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 OF *AMICI CURIAE* TWENTY-FOUR PROFESSORS OF LAW IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether petitioner's right to counsel under the Sixth Amendment had attached after he was arrested and brought before a magistrate who informed him of his rights and of the accusation against him, found probable cause that he had committed the offense he was accused of, and committed him to jail pending trial or the posting of bail.

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INTEREST OF *AMICI CURIAE*[1]

Amici are law professors[2] whose teaching and research interests include matters of criminal procedure. *Amici* have an interest in this case because the lower court's decision undermines the right to counsel protected under the Sixth Amendment. As professors of law, *amici* are keenly aware of the essential role that counsel play in

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

[2] This brief represents the views of the following professors of law: Susan Bandes, DePaul University School of Law; John Blume, Cornell Law School; Craig Bradley, Indiana University School of Law–Bloomington; Douglas L. Colbert, University of Maryland School of Law; Joshua Dressler, Ohio State University Moritz School of Law; Stuart Green, Louisiana State University Paul M. Hebert Law Center; Bernard Harcourt, University of Chicago Law School; Susan N. Herman, Brooklyn Law School; John Junker, University of Washington School of Law; Yale Kamisar, University of Michigan Law School; Arnold Loewy, Texas Tech University School of Law; Erik Luna, University of Utah S.J. Quinney College of Law; Bridget McCormack, University of Michigan Law School; Tracey Meares, Yale Law School; David Moran, Wayne State University Law School; Anne Bowen Poulin, Villanova University School of Law; Daniel Richman, Columbia Law School; Stephen Saltzburg, George Washington University Law School; Christopher Slobogin, University of Florida Levin College of Law; Carol Steiker, Harvard Law School; Jordan Steiker, University of Texas School of Law; George Thomas, Rutgers School of Law–Newark; James Tomkovicz, University of Iowa College of Law; and Charles Whitebread, University of Southern California Law School. They do not join this brief as representatives of their respective institutions.

protecting the integrity of our criminal justice system. Our nation relies upon its lawyers to defend those whose freedom is at stake and to ensure that justice is done to all persons, innocent and guilty, wealthy and poor. *Amici* file this brief to urge this Court to clarify that when the government accuses a person of having committed a crime and places substantial restrictions on his liberty, that person is entitled to a lawyer to defend his liberty.

INTRODUCTION AND SUMMARY OF ARGUMENT

In this case, an innocent man was arrested and jailed for a crime it was legally impossible for him to commit—he was accused of being a felon in possession of a firearm, though he was not in fact a felon at all. Once his oft-repeated request for appointed counsel was finally granted, the charges against him were determined to be baseless and dropped—but not before petitioner Walter Rothgery spent weeks in jail. Pet. Br. 3. This case presents the Court with an opportunity to prevent such injustices in the future by clarifying its rule regarding when the Sixth Amendment right to counsel attaches.

This Court has consistently held that the right to counsel under the Sixth Amendment[3] attaches at the initiation of adversary judicial proceedings. While those proceedings may commence in a variety of ways—*e.g.,* by charge, indictment, information, or

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[3] Rothgery's right to counsel arose under the Fourteenth Amendment, which incorporates the protection of the Sixth Amendment. *See Gideon v. Wainwright*, 372 U.S. 335, 342 (1963). For simplicity's sake, this brief refers to the right to counsel as a Sixth Amendment right.

arraignment—the right to counsel attaches as soon as they do. The Fifth Circuit's holding in the present case cannot be reconciled with this Court's precedents, and it should be reversed.

The present case also offers the Court an opportunity to simplify the analysis of when the right to counsel attaches in other cases, reducing the likelihood that future innocent persons will be jailed before trial for extended periods of time without the assistance of counsel. The history and purposes of the Sixth Amendment, as well as this Court's precedents, support the conclusion that the Sixth Amendment guarantees a right to counsel to defend a person's liberty when that liberty is threatened. The current "initiation of judicial proceedings" rule attempts to get at when such defense is needed. *Amici* submit that a modest refinement of the test would improve it.

Specifically, *amici* propose that the Court make explicit what is already implicit in its cases. The Court should declare that, following a warrantless arrest, the right to counsel has attached, at the latest, when there has been a judicial determination of probable cause and the government has imposed significant restrictions on a person's liberty. Such a rule is consistent with this Court's precedents and readily applicable notwithstanding the vagaries of state procedure.

The rule *amici* suggest draws upon two lines of authority. In one, this Court has explained that the right to counsel attaches at the initiation of adversary judicial proceedings—the point at which a "suspect" becomes an "accused." *Michigan v. Jackson*, 475 U.S. 625, 632 (1986); *see also Brewer v.*

Williams, 430 U.S. 387, 398 (1977). In the second line of authority, this Court has held that the government may not impose significant restraints upon a person's liberty for more than 48 hours following arrest without a judicial determination of probable cause. *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991); *Gerstein v. Pugh*, 420 U.S. 103 (1975). These two lines of authority, read together, support a simple, bright-line rule: following a warrantless arrest, the right to counsel attaches, at the latest, when there has been a judicial determination of probable cause and significant restrictions on the accused's liberty have been imposed. The proposed rule would not necessarily require counsel to be appointed for a *Gerstein* hearing. Rather, it would simply recognize that a person has a right to a lawyer once the hearing is complete if the result is to impose an ongoing, significant restriction on the accused's liberty.

ARGUMENT

I. The Fifth Circuit's Decision Cannot Be Reconciled With This Court's Precedents.

A. Under this Court's precedents, the right to counsel attaches at the initiation of adversary proceedings, when a suspect becomes an accused.

This Court has long held that the right to counsel attaches at the initiation of adversary judicial proceedings. *See, e.g.*, *Brewer v. Williams*, 430 U.S. 387, 398 (1977) (citing cases). The Court has made clear that adversary proceedings might commence in any number of ways, such as by "formal charge, preliminary hearing, indictment, information, or

arraignment." *Id.* But no matter *how* proceedings might commence, this Court has consistently said that the right to counsel attaches *as soon as they do*.

Thus, in *Michigan v. Jackson*, 475 U.S. 625 (1986), the Court summarily rejected the argument that under Michigan's particular procedures, arraignment did not trigger the right to counsel. *See id.* at 629 n.3. The Court explained that the Sixth Amendment provides a right to counsel once "a person who had previously been just a 'suspect' has become an 'accused,'" including by formal accusation at an arraignment. *Id.* at 632.

In contrast, *before* the initiation of adversary judicial proceedings, there is no right to counsel. In *Kirby v. Illinois*, 406 U.S. 682 (1972), for example, the Court held that the right to counsel had not attached when Kirby was identified in a police lineup shortly after arrest. *Id.* at 684-685 (plurality opinion). In *Jackson*'s terms, Kirby—who had been picked up by the police for carrying another man's social security card and travelers' checks—was merely a suspect when his victim came in and identified him. *See id.*

This Court's focus on the initiation of adversary judicial proceedings—the moment of transition between "suspect" and "accused"—reflects an understanding that varied state procedures and the varied facts of specific cases can make it hard to identify a single, specific triggering event at which the right to counsel attaches in all cases. Instead, the Court's rule is essentially that the right to counsel attaches *whenever* the government determines that it shall be adverse to an individual, seeking to

deprive him of his liberty. *See Brewer*, 430 U.S. at 398; *Kirby*, 406 U.S. at 689.

B. The decision below cannot be reconciled with this Court's precedents.

The Fifth Circuit's decision below cannot be squared with this Court's precedents and it should be reversed. It is clear that Rothgery was, in fact, "arraigned" in the sense in which *Jackson* used the term when he appeared in front of the magistrate. *See* Pet. Br. 20-21 & n.7 (explaining meaning of arraignment); Pet. App. 14a-15a (describing Rothgery's appearance before the magistrate). In light of the Court's statement in *Jackson* that "arraignment signals 'the initiation of adversary judicial proceedings,'" the fact that Rothgery had been arraigned should have ended the inquiry. *Jackson*, 475 U.S. at 629; *see also id.* at 629 n.3 (noting the "clear language in our decisions about the significance of arraignment"). Indeed, as petitioner points out, the arraignment in this case cannot be distinguished from the arraignment in *Jackson*. Pet. Br. 27-30.

Similarly, the *Jackson* Court's discussion of the Sixth Amendment significance of the line between being a "suspect" and an "accused" should have dispelled any doubt that Rothgery's right had attached. *See Jackson*, 475 U.S. at 632 (distinguishing between being an accused and a suspect); Pet. App. 15a (court below noting that the magistrate "informed Rothgery that Rothgery was *accused* of the criminal offense of unlawful possession of a firearm by a felon") (emphasis added); *id.* at 35a (the magistrate's warning to Rothgery stating that "[y]ou are *accused* of the criminal offense

of: unlawful possession of a firearm by a felon") (emphasis added).

The Fifth Circuit, however, declined to recognize the significance of the fact that Rothgery's arraignment made him an "accused." Instead, the lower court focused on that court's own precedents as well as language from Justice Stewart's plurality opinion in *Kirby*, *see* Pet. App. 5a-6a (the court below attempting to ascertain whether "the government has committed itself to prosecute and a defendant finds himself faced with the prosecutorial forces of organized society") (citations and quotation marks omitted), and concluded that Rothgery's right to counsel would attach only at the point where he could prove that the prosecutor was aware of or involved in the proceedings. Because Rothgery had not proved that the prosecutor knew about the arrest and the arraignment, the Fifth Circuit held that Rothgery's right to counsel had not attached. *See* Pet. App. 12a.

Once a person has stood before a court, been accused of a crime, and had his liberty taken away, he is "accused," whether a prosecutor happened to be directly involved or not, and *Kirby* does not suggest otherwise. There, Justice Stewart was merely explaining why the right to counsel does not apply when a person has been arrested but *not* charged. As the *Jackson* Court would have put it, Kirby was a mere suspect rather than an accused. *See Jackson*, 475 U.S. at 632. Rothgery was plainly an accused.

Moreover, even on its own terms, the Fifth Circuit's decision is incorrect. This Court has held that the knowledge of one state actor must be imputed to another in the Sixth Amendment context.

Jackson, 475 U.S. at 634 (stating that, in the Sixth Amendment context, "we impute the State's knowledge from one state actor to another"). The Court explained: "the Sixth Amendment concerns the confrontation between the State and the individual. One set of state actors (the police) may not claim ignorance of defendants' unequivocal request for counsel to another state actor (the court)." *Id*. Since, under *Jackson*, the police cannot claim ignorance of what occurs in court, there is no justification for permitting a prosecutor, who is an officer of the court, to claim ignorance of an arraignment. The Fifth Circuit's prosecutorial-involvement test is thus barred by *Jackson*.

Even if this Court had not already rejected the Fifth Circuit's approach, the Court should not now adopt it. Petitioner has explained that the Fifth Circuit's rule would be impractical and that it would impose serious hardship on indigent defendants. Pet. Br. 38-44. In addition, the Fifth Circuit's approach will have the inevitable effect of undermining the right to counsel. In many cases, pretrial detention is for all intents and purposes the actual punishment for the alleged offense, and a denial of counsel to those imprisoned before indictment will effectively deny them counsel to contest their imprisonment at all. *See* American Bar Ass'n, Gideon's *Broken Promise: America's Continuing Quest for Equal Justice* 23 (2004) (noting that "in some places throughout the country, poor persons accused of crime are arrested and detained in local jails for months or even years before they have a chance to speak with a lawyer"); *see also* Steven K. Smith & Carol J. DeFrances, U.S. Dept. of Justice, Bureau of Justice Statistics, Indigent Defense 4 tbl. 7 (1996)

(more than one-third of state jail inmates waited more than two weeks for their first meeting with assigned counsel). The Fifth Circuit's approach exalts form over substance, too often providing counsel when it is too late to do any good.

The decision below is fundamentally inconsistent with this Court's precedents. Moreover, even if this Court were writing on a blank slate, it should reject the Fifth Circuit's rule because it is both impractical and insufficiently protective of the core purposes of the right to counsel. *Amici* submit, however, that the Court should also take this opportunity to clarify that, following a warrantless arrest, the right to counsel has attached, at the latest, once a court finds probable cause to believe a person has committed the crime of which he has been accused and has imposed significant restraints upon his liberty.

II. This Court Should Hold That, Following A Warrantless Arrest, The Right To Counsel Attaches Once A Court Has Found Probable Cause To Commit An Accused To Custody.

A. The Sixth Amendment guarantees a right to counsel to defend an accused's liberty.

Under the common law, while parties in civil cases and misdemeanor defendants were entitled to counsel, defendants in felony cases had no right to the assistance of counsel. Francis H. Heller, *The Sixth Amendment to the Constitution of the United States* 9-10 (1951). *Cf.* William M. Beaney, *The Right to Counsel in American Courts* 8-11 (1955) (noting that, over time, judges in England recognized the injustice of the rule and increasingly permitted

counsel to play a role in the defense). That rule changed only slightly after the Glorious Revolution, when defendants in treason cases gained the right to counsel (a matter of special concern to the political classes). Heller, *The Sixth Amendment to the Constitution*, at 10. But it was not until 1836 that those accused of other felonies were granted the right to counsel. *Id.*[4]

The Sixth Amendment was a rejection of the common law approach. *Id.* at 109; *see also Powell v. Alabama*, 287 U.S. 45 (1932). This Court, in explaining that the common law rule never gained traction in America, assessed it harshly: "An affirmation of the right to the aid of counsel in petty offenses, and its denial in the case of crimes of the gravest character, where such aid is most needed, is … outrageous and … obviously a perversion of all sense of proportion." *Powell*, 287 U.S. at 60. In America, the Court noted, the right to be heard by counsel has always been seen to be "fundamental." *Id.* at 68, 70, 73.

The American rule, embodied in the Sixth Amendment, recognizes that "the right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." *Id.* at

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[4] The common law deprived the accused of other rights that are now explicitly protected by the Sixth Amendment. For example, until 1606, an accused was not permitted to present witnesses at all in his defense. Heller, *The Sixth Amendment to the Constitution*, at 9. Even then, defense witnesses could not be sworn; that right was denied until the beginning of the eighteenth century for felony trials. *Id.* & n.34. At common law, an accused felon was not even entitled to receive a copy of the indictment against him. *Id.* at 10.

68-69. Indeed, in our Nation's tradition, the importance of having counsel to represent one's interests can hardly be overstated. This Court has approvingly quoted the adage that "a lawyer who represents himself has a fool for a client." *Kay v. Ehrler*, 499 U.S. 432, 438 (1991). The layman is in even greater need of counsel. Justice Sutherland, writing for the Court in *Powell*, explained:

> Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. 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.

287 U.S. at 69. Justice Sutherland continued: "If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect." *Id.*

Those words aptly describe the situation of indigent defendants today, who depend on the court to protect their right to counsel. As this Court is aware, approximately eighty percent of state felony

defendants use court-appointed lawyers. *Kowalski v. Tesmer*, 543 U.S. 125, 140 (2004) (Ginsburg, J., dissenting) (citing Caroline Wolf Harlow, U.S. Dept. of Justice, Bureau of Justice Statistics, Defense Counsel in Criminal Cases 1, 5 (2000), http://www.ojp.usdoj.gov/bjs/pub/pdf/dccc.pdf). Many of those defendants, like sixty-eight percent of the state prison population, did not complete high school; many lack basic literacy skills. *Halbert v. Michigan*, 545 U.S. 605, 621 (2005) (citations omitted). Indeed, this Court has observed that seven of ten inmates are unable to perform such basic tasks as writing a letter to explain an error on a credit card bill, using a bus schedule, or stating in writing an argument made in a newspaper article. *Id.*; *see also* U.S. Dept. of Ed., National Center for Education Statistics, Literacy Behind Bars: Results from the 2003 National Assessment of Adult Literacy Prison Survey 5-7, 13 (2007), http://nces.ed.gov/pubs2007/2007473.pdf.

In light of the history of the Sixth Amendment and recognizing the fact that lawyers are "necessities, not luxuries," *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963), courts have insisted on a broad understanding of the right to counsel. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right … to have the Assistance of Counsel for his defence," and this Court has construed "prosecution" to comprehend the pre-trial period, "when consultation, thorough-going investigation and preparation [are] vitally important," in addition to the trial. *Powell*, 287 U.S. at 57 (citing *Burgess v. Riseley*, 13 Abb. N. Cas. 186 (N.Y. Sup. Ct. 1883); and *Batchelor v. State*, 125 N.E. 773 (Ind. 1920)). As this Court has

explained, the right to counsel is essential to a person's ability to "assert *any* other rights he may have." *United States v. Cronic*, 466 U.S. 648, 654 (1984) (emphasis added, citation and quotation marks omitted).

The Court's statement in *Powell* that the right to counsel applies beyond the confines of trial was hardly novel. In *Burgess*, the nineteenth century New York case on which the *Powell* Court relied, the court rejected the argument that a person "committed by a magistrate … in default of bail" before an indictment was returned was not entitled to see a lawyer. 13 Abb. N. Cas. at 186. The court reasoned:

> It is said, however, that there is no indictment as yet against the relator, and that, therefore, the constitutional provision [guaranteeing the right to counsel] does not apply. This is, also, it seems to me, a narrow interpretation of the fundamental law. The relator is in jail and adjudged probably guilty of a grave crime.

Id. at 188. The court pointed out that the accused, even before indictment, has rights: "He may claim, perhaps, that his detention is illegal; that the evidence taken before the magistrate was insufficient, and may desire, through counsel, to obtain a writ of *habeas corpus*, or some other process to inquire into the legality of his imprisonment." *Id*. To protect these rights, the right to counsel should be construed to extend to "any and every step which may be taken to inquire into the imprisonment.… This construction is demanded by every consideration of humanity, and the enlightened

views of personal rights resulting from Christian civilization." *Id*. at 188-189.

In *Batchelor*, too, the court held that an accused had been denied the right to counsel when, after arrest but before indictment or arraignment, he had repeatedly asked to see a lawyer but had been refused. 125 N.E. at 775. The grand jury indicted him on the fifth day following his arrest, and he was brought that day before the court to be arraigned, where he was told he had a right to a lawyer. *Id.* at 774-775. He pleaded guilty without asking for a lawyer. *Id*. at 775. In reversing his conviction, the court held that he had been denied the right to counsel, noting the time he had been in custody without being permitted to see a lawyer despite his requests. *Id*. at 776.

The cases confirm that the underlying purpose of the Sixth Amendment is to provide a person with the assistance of counsel to contest government-imposed restraints on liberty; it is not merely a right to legal assistance at trial. That is why, as the *Burgess* court explained, a jailed individual may meet with his lawyer to ask the lawyer to file a petition for a writ of habeas corpus prior to an indictment—the long-established method to challenge restrictions on liberty. *See* Akhil Reed Amar, *Sixth Amendment First Principles*, 84 Geo. L.J. 641, 705 (1996) (explaining that an accused may need to file a petition for a writ of habeas corpus if he is detained prior to trial); *Gerstein v. Pugh*, 420 U.S. 103, 115 (1975) (noting that at common law, "[t]he initial determination of probable cause … could be reviewed by higher courts on a writ of habeas corpus" (citations omitted)). As discussed in part I.A, *supra*,

consistent with this broad understanding of the right to counsel, this Court has long held that the right attaches at the beginning of adversary proceedings—that is, as soon as a person truly needs counsel to protect his interests. *See Brewer*, 430 U.S. at 398.

Indeed, it would be contrary to the most fundamental principles of our legal system to conclude that, in a garden-variety criminal case, a person could be arrested and committed to jail by a magistrate, but denied access to a lawyer to file a petition for habeas corpus simply *because* the state decided to hold the person without indictment or trial. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 554-555 (2004) (Scalia, J., dissenting) ("The very core of liberty secured by our Anglo-Saxon system of separated powers has been freedom from indefinite imprisonment at the will of the Executive."). Yet that is effectively what the court below decided—since he had no evidence of the prosecutor's prior involvement in his case, Rothgery had *no right to counsel at all* until the indictment was filed. *See* Pet. App. 12a. The Sixth Amendment's history and purpose compel a much broader understanding of the right to counsel: the right to counsel must be understood to be a right to counsel when the government has decided to take one's freedom away.

B. This Court should declare that, following a warrantless arrest, the right to counsel attaches, at the latest, once a court has found probable cause to commit an accused to custody.

There is a very straightforward way of determining whether counsel is necessary to defend an individual's freedom—look to whether a court has

imposed restrictions on that freedom. Specifically, *amici* urge this Court (consistent with the history and purposes of the Sixth Amendment set forth above) to hold that, following a warrantless arrest, the right to counsel has attached when a judge has determined that there is probable cause to believe the person has committed a crime and has imposed significant restrictions on a person's liberty.

Such a rule is supported by this Court's approach in *Gerstein* and *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991). *Gerstein* held that a person arrested without a warrant must be "promptly" brought before a magistrate for a judicial determination of probable cause, if the state wishes to impose any significant restraint on him prior to trial. *Gerstein*, 420 U.S. at 125; *see also McLaughlin*, 500 U.S. at 53. *McLaughlin* clarified what qualified as "prompt" under *Gerstein*, holding that a person presumptively may not be held more than 48 hours following arrest without a judicial determination of probable cause. *McLaughlin*, 500 U.S. at 47, 56. The Court's decision in *McLaughlin* simplified the determination required under *Gerstein*, and a similar clarification for when the right to counsel attaches will likewise assist the lower courts.

Additionally, the reasoning of *Gerstein* and *McLaughlin* is substantially applicable here. *Gerstein* explained: "The consequences of prolonged detention may be more serious than the interference occasioned by arrest. Pretrial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships. Even pretrial release may be accompanied by burdensome conditions that effect a significant restraint of

liberty." *Gerstein*, 420 U.S. at 114 (citations omitted). *McLaughlin* held that 48 hours is a reasonable measure of the "prolonged detention" that cannot constitutionally be imposed without a judicial determination of probable cause. *See McLaughlin*, 500 U.S. at 56; *see also Gerstein*, 420 U.S. at 125 n.26 (explaining that the "key factor is [whether there is] significant restraint on liberty").

These decisions recognize that a person's right to liberty speaks more forcefully after he has been restrained for more than 48 hours. He is, therefore, entitled to a judicial proceeding before his liberty can continue to be significantly restricted. And, as set forth above, once a person's liberty has been significantly restrained in a judicial proceeding, he has need of, and is entitled to, counsel to defend that liberty.

Accordingly, this Court should declare that, following a warrantless arrest, a person has a right to counsel following a *Gerstein* hearing if the hearing results in the continuation of significant restraints on the person's liberty. Such a rule is consistent with this Court's precedents, which emphasize that the right to counsel attaches as soon as judicial proceedings have commenced against an accused, no matter how those proceedings might have commenced. *See, e.g.*, *Brewer*, 430 U.S. at 398 ("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*.")

(emphasis added, citations and quotation marks omitted); *see also supra* part I.A. It would also simplify the determination a court must make. *See* Pet. App. 6a (the court below discussing its need to discern the "sometimes elusive degree to which the prosecutorial forces of the state have focused on an individual") (citation and quotation marks omitted). It would also establish as beyond question the right of a person incarcerated for a prolonged period prior to trial to the assistance of counsel.

Amici do not suggest that a person is entitled to appointed counsel at a *Gerstein* hearing. In *Gerstein* itself, the Court concluded that an accused did not have the right to have counsel present at the hearing it required. *Gerstein*, 420 U.S. at 122. On the other hand, whether counsel is required at an initial hearing depends on the nature of the hearing. Thus, in *Moore v. Illinois*, 434 U.S. 220 (1977), the Court held that the state was required to provide counsel at an initial appearance—during which a judge decided whether to bind the accused over to the grand jury and set bail—when the hearing was a somewhat more formal affair. *See id*. at 222-223, 226-229.

Whether or not the Constitution requires counsel to be present at the specific initial hearing or arraignment held under a given state's procedures or in a given prosecution, "[t]he question whether arraignment signals the initiation of adversary judicial proceedings … 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. In *Jackson*, the Court specifically noted that it was not confronted with the question of whether counsel was required *at* the arraignment,

but it nevertheless had no trouble concluding that the arraignment in question caused the right to counsel to attach. *Id.*

Consistent with the *Jackson* Court's observation, once the government has determined that it will restrain a person's liberty for more than 48 hours and has provided him with a *Gerstein* hearing or some other judicial hearing, he should have a right to counsel, regardless of whether counsel was required at that hearing. Again, that this is the appropriate timeframe follows from *McLaughlin* and *Gerstein*. In effect, if the government does not release a person following his *Gerstein* hearing, it has said: "We are restraining you because we believe you have probably committed a crime." Or, as the court in *Burgess* put it, the accused's liberty is restrained because he has been "adjudged probably guilty." 13 Abb. N. Cas. at 188. It is at that point that a person needs counsel to defend his liberty. The Sixth Amendment, properly understood, protects that right.

The proposed rule is also consistent with this Court's decisions in *Argersinger v. Hamlin*, 407 U.S. 25 (1972), and its progeny. Those cases hold that, in any criminal prosecution where a person's freedom is at stake, even for a single day, he is entitled to counsel. *Id.* at 33; *see also Glover v. United States*, 531 U.S. 198, 203 (2001) ("*any* amount of actual jail time has Sixth Amendment significance") (emphasis added). As the Court explained, "incarceration [is] so severe a sanction that it should not be imposed … unless an indigent defendant ha[s] been offered appointed counsel." *Scott v. Illinois*, 440 U.S. 367, 372-73 (1979). Indeed, a person may not even be

given a suspended sentence of imprisonment without first being provided counsel. *Alabama v. Shelton*, 535 U.S. 654 (2002).

Given that an uncounseled accused may not be sentenced to even a day's confinement following trial, the only justification for denying a jailed person a lawyer *prior* to trial should be practical considerations akin to the practical considerations that underlay the decision in *McLaughlin*. *McLaughlin*, however, held that those practical considerations permit the government to hold an accused for only up to 48 hours based on a police officer's reasonable determination of probable cause. After that point, the accused is entitled to the protections of the judicial system, and he may not be held longer without a neutral magistrate's determination of probable cause. Once that determination is made and the accused's liberty is restrained, he should be entitled to the assistance of counsel without the need to further parse the nature of the proceedings already held or to be scheduled or to determine the identities of which state actors might have been involved to that point.

Under the Fifth Circuit's rule, any defendant who cannot prove that a prosecutor was involved in pre-indictment proceedings could languish in jail, awaiting indictment. While this Court's precedents demonstrate that adversary judicial proceedings had been commenced against Rothgery at his initial arraignment, this Court should clarify that the hearing required by *Gerstein* and *McLaughlin* triggers the right to counsel to attach, if it has not already attached, if the hearing results in a continuation of substantial restrictions on a person's

liberty.[5] This Court's precedents do not require a state to provide counsel immediately upon incarceration, but the Sixth Amendment does not permit states, no matter what procedures they may employ, to impose significant restraints on people's liberty for extended periods before trial without providing them with access to counsel. The Court should leave no doubt: the Sixth Amendment does not require a person to wait in jail for months, awaiting the day a "Dickensian bureaucratic machine … churns its cycle," *see McLaughlin*, 500 U.S. at 71 (Scalia, J., dissenting), and a prosecutor finally picks up the accused's file and obtains an

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[5] *Amici* do not suggest that the right to counsel attaches in those cases where a person arrested for a petty offense is bailed at the police station and given a so-called "appearance ticket" or the like, required merely to appear before a court at a later time where proceedings against him will commence (and where, if the state decides to consider imprisonment, the right to counsel will attach, consistent with *Argersinger*). Under the rule *amici* suggest, the right to counsel does not attach when a person is admitted to bail if there has not been a judicial determination of probable cause (or other judicial proceeding) and if the imposition of bail does not carry with it restrictions other than that he appear before a court at a later time. *See Gerstein*, 420 U.S. at 125 & n.26 (no probable cause determination is necessary when there are no "significant pretrial restraint[s] of liberty.") It is the judicial determination of probable cause, which is constitutionally required for significant pretrial restraints on liberty, that initiates adversary judicial proceedings, and which therefore causes the right to counsel to attach. Likewise, if the government does not wish to subject the accused to a risk of imprisonment, the right to counsel does not attach (although it should attach if, not being able to post bail, the person is confined). *See Scott*, 440 U.S. at 373-374 (a person has a right to counsel if he may be subject to imprisonment).

indictment against him, so that he may at last have a right to a lawyer to defend his liberty.

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Some have criticized this Court's criminal procedure jurisprudence as being more protective of the guilty than the innocent. *See* Amar, *Sixth Amendment First Principles*, 84 Geo. L.J. at 644-648; *see also McLaughlin*, 500 U.S. at 71 (Scalia, J., dissenting). This is a case where an innocent man spent weeks in jail—and months subject to other restrictions on his liberty—only because he could not afford a lawyer and the state refused to provide him with one. The Sixth Amendment should be, and traditionally has been, seen to protect such an innocent person's right to the assistance of counsel in defending his freedom.

The Court should reverse the judgment of the Fifth Circuit and hold that, following a warrantless arrest, a judicial determination of probable cause and the imposition of significant restrictions on a person's liberty cause that person's right to counsel to attach.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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