upon which its holdings turn. There, the government had argued that

Indeed, other courts that have addressed the question have understood *Brewer* and *Jackson* to foreclose any "prosecutorial involvement" test of the kind adopted by the Fifth Circuit here. For instance, in *State* v. *Jackson*, 380 N.W.2d 420 (Iowa 1986), the Iowa Supreme Court expressly rejected the State's argument that a defendant's right to counsel did not attach at his initial appearance because there was "no participation by a prosecuting attorney in the proceedings," *id.* at 423, concluding that the initial appearance itself sufficiently evidenced "the State's commitment to prosecute," *id.* at 424. The court observed that the case was "indistinguishable in principle from *Brewer*," where "no participation by a prosecuting attorney was shown." *Id.*

Similarly, before this Court's decision in *Jackson*, the Georgia Supreme Court had held that the right to counsel did not attach at an initial appearance before a magistrate at which no prosecutor was present. *See Ross* v. *State*, 326 S.E.2d 194 (Ga. 1985). After *Jackson*, the court recognized that the holding of *Ross* could no longer stand, and overruled it, holding that, under *Jackson*, the "Sixth Amendment right to counsel attaches at an initial appearance hearing" regardless of

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the holding of *Massiah* v. *United States*, 377 U.S. 201 (1964), applied only when the police, rather than an informant, set up the meeting at which incriminating statements were elicited from the defendant. Rejecting that argument, the Court observed, "While in *Massiah* it may have been the Government agent who was responsible for setting up the meeting with the defendant, one discovers this only by looking at the opinions of the Court of Appeals. It is not mentioned in this Court's opinion since the issue of who set up the meeting with whom was not pertinent to our disposition." *Moulton*, 474 U.S. at 174.

whether a prosecutor is involved in the proceeding. *O'Kelley* v. *State*, 604 S.E.2d 509, 511-512 (Ga. 2004).

B. *Kirby* v. *Illinois* Does Not Support The Fifth Circuit's Analysis

The Fifth Circuit apparently derived its "prosecutorial involvement" test in part from its reading of *Kirby*'s statement that "[t]he initiation of judicial criminal proceedings" is significant because it is at that time that "the government has committed itself to prosecute," "the adverse positions of government and defendant have solidified," and "a defendant finds himself faced with the prosecutorial forces of organized society." 406 U.S. at 689; *see* Pet. App. 5a. But—particularly in light of this Court's subsequent holdings in *Brewer* and *Jackson*—it is clear that the Fifth Circuit misconstrued the import of this language, which in fact provides no support for the Fifth Circuit's approach.

Kirby's holding—as this Court has repeatedly recognized since—was that the right to counsel attaches upon "[t]he initiation of judicial criminal proceedings." 406 U.S. at 689. And *Kirby* expressly recognized that judicial criminal proceedings may commence by "arraignment," which *Brewer* and *Jackson* later made clear includes initial post-arrest "arraignment[s]" before a magistrate. *See id.*; *Jackson*, 475 U.S. at 629 n.3. In many jurisdictions, "police often file charges on their own initiative," and defendants are arraigned on those charges, including in some felony cases, without any involvement by a prosecutor. LaFave, § 1.3(h), at 98-

99.[14] Neither *Kirby* nor any subsequent decision of this Court suggests that a constitutional distinction should be drawn between court arraignments based on the happenstance of whether police or prosecutors initiated the process leading to the arraignment. *Cf. Moran* v. *Burbine*, 475 U.S. 412, 430 (1986) ("As a practical matter, it makes little sense to say that the Sixth Amendment right to counsel attaches at different times depending on . . . fortuity[.]").

Indeed, the function of an initial arraignment like the one in *Brewer*, in *Jackson*, and in this case is the same—and its consequences for the defendant are identical—whether or not a prosecutor is involved. In either case, an arraignment is the inception of the State's criminal process, transforming the person arraigned from a suspect under investigation to a defendant against whom the State has made an accusation of criminal conduct. In either case, if the crime charged is a felony, the arraignment almost invariably results in significant restrictions on the defendant's liberty, either through confinement in jail, or release subject to bail or other conditions, with the prospect of jail if those conditions are not satisfied. And in either case, an arraignment marks the point at which the defendant becomes "immersed in the intricacies of substantive and procedural law," *Kirby*, 406 U.S. at 689, and consequently requires "the guiding hand of counsel," *Powell*, 287 U.S. at 69. As this Court has observed, that guid-

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[14] *See also* William F. McDonald et al., *Police-Prosecutor Relations in the United States* 205-206 (U.S. Dep't of Justice, Nat'l Inst. of Justice 1981) (finding that police filed initial charges directly with the courts in all or some cases in 64% of jurisdictions surveyed).

ing hand is necessary not only to enable the accused to "meet the adversary presentation of the prosecutor," but also to play the "different . . . role" of assisting him in navigating the "legal system governed by complex rules and procedures," *Evitts* v. *Lucey*, 469 U.S. 387, 394 n.6 (1985), that he faces upon arraignment. In short, whether or not a prosecutor is involved, an initial appearance at which a court informs an arrestee of the accusation against him, and restricts his liberty to ensure that he answers that accusation, marks the point at which he becomes an "accused," with all the attendant burdens of that status—and a consequent need for the assistance of counsel.

Rather than focusing on the function and effect of a defendant's initial appearance, the Fifth Circuit read *Kirby* to mean that a defendant's confrontation by a judicial officer with the accusation against him and commitment to confinement could not initiate adversary judicial proceedings unless there was some other indication that a particular official had "committed [the State] to prosecute." *Kirby*, 406 U.S. at 689. This turns the reasoning of *Kirby* on its head. As *Kirby* made clear, it is "[t]he initiation of judicial criminal proceedings" itself—however such proceedings are commenced—that signals the government's commitment to prosecute. *Id.* No further evidence of the government's adverse position is needed.

Nor has this Court ever suggested that the "prosecutorial forces of organized society," *Kirby*, 406 U.S. at 689, are limited to prosecuting attorneys. Rather, as this Court has recognized, "the Sixth Amendment concerns the confrontation between the *State* and the individual," and requires that "[t]he Court impute the State's knowledge from one state actor to another." *Jackson*, 475 U.S. at 634 (emphasis added). And the

function of counsel is to serve as "a 'medium' between [the defendant] and the *State*." *Moulton*, 474 U.S. at 176 (emphasis added). The Sixth Amendment right to counsel thus applies when "the accused [is] confronted . . . by the procedural system, *or* by his expert adversary, *or by both*." *United States* v. *Gouveia*, 467 U.S. 180, 189 (1984) (internal quotation marks and citation omitted) (emphases added).

When, as here, a defendant is confronted by the sovereign authority of the State in the person of a judge, informed of a criminal accusation that has been leveled against him "in the name and by the authority of the State," Pet. App. 33a, and committed to confinement based on that accusation, he is confronted with "the prosecutorial forces of organized society." After such a proceeding, there can be no doubt that—in *Kirby*'s phrase—"the adverse positions of government and defendant have solidified," 406 U.S. at 689, judicial criminal proceedings have commenced, and the defendant's Sixth Amendment right to counsel has attached.

III. THE FIFTH CIRCUIT'S TEST IS UNWORKABLE AND THREATENS TO IMPOSE SERIOUS HARDSHIP ON INDIGENT DEFENDANTS

A. The Fifth Circuit's Test Requires An Unworkable And Unduly Intrusive Inquiry Into Prosecutors' Deliberations And Communications

This Court's decisions in *Kirby*, *Brewer*, and *Jackson* establish a straightforward, objective test for determining when the Sixth Amendment right to counsel attaches: the act of haling a criminal defendant before a judicial officer, who apprises the accused of the government's allegations and commits him to bail or jail, marks the commencement of adversary judicial proceedings and triggers the right to counsel. That consti-

tutional rule has the obvious virtues of simplicity and ease of application, turning as it does on the occurrence of clear and objectively verifiable events that are matters of public record. *See O'Kelley*, 604 S.E.2d at 511 (noting that this Court's precedent on the attachment of the right to counsel eschews "case-by-case analysis" in favor of a "simplified analysis based on categories of proceedings").

By contrast, under the Fifth Circuit's rule, an indigent defendant's request for the appointment of counsel following an initial appearance requires the resolution of a case-specific factual inquiry: was the defendant arrested and brought before a judge for an initial appearance (as is often the case) based solely on the allegations of a police officer without the awareness or involvement of a prosecuting attorney, or did a prosecutor play some role prior to the initial appearance? Having the attachment of the right to counsel turn on the answer to what the Fifth Circuit itself described as a "sometimes elusive" inquiry, Pet. App. 6a, would have a number of undesirable consequences.

First, such a rule would prolong and complicate routine criminal proceedings. Requiring an evidentiary inquiry into the communications between the police and the prosecutor's office to determine whether a prosecutor was aware of, or involved in, the process leading to a defendant's arrest and initial appearance would add unnecessary expense and delay and further tax limited judicial resources. Moreover, it is unclear what degree of awareness or involvement by prosecutors is required under the Fifth Circuit's rule. That rule may thus lead to litigation over questions such as whether it is sufficient that a police officer informed a prosecutor that an individual had been arrested or whether a prosecutor must be involved in the pretrial proceedings in some

manner, and if so, the requisite extent and formality of such involvement. *Cf. Berkemer* v. *McCarty*, 468 U.S. 420, 432 (1984) (rejecting doctrinal proposal where "[t]he litigation necessary to resolve such matters would be time-consuming and disruptive of law enforcement").

Second, under the Fifth Circuit's rule, the defendant's right to counsel may turn in many cases on the resolution of a contested evidentiary proceeding—in circumstances in which the key evidence is necessarily in the State's hands. Requiring the defendant to conduct that proceeding, without counsel, in order to determine whether he is entitled to counsel would put him in a self-evidently unfair position.

Third, a rule under which the right to counsel is triggered by a prosecutor's involvement would create a perverse incentive for prosecutors to delay their involvement in criminal proceedings. Early prosecutorial involvement, however, is important to rectifying meritless arrest and pretrial detention decisions. *See, e.g.*, LaFave, § 1.3(h), at 99-103 (noting that prosecutorial screening of cases prior to the filing of charges and initial appearance frequently results in a decision not to proceed further).

Fourth, the Fifth Circuit's rule would require an inquiry into the kind of inner workings of the law enforcement establishment—including communications between police officers and prosecutors, and among attorneys within the prosecutor's office—that may be the subject of statutory and common-law privileges, including the attorney-client and attorney work product privileges, the law enforcement privilege, and the deliberative process privilege. *See generally Puerto Rico* v. *United States*, 490 F.3d 50, 62-64 (1st Cir. 2007) (dis-

cussing law enforcement privilege); *In re U.S. Dep't of Homeland Sec.*, 459 F.3d 565, 568-569 (5th Cir. 2006) (same); *United States* v. *Edelin*, 128 F. Supp. 2d 23, 39-40 (D.D.C. 2001) (discussing deliberative process, attorney-client, and work product privileges).

Finally, requiring such a fact-specific inquiry runs contrary to the common-sense interest in providing clear and simple rules in matters of criminal procedure. As one leading Sixth Amendment scholar has noted, a rule requiring a court to "ascertain the precise point when the state makes an actual, substantive decision to pursue conviction" in order to determine when the right to counsel attaches "would be impractical" because it would require an inquiry into "subjective mental processes" in which, often, the "only evidence would be the potentially self-serving reports of state agents." James J. Tomkovicz, *An Adversary System Defense of the Right to Counsel Against Informants: Truth, Fair Play, and the* Massiah *Doctrine*, 22 U.C. Davis L. Rev. 1, 68 n.272 (1988). And, as this Court has observed, clear rules are particularly important in criminal procedure "so that States and counties may establish procedures with confidence that they fall within constitutional bounds." *Riverside*, 500 U.S. at 56; *see, e.g.*, *Minnick* v. *Mississippi*, 498 U.S. 146, 151 (1990) (noting the "merit" of rules of criminal procedure with "clarity of . . . command" and "certainty of . . . application").[15]

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[15] *See also* Donald A. Dripps, *Constitutional Theory for Criminal Procedure:* Dickerson, Miranda, *and the Continuing Quest for Broad-But-Shallow*, 43 Wm. & Mary L. Rev. 1, 40 (2001) (noting that "the case for general rules governing criminal procedure is overwhelming" in light of the "volume of cases presenting constitutional issues . . . and the need to supply . . . lower courts with reliable guidance").

B. The Fifth Circuit's Rule Threatens To Cause Serious Harm To Indigent Defendants

In addition to being unworkable in practice, the rule adopted by the Fifth Circuit—under which the right to counsel would not attach until indictment, absent a showing of prosecutorial involvement in pre-indictment proceedings—does violence to core Sixth Amendment values. Under that rule, an indigent defendant who is innocent of the charges against him could nevertheless sit in jail for months awaiting indictment "because he does not know how to establish his innocence." *Powell*, 287 U.S. at 69.

That concern is far from theoretical. According to a report to the Texas State Bar, prior to 2001, in some Texas counties it was "quite common that the appointment of counsel [did] not occur until after an indictment from the grand jury. In these instances, defendants languish[ed] in jail for considerable periods of time without the benefit of legal representation."[16] The report described one such case:

> The Committee has been told the story of a woman who sat in jail for 27 days before an attorney was assigned to her matter. Within 45 minutes after receiving the case, her court ap-

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[16] Allan K. Butcher & Michael K. Moore, *Muting Gideon's Trumpet: The Crisis in Indigent Criminal Defense In Texas* (Sept. 22, 2000), *available at* www.uta.edu/pols/moore/indigent/last.pdf. This report was prepared by the Committee on Legal Services to the Poor in Criminal Matters of the State Bar of Texas, which was charged by the Texas State Bar with "study[ing] the system of defense of indigent persons in criminal law matters in Texas, collect[ing] data and other information . . . and develop[ing] recommendations for action by the State Bar of Texas [and] the Texas Legislature." *Id.*

> pointed attorney determined the case lacked merit [and] he approached the prosecutor who agreed, and the judge ordered her release. The effect of this is quite clear—the timely appointment of counsel would have resulted in this woman's near immediate release instead of costing her nearly one month in jail.[17]

In cases in which an indigent defendant cannot prove that a prosecutor was aware of or involved in his arrest or initial appearance, the Fifth Circuit's rule would permit precisely this result.

As such cases demonstrate, the denial of counsel exacts a particularly high toll on indigent defendants who, like Rothgery, would be able promptly to secure the dismissal of charges with the assistance of counsel. Absent such assistance, "a law-abiding citizen wrongfully arrested" may be left in jail, "compelled to await the grace of a Dickensian bureaucratic machine," *Riverside*, 500 U.S. at 70-71 (Scalia, J., dissenting), until prosecutors determine whether to indict him. Such "[p]retrial confinement may imperil [a defendant's] job, interrupt his source of income, and impair his family relationships." *Gerstein*, 420 U.S. at 114. Moreover, even an accused who is able to post bail and be released from jail faces serious harms:

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[17] *Id.* In 2001, Texas enacted the Fair Defense Act, which required counties to adopt procedures allowing for prompt access to counsel by incarcerated persons. *See* Texas Fair Defense Act, 77th Leg., R.S., ch. 906, 2001 Tex. Gen. Laws 906; Tex. Code Crim. Proc. art. 1.051. For persons released on bail, the Fair Defense Act makes entitlement to the appointment of counsel turn on whether adversary judicial proceedings have commenced. *See* Tex. Code Crim. Proc. art. 1.051(j).

> A person facing serious criminal charges is hardly freed from the state's control upon his release from a police officer's physical grip. He is required to appear in court at the state's command. . . . Pending prosecution, his employment prospects may be diminished severely, he may suffer reputational harm, and he will experience the financial and emotional strain of preparing a defense.

Albright v. *Oliver*, 510 U.S. 266, 278 (1994) (Ginsburg, J., concurring).

Under the Fifth Circuit's approach, then, an indigent defendant could suffer extended restrictions on his liberty, and all the harms attendant on an unresolved criminal accusation, solely because he is unable to afford counsel to prove his innocence. Because the vast majority of felony defendants are in need of court-appointed counsel,[18] the Fifth Circuit's rule would thus severely and inequitably constrict access to justice.

This Court, of course, recognized this fundamental point nearly 45 years ago, observing that the "noble ideal" in which "every individual stands equal before the law" "cannot be realized if the poor man charged with crime" lacks "a lawyer to assist him." *Gideon*, 372 U.S. at 344. The decision below cannot be squared with this basic principle.

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[18] In 1996, 82 percent of felony defendants prosecuted in state courts in the 75 largest counties had state-appointed counsel. U.S. Dep't of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Defense Counsel in Criminal Cases* 1 (Nov. 2000), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/dccc.pdf.

CONCLUSION

For the foregoing reasons, the judgment of the Fifth Circuit should be reversed.

Respectfully submitted.

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