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 *AMICI CURIAE* OF THE BRENNAN CENTER FOR JUSTICE, THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, AND THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST [1]

The Brennan Center for Justice at New York University School of Law is a non-partisan public policy and law institute that focuses on fundamental issues of democracy and justice. An important part of the Brennan Center's work is its effort to close the "justice gap" by strengthening public defender services and working to secure the promise of *Gideon v. Wainwright*, 372 U.S. 335 (1963). Because the subjective test adopted by the court below jeopardizes indigent defendants' Sixth and Fourteenth Amendment rights, the Brennan Center has a strong interest in this case.

The NAACP Legal Defense and Educational Fund, Inc. (LDF) is the nation's oldest civil rights law firm, founded as an arm of the NAACP in 1939 by Charles Hamilton Houston and Thurgood Marshall. LDF was chartered by the Appellate Division of the Supreme Court of New York in 1940 as a non-profit legal aid society "to render legal aid gratuitously to such Negroes as may appear to be worthy thereof, who are suffering legal injustices by reason of race or color and unable to employ and engage legal aid and assistance on account of poverty." Since 1957, LDF has operated independently from the NAACP. This Court has recognized that LDF "has a corporate reputation for expertness in presenting

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[1] 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* or their counsel made a monetary contribution to its preparation or submission. Both Petitioner and Respondent have consented to the filing of this brief, and pursuant to Rule 37.3(a), the letters of consent have been filed with the Clerk of the Court.

and arguing the difficult questions of law that frequently arise in civil rights litigation." *NAACP v. Button*, 371 U.S. 415, 422 (1963). LDF is interested in this civil rights case because the lower court's narrow approach to determining when Sixth Amendment rights attach jeopardizes the rights of indigent defendants, including African Americans and other minorities who studies show are, on average, more likely to require the appointment of counsel.

The National Legal Aid and Defender Association (NLADA) is a nonprofit corporation that works to support indigent defender services and civil legal assistance to those who cannot afford lawyers. NLADA has approximately 700 program members, representing 12,000 lawyers, including nonprofit organizations, government agencies, legal aid organizations, and law firms. NLADA American Council of Chief Defenders is a leadership council that is dedicated to promoting fair justice systems and ensuring that citizens who are accused of crimes have adequate legal representation. The question of precisely when the right to counsel attaches is one of significant importance to NLADA and its members.

SUMMARY OF ARGUMENT

The Sixth Amendment right to counsel is so familiar—so ingrained in our society—that the constitutional importance of the right is "obvious." *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). The parties here do not dispute that the right to counsel can attach long before trial. Pet'r Br. at 2; Respon. Cert. Opp. at 7. Nor is there any dispute that Sixth Amendment rights attach upon "[t]he initiation of adversary judicial criminal proceedings." *Kirby v. Illinois*, 406 U.S. 682, 689 (1972). The central questions here are *when* such judicial criminal proceedings are initiated and *how* that is determined.

As Petitioner demonstrates, these questions were squarely answered in *Brewer v. Williams*, 430 U.S. 387 (1977), and *Michigan v. Jackson*, 475 U.S. 625 (1986), which—applying *Kirby*'s straightforward, objective approach—held that adversary judicial proceedings had begun when a defendant was brought before a judicial officer, was apprised of the accusation against him, and had restrictions imposed on his liberty to ensure he answered that accusation.

Contrary to *Brewer* and *Jackson,* the Fifth Circuit did not apply any objective standard in the proceedings below. Instead, drawing on pre-*Jackson* Fifth Circuit precedent, the court employed a subjective test to determine when Sixth Amendment rights attach—a test that, as the Fifth Circuit itself put it, requires an inquiry into "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)). Reasoning that the inquiry depends on when prosecuting attorneys have "focused on" a citizen, the Fifth Circuit held that "adversary judicial proceedings cannot initiate without some prosecutorial awareness or involvement." *Id.* at n.7 (paraphrasing *McGee v. Estelle*, 625 F.2d 1206, 1208 (5th Cir. 1980)).

The Fifth Circuit's approach departs not only from *Brewer* and *Jackson*, but also from this Court's repeated holdings rejecting nearly identical subjective tests to determine when other fundamental rights attach.

For example, when considering the appropriate test for determining when a citizen has been placed in "custody," thereby triggering the Fifth Amendment right to *Miranda* warnings, this Court expressly rejected lower court holdings that *Miranda* rights attached only when the questioning officers' suspicions had "focused on" the defendant. *Stansbury v. California*, 511 U.S. 318, 321, 323 (1994) (per curiam). Instead, the Court applied an objective test that addressed "how a reasonable person in the position of the individual being questioned would gauge the breadth of his or her 'freedom of action.'" *Id.* at 325. (quotation omitted). Similarly, when considering the appropriate test for determining when there has been a "seizure" triggering Fourth Amendment rights, this Court rejected lower court tests that anchored attachment in part to whether government officials "intended to investigate" the citizen detained. *Brendlin v. California,* 127 S. Ct. 2400, 2408 (2007) ("[W]e have repeatedly rejected attempts to

introduce this kind of subjectivity into Fourth Amendment analysis"). Rather, the Court opted for an objective standard that addressed whether "a reasonable person would have believed that he was not free to leave." *Id.* at 2405 (quotation omitted).

This Court likewise should reject the subjective test employed by the Fifth Circuit to determine whether a defendant has become an "accused"—*i.e.*, "faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law." *Jackson*, 475 U.S. at 631 (quoting *United States v. Gouveia*, 467 U.S. 180, 189 (1984)).

The Fifth Circuit's subjective test cannot be reconciled with *Brewer* and *Jackson*, is out of line with this Court's Fourth and Fifth Amendment jurisprudence, and conflicts with the "noble ideal[s]," *Gideon*, 372 U.S. at 344, of the Sixth Amendment. This Court should reverse the decision below.

ARGUMENT

I. AS IT HAS IN THE FOURTH AND FIFTH AMENDMENT CONTEXTS, THIS COURT SHOULD REJECT A SUBJECTIVE TEST FOR DETERMINING WHEN SIXTH AMENDMENT RIGHTS ATTACH

A. The Lower Court's Subjective Test, Like Those Rejected for Determining When Fourth and Fifth Amendment Rights Attach, Should Not Govern the Sixth Amendment

This Court repeatedly has rejected application of subjective tests, like the one applied below, in determining when certain Fourth and Fifth Amendment rights attach.

For example, in determining whether a suspect is in "custody" triggering *Miranda* rights, the Court has consistently applied an objective standard, rejecting lower court tests that are nearly indistinguishable from the one applied by the Fifth Circuit here. *See Stansbury*, 511 U.S. at 324-26; *see also Yarborough v. Alvarado*, 541 U.S. 652, 662-63 (2004).

In *Stansbury*, law enforcement officers took the defendant to the station and questioned him concerning an encounter with a murder victim. 511 U.S. at 320-21. The officers did not provide *Miranda* warnings when they began the questioning because they considered someone else the lead suspect. *Id.* at 320. It was only after the defendant's statements aroused suspicions that the officers gave the defendant his *Miranda* warnings. *Id*. After the state charged him with first-degree murder, the defendant moved to suppress statements made

before he was *Mirandized*, and the evidence discovered as a result of those statements. *Id.* at 321. The California courts held that the statements and evidence were admissible because the defendant was not "in custody"—the event triggering the right to *Miranda* warnings—until the questioning police officers' suspicions had "focused on" him. *Id.* at 321-22.

This Court rejected the California courts' subjective test. It held that attachment of *Miranda* rights "depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned." *Id.* at 323. Citing prior precedents, the Court reiterated the virtues of an objective inquiry over trying to parse the state of mind and "focus" of government officials. *Id.* at 323-24 (citing *Beckwith v. United States*, 425 U.S. 341, 345-46 (1976) ("[It] was the compulsive aspect of custodial interrogation, and not the strength or content of the government's suspicions at the time the questioning was conducted, which led the Court to impose the *Miranda* requirements with regard to custodial questioning."); *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984) ("[T]he only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation."); *Minnesota v. Murphy*, 465 U.S. 420, 431 (1984) ("The mere fact that an investigation has focused on a suspect does not trigger the need for *Miranda* warnings in noncustodial settings, and the probation officer's knowledge and intent have no bearing on the outcome of this case.")).

An objective inquiry, the Court reasoned, is required because a defendant cannot be expected "to probe [an] officer's innermost thoughts" to determine whether the

officer has "focused on" the defendant. *Id.* at 324. Further, this Court recognized that the "threat to a citizen's Fifth Amendment rights that *Miranda* was designed to neutralize has little to do with" the subjective views of officers and should not be anchored to the potentially "evolving" intent or understandings of government officials. *See id.* at 324-25 (quotation omitted).

To this end, this Court adopted an objective test to determine whether a person is in "custody": "[H]ow a reasonable person in the position of the individual being questioned would gauge the breadth of his or her 'freedom of action' . . . . [I]t is the objective surroundings, and not any undisclosed views, that control the *Miranda* custody inquiry." *Id.* at 325 (quotation omitted).

This Court has applied a similar objective test in considering whether a citizen has been "seized" within the meaning of the Fourth Amendment's protection against unreasonable searches and seizures, again rejecting subjective tests used by lower courts. *Brendlin*, 127 S. Ct. at 2405-06 (describing longstanding objective test used for determining whether "seizure" occurred as "whether 'a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter'"). In *Brendlin*, this Court recently applied this test to consider whether the passenger of an automobile pulled over during a traffic stop is "seized" under the Fourth Amendment. *Id.* at 2403. In finding a seizure in those circumstances, the Court rejected a subjective test applied by a state high court that would have hinged Fourth Amendment rights in large part on whether the officer "intended to investigate" the passenger when the car was pulled over. *Id.* at 2408. This

Court concluded that "we have repeatedly rejected attempts to introduce this kind of subjectivity into Fourth Amendment analysis." *Id.*

In sum, in assessing the proper standards for determining when certain Fourth and Fifth Amendment rights attach, this Court has adopted objective tests and expressly rejected subjective inquiries virtually indistinguishable from the one applied by the Fifth Circuit. There is no principled basis for a departure from this approach in the Sixth Amendment context.

B. The Reasons for Applying Objective Rather Than Subjective Tests in the Fourth and Fifth Amendment Contexts Have Equal Force in the Sixth Amendment Context

The rationale articulated by this Court for using objective tests to determine when Fourth and Fifth Amendment rights attach is equally applicable to the Sixth Amendment analysis.

As a threshold matter, the trigger for Fourth, Fifth, or Sixth Amendment rights should not vary or be dependent on the elusive and evolving "focus" or awareness of government officials. *See Brendlin,* 127 S. Ct. at 2408; *Stansbury*, 511 U.S. at 324-25. The Fifth Circuit's test does just that, by concluding that "an adversary criminal proceeding has not begun in a case"—and hence the right to counsel has not attached—"where the prosecution officers are unaware of either the charges or the arrest." Pet. App. 6a (quoting *McGee*, 625 F.2d at 1208). As the Fifth Circuit acknowledged below, this test essentially requires an inquiry into the "sometimes elusive degree to which the prosecutorial

forces of the state have *focused on* an individual." *Id.* (quoting *Lomax*, 629 F.2d at 415 (emphasis added)). This is precisely the type of "elusive" inquiry this Court rejected as improperly subjective and unworkable in the Fourth and Fifth Amendment contexts. *Stansbury*, 511 U.S. at 321, 324 (rejecting lower court test that attached rights to *Miranda* warning on whether the officers' suspicions had "focused on" the defendant); *Brendlin*, 127 S. Ct. at 2408-09 (rejecting lower court test that attached Fourth Amendment rights based on whether officer "intended to investigate" passenger of automobile).

Beyond the difficulty in delving into a government official's mindset—which requires a speculative inquiry to determine what a prosecutor "knows," what he or she is "focused on," and when he or she becomes "involved"—a subjective test makes the attachment of Sixth Amendment rights contingent on arbitrary and/or fortuitous circumstances. For instance, "awareness" of a Texas prosecutor could fluctuate depending on the day of arrest, since jails may be required to report their arrestees to county prosecutor offices on particular days. *See* Tex. Code Crim. Proc. art. 2.19 ("On the first day of each month, the sheriff shall give notice, in writing, to the district or county attorney, where there be one, as to all prisoners in his custody, naming them, and of the authority under which he detains them."). Awareness or "involvement" could also depend on any number of other random circumstances, such as whether a sheriff's or prosecutor's office issues a press release shortly after a high-profile arrest. *See*, *e.g.*, Press Release, Denton County, Texas, Sheriff's Office, *$1/2 Million Worth of Heroin Seized, 3 Arrested*, http://sheriff. denton

county.com/View_Press_Release. asp?id=175; *see also* Press Release, Bexar County, Texas District Attorney's Office, *Burglary Ring Busted* (Dec. 20, 2007), http://www.bexar.org/da2/PressRelease/2007/12202007.htm.

Indeed, the right could vary depending on the sophistication, or lack thereof, of a jurisdiction's computer intake system. Some Texas counties, for example, have computer systems that provide arrest and detention information simultaneously to prosecutors, law enforcement officers, jail personnel, and clerks. Prosecutors in these jurisdictions use these systems to pre-screen cases early in the process before an initial appearance. Dottie Carmichael et al., *Evaluating the Impact of Direct Electronic Filing in Criminal Cases: Closing the Paper Trap*, Public Policy Research Institute, Texas A&M University 2-3 (2006) [hereinafter Carmichael 2006], http://www.courts.state.tx.us/tfid/pdf/FinalReport7-12-06wackn.pdf.[2] Thus, government "awareness," and Sixth Amendment rights, could depend on how electronic information is processed, which is not only arbitrary, but varies from county to county. *See* Dottie Carmichael et al., *Study to Assess the Impacts of the Fair Defense Act on Texas Counties*, Public Policy Research Institute, Texas A&M University 27-28 (2005) [hereinafter Carmichael 2005], http://www.courts.state.tx.us/tfid/Resources.asp (noting that in Dallas County, prosecutors generally pre-screen cases within 72 hours of arrest, but that few other counties can meet that pace). Similarly, under the Fifth Circuit's test, the right could

[2] *See also* Barry Mahoney & Walt Smith, *Pretrial Release and Detention in Harris County: Assessment and Recommendations* 2-3 (2005), http://effectivealt.web.aplus.net/sitebuildercontent/sitebuilderfiles/reportfinalharriscounty pretrial.doc.

vary depending on the resources and staffing of the various prosecutor offices in Texas's 254 counties, leaving the Sixth Amendment right not to objective standards, but instead to the wide-ranging daily work-loads of individual prosecutors.

Finally, leaving the timing for "awareness," "focus" or "involvement" in the first instance to the voluntary acts of government officials creates the opportunity for manipulation to gain prosecutorial advantages.[3]

By contrast, the objective approach applied in *Brewer* and *Jackson* provides a clear and consistent framework for protecting Sixth Amendment rights. It fixes the attachment of the right to counsel on the occurrence of objectively verifiable proceedings and avoids, in keeping with Fourth and Fifth Amendment precedents, uncertain, evolving subjective inquiries of government officials. As *Brewer* and *Jackson* hold, under that objective approach, "adversary judicial proceedings" have begun, at the very least, when an arrestee is brought for his first appearance before a judge, who informs him of the accusation against him and restricts his liberty (including release on bail). That event provides an objective marker that the person formerly a "suspect" has become an "accused" within the meaning of the Sixth Amendment. Reaffirming that the right to counsel attaches in these circumstances would allow

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[3] *Cf. Gerstein v. Pugh*, 420 U.S. 103, 118 (1975) ("A democratic society . . . naturally guards against the misuse of the law enforcement process. Zeal in tracking down crime is not in itself an assurance of soberness of judgment. Disinterestedness in law enforcement does not alone prevent disregard of cherished liberties. Experience has therefore counseled that safeguards must be provided against the dangers of the overzealous as well as the despotic." (quotation omitted)).

the government—including courts, prosecutors, police officers, and those implementing criminal justice procedures and policies—to know with a high degree of certainty when the right to counsel is triggered. *Cf. Dunaway v. New York*, 442 U.S. 200, 213-14 (1979) ("A single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront."). Because uncertainty and delay surrounding the appointment of counsel imposes a real harm on defendants, using an objective marker to determine the right to counsel is far preferable to relying on elusive understandings, happenstance, or a fact-intensive, backward-looking, and often time-consuming inquiry.

Moreover, an objective test also avoids unwarranted departure from other constitutional principles. A subjective test, like the one used below, that seeks to determine a prosecutor's "focus" or knowledge departs from the principle, recognized by this Court in *Jackson*, that knowledge is imputed from one state actor to another for Sixth Amendment purposes:

> Sixth Amendment principles require that we impute the State's knowledge from one state actor to another. For 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).

475 U.S. at 634 (footnote omitted).

Further, a subjective test, which requires a defendant to establish government knowledge or "focus," places an undue burden on the accused. For example, though the decision below is not entirely clear, the Fifth Circuit appears to have presumed that the burden of showing prosecutorial knowledge, focus, or involvement rests on a criminal defendant. Pet. App. 7a ("Rothgery provides no reason why the officer's acts should somehow be imputed to the prosecutor's office or should otherwise be interpreted to signal that Rothgery was opposed by the prosecutorial forces of the state."). Such an approach is inconsistent with this Court's precedents imposing such burdens on the government, not the accused. *See*, *e.g.*, *Missouri v. Seibert*, 542 U.S. 600, 608 n.1 (2004) (government bears burden to show an individual's waiver of *Miranda* rights and voluntariness of confession); *Nix v. Williams*, 467 U.S. 431, 444-45, n.5 (1984) (government bears burden to show inevitable discovery of evidence obtained by unlawful means); *United States v. Matlock*, 415 U.S. 164, 177 (1974) (government bears burden to show voluntariness of consent to search). Placing the burden on the government is particularly appropriate where, as here, the relevant information is in the hands of the government. *See Tague v. Louisiana*, 444 U.S. 469, 470-71 (1980) (per curiam) ("Since the State is responsible for establishing the isolated circumstances under which the interrogation takes place and has the only means of making available corroborated evidence of warnings given during incommunicado interrogation, the burden is rightly on its shoulders." (quoting *Miranda v. Arizona*, 384 U.S. 436, 475 (1966)).

Ultimately, an objective test focuses, as it should, on the nature and consequences of the proceeding itself.

By shifting the focus away from the proceeding, the Fifth Circuit's test injects improper subjectivity and arbitrariness into the Sixth Amendment analysis. That subjective approach has been rejected for the Fourth and Fifth Amendments. It should be rejected here.

II. "ADVERSARY JUDICIAL PROCEEDINGS" HAVE BEGUN WHEN A PERSON IS BROUGHT BEFORE A MAGISTRATE, INFORMED OF THE ACCUSATION AGAINST HIM, AND HAS RESTRAINTS IMPOSED ON HIS LIBERTY

The objective test employed by *Brewer* and *Jackson* properly recognizes that a suspect becomes an "accused" within the meaning of the Sixth Amendment, adversary judicial proceedings commence, and his right to counsel therefore attaches, once he is informed of the accusations against him by a judicial officer and committed to jail or bail. There can be no question that an accused at this stage in the system has been "faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law." *Jackson*, 475 U.S. at 631 (quotation omitted). A detailed examination of the Texas pre-indictment system bears this out.

A. Pre-Indictment Proceedings in Texas: Arrest to Magistration

Under Texas law, the police may arrest citizens in a variety of circumstances with or without a warrant. Where, as here, the situation involves a warrantless arrest, Texas law generally permits such arrests when individuals are "found in suspicious places and under circumstances which reasonably show that such persons have been guilty of some felony . . . breach of the peace

. . . or threaten, or are about to commit some offense against the laws." Tex. Code Crim. Proc. art. 14.03(a)(1). Warrantless arrests can be made for conduct within an officer's view, or, for various offenses, outside an officer's presence. *Id.* art. 14.03(b); *see also id.* art. 14.04 (warrantless arrest permissible when officer receives "representation of a credible person, that a felony has been committed, and that the offender is about to escape"). Mr. Rothgery, for instance, was arrested without a warrant for unlawful possession of a firearm by a felon.

Though the circumstances allowing for warrantless arrest are wide-ranging, they are still limited by statute, and few citizens would know or understand when an officer's arrest is improperly made.

As defined by Texas law, an arrest, with or without a warrant, occurs when the accused is "actually placed under restraint or taken into custody by an officer . . . ." *Id.* art. 15.22. In making an arrest an officer may use force. *Id.* art. 15.24. And, with certain exceptions, *id.* art. 14.05, he "may break down the door of any house for the purpose of making an arrest, if he be refused admittance after giving notice of his authority and purpose." *Id.* art. 15.25. In Texas, approximately six out of ten of those arrested are indigent.[4]

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[4] "In 2006, 62 percent of felony defendants in Texas courts received appointed counsel." Texas Task Force on Indigent Defense, *2006 Annual Report and Expenditure Report: Evidence-based Practices Are Good for Public Defense* 3 (2007), http://www.courts.state.tx.us/tfid/pdf/TFIDFY06AR FINAL 012507.pdf. The rates can vary significantly by county. In some

(Cont'd)

After an arrest (with or without a warrant), individuals may sit in jail for up to 48 hours before being taken to a magistrate. *See* Tex. Code Crim. Proc. arts. 14.06(a), 15.17(a).

B. The Initial Appearance: A Citizen is Brought Before a Court, Advised of the Accusations, and His or Her Liberty Is Restrained

After spending up to two days in jail following a warranted or warrantless arrest, an arrestee in the Texas system is next brought before a magistrate for an initial appearance in what typically is called the "magistration." There, he is advised "of the *accusation* against him and of any affidavit filed therewith." *Id.* art. 15.17(a) (emphasis added). He also is advised of "his right to retain counsel, of his right to remain silent, of his right to have an attorney present during any interview with peace officers or attorneys representing

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counties the felony appointment rate is over 80%; in others less than 30%. Wesley Shackelford, *Review of Tarrant County Indigent Defense System* 3 (2006), http://www.courts. state.tx.us/tfid/pdf/Tarrant%20County%20Report.pdf. (containing statistics on 10 Texas counties). Statistics show that nationwide African Americans and other minorities are, on average, more likely to require the appointment of counsel: According to the Bureau of Justice Statistics, as of 2001, "69% of white State prison inmates reported they had lawyers appointed by the court," whereas "77% of blacks and 73% of Hispanics had publicly financed attorneys. In Federal prison black inmates were more likely than whites and Hispanics to have public counsel: 65% for blacks, 57% for whites and 56% for Hispanics." Bureau of Justice Statistics, *Indigent Defense Statistics: Racial Disparity and the Use of Publicly Financed Counsel*, http://www.ojp.usdoj.gov/bjs/id.htm#racial.

the state, of his right to terminate the interview at any time, and of his right to have an examining trial." [5] *Id.* In cases where the defendant is arrested without a warrant, for convenience, the probable cause determination required by *Gerstein v. Pugh*, 420 U.S. 103 (1975), often is combined with the initial appearance. *See* Tex. Code Crim. Proc. 14.06(a).

In Mr. Rothgery's magistration, for example, he was confronted with an Affidavit of Probable Cause sworn by the arresting officer that stated the "charge" against him, the magistrate found that "probable cause existed for the arrest of the individual *accused* therein," and informed Rothgery that he was "*accused* of the criminal offense of: unlawful possession of a firearm by a felon." Pet App. 33a-35a (emphasis added).

During this initial appearance, the magistrate is statutorily required to "inform the person arrested of the person's right to request the appointment of counsel if the person cannot afford counsel . . . . [and] of the procedures for requesting appointment of counsel . . . ." Tex. Code Crim. Proc. art. 15.17(a). The magistrate at Mr. Rothgery's magistration provided this information. Pet. App. 35a-37a.

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[5] Under Texas law, "[t]he accused in any felony case shall have the right to an examining trial before indictment . . . whether he be in custody or on bail . . . ." Tex. Code Crim. Proc. art. 16.01. This pre-indictment right gives an accused the opportunity to "examine into the truth of the accusation made." *Id.* The accused and government may call and question witnesses. *Id.* arts. 16.06-.07. After the examining trial, the judge can make an order committing the defendant to jail, grant bail, or discharge him for lack of probable cause. *Id.* art. 16.17.

C. At the Magistration, the Court Grants or Denies the Accused Bail

During this initial appearance, the magistrate "admit[s] the person arrested to bail if allowed by law," or jails those who lack the means to post bail. *See, e.g.*, Tex. Code Crim. Proc. arts. 15.17(a), 17.27. "'Bail' is the security given by the *accused* that he will appear and answer before the proper court the *accusation* brought against him . . . ." *Id.* art. 17.01 (emphasis added). Unlike many defendants,[6] Mr. Rothgery managed to post bail.

Historically in Texas, those denied bail often waited weeks—or even months—before they were indicted and provided counsel. As one report found:

> Delay in appointment of counsel is a major concern in many counties. For instance, in some counties, indictment triggers the appointment of counsel. Indictment can occur months after arrest, leaving the defendant in jail with no access to counsel during that period. Even in counties where it is not indictment that triggers appointment, but some other earlier appearance before the court, that might not occur for weeks after arrest. In either case, even for those defendants out on bond, the practice whereby counsel is appointed some or a considerable

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[6] According to the Texas Commission on Jail Standards Jail Population Report, as of January 1, 2008, more than 50% of the state's county and city jail detainee population are pretrial and have not been convicted of a crime. *See generally* Texas Commission on Jail Standards, *Jail Population Report* (2008), http://www.tcjs.state.tx.us/docs/abrerpt.pdf.

> time after arrest works to the defendant's detriment in that counsel is impeded in pursuing witnesses and factual leads in a timely, expeditious fashion.

Texas Appleseed Fair Defense Project, *The Fair Defense Report, Analysis of Indigent Defense Practices in Texas* 29 (2000), http://www.texasappleseed.net/pdf/projects_fairdefense_fairref.pdf; *accord* Michael K. Moore & Allan K. Butcher, *Examining the Impact of Criminal Defense Reform in Texas: Has the Fair Defense Act Been Effective?* 14 (2005), http://www.courts.state.tx.us/tfid/pdf/ButcherMooreSPWSA05.pdf.[7]

The Fifth Circuit's rule—under which counsel need not be appointed until indictment absent some pre-indictment prosecutorial involvement—would permit such lengthy stays in jail with no access to counsel. Moreover, that would be so even for defendants who, like Rothgery, could readily prove their innocence and obtain dismissal of the charges against them with a lawyer's help. Under the Fifth Circuit's rule, that is, "a law-abiding citizen wrongfully arrested may be compelled to await the grace of a Dickensian bureaucratic machine, as it churns its cycle" for an indefinite period—without the assistance of counsel to demonstrate "that there is absolutely no reason to hold him, that a mistake has been made." *County of Riverside v. McLaughlin*, 500 U.S. 44, 71 (1991) (Scalia, J., dissenting).

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[7] *Accord* Carmichael 2005, *supra*, at 27 ("At every study site except Dallas, stakeholders recall that before [the Fair Defense Act], indigent defendants charged with both misdemeanors and felonies were commonly detained for months with no advocate to protect their legal rights and interests. Since the FDA, defendants may still be held in custody while prosecutors review their case. However, it is no longer without access to an attorney.").

Because of these and other problems, Texas law was amended to provide that a person denied or financially unable to post bail at magistration is provided counsel within three business days in counties, like Gillespie County, with populations of less than 250,000, and within one business day in counties with a population of over 250,000. *See* Tex. Code Crim. Proc. art. 1.051(c). These reforms, however, do not apply to persons, like Mr. Rothgery, released on bond. *See id.* art. 1.051(j). Moreover, even in Texas, some studies suggest that large percentages of defendants are not appointed counsel within the statutory time frames. *See* Carmichael 2006, *supra*, at 98, Figure 9-3 (reflecting percent of individuals without counsel 4, 7, 14 days of confinement). In one county, for example, only 20% of defendants had counsel in four days and only 73% of defendants had received counsel after 14 days of confinement. *Id.* In another county, only 38% of defendants were appointed counsel within four days and only 65% of defendants received counsel within two weeks. *Id.* Even the county with the highest appointment rates had only slightly more than half of the defendants (56%) receiving court appointed counsel within four days, and only 88% within two weeks. *Id.*[8]

Most significantly, as discussed above, the Fifth Circuit's rule would permit reversal of these reforms and permit states to incarcerate defendants without access to counsel, potentially for as long as several months, while they await indictment. Such jail time—which, in

[8] The study could not draw conclusions as to why this was the case, though some of these individuals may not have requested counsel (and thus not triggered the deadlines for appointment which begin upon the defendant's request).

the case of innocent defendants like Mr. Rothgery, serves no valid purpose—presents serious risks. Texas jails are overcrowded. *See* ACLU of Texas, *Prisons and Jail Accountability Project (PJAP)*, http://www.aclutx.org/projects/prisons.php. For example, in Harris County, at least 1,700 jail inmates reportedly were sleeping on mattresses on the floor in June 2005. *See* Polly Ross Hughes, *Revised Numbers Show Jail Overcrowding is Worse*, Houston Chronicle, Aug. 5, 2005, *available at* http://www.solutionsfortexas.net/id408.html; *see also* Texas Commission on Jail Standards, *Jail Population Report* (2008), http://www.tcjs.state.tx.us/docs/abrerpt.pdf. (reflecting county-by-county jail populations and capacities as of January 2008).

The facilities and conditions often fail to meet the standards set by the Texas Commission on Jail Standards. *See* ACLU of Texas, *Prisons and Jail Project*, http://www.aclutx.org/projects/prisonspg.php?pid=93. Further, aside from the overcrowded poor conditions, those jailed face serious health risks. In Bexar County, for instance, more than 900 inmates tested positive for tuberculosis in 2005 and 301 tested positive for methicillin resistant staphylococcus aureus. *See id.*; *see also* Michael Puisis, *Findings on the Medical and Mental Health Programs of the Dallas County Jails* 30-32 (2005), http://www.dallasnews.com/sharedcontent/dws/img/03-05/jailhealth3.pdf (discussing significant tuberculosis problems in Dallas County jails). In addition, Texas jails have a significant problem with hepatitis C. *See* ACLU of Texas, *Prisons and Jail Project*, http://www.aclutx.org/projects/prisonspg.php?pid=93 ("In a public hearing before the Subcommittee of Healthcare and Special Populations of the House

Correction Committee, staff from the Correctional Managed Health Committee stated that 30% of prisoners received from the county jails test positive for Hepatitis C upon entry to the Texas Department of Criminal Justice.").

Those jailed also face a serious risk of violence, including sexual violence. In 2004, the Bureau of Justice Statistics reported hundreds of cases of sexual assault in local jails nationwide. *See* Alan J. Beck & Timothy A. Hughes, *Sexual Violence Reported by Correctional Authorities, 2004*, Bureau of Justice Statistics (2005), http://www.ojp.usdoj.gov/bjs/pub/pdf/svrca04.pdf. *Id.* at App. Table 1a. (providing statistics on sexual violence in Texas prisons).

Moreover, even a defendant who is able to post bond and obtain release on bail following his initial appearance suffers significant harms:

> He is required to appear in court at the state's command. He is often subject . . . to the condition that he seek formal permission from the court (at significant expense) before exercising what would otherwise be his unquestioned right to travel outside the jurisdiction. 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). The mere possibility that the defendant could be returned to jail for violating bail conditions is

by itself a significant intrusion on his liberty. *Cf. Alabama v. Shelton*, 535 U.S. 654, 658 (2002) ("[A] suspended sentence that may 'end up in the actual deprivation of a person's liberty' may not be imposed unless the defendant was accorded 'the guiding hand of counsel' in the prosecution for the crime charged." (quotation omitted)). Further, as this Court has recognized, "pretrial release may be accompanied by burdensome conditions that effect a significant restraint of liberty." *Gerstein*, 420 U.S. at 114 (citing 18 U.S.C. §§ 3146(a)(2), (5)).[9]

Perhaps most significant of all, as this case demonstrates, the consequences of delaying appointment of counsel can be devastating: such delay prevents counsel from promptly investigating the facts before witnesses disappear or evidence is destroyed; assessing the defendant's mental and emotional state; ensuring that the accused understands and can invoke his rights and that the state properly follows its statutory

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[9] In *Gerstein*, this Court cited as examples of "burdensome conditions" provisions of the federal law in effect at the time allowing bail conditions, such as "restrictions on the travel, association, or place of abode of the person," 18 U.S.C. § 3146(a)(2) (1975), and "any other condition deemed reasonably necessary to assure appearance as required," *id.* § 3146(a)(5). Texas law specifies many other conditions, allowing the government to order defendants: to home confinement, Tex. Code Crim. Proc. art. 17.44(a)(1); to electronic monitoring and curfew, *id.* art. 17.43(a); to submit to DNA samples, *id.* art. 17.47; to undergo controlled substance testing, *id.* art. 17.44(a)(2); and to submit to the installation of a device that may prevent ignition of a motor vehicle, *id.* art. 17.441. A review of one county's approach to bond found that the extent of conditions depended on the specific judge; indeed, one judge imposed a total of 1,240 conditions on 301 different defendants. Mahoney & Smith, *supra*, at 16-17.

procedures (such as the right to an examining trial, *see supra* note 5); and redressing unjust errors like the one made in Mr. Rothgery's case. As one Texas report put it, "[w]aiting until indictment to provide an attorney, which was not an uncommon occurrence in many pre FDA jurisdictions, was not unlike awaiting until the autopsy to provide a physician." Moore & Butcher, *supra*, at 14; *see also id.* ("For the right to an attorney to be meaningful . . . . [t]he counsel should be assigned within a reasonable number or hours or days and not a matter of weeks or months after the arrest."). When the "stakes are this high," *cf. Gerstein*, 420 U.S. at 114, the appointment of counsel is essential if the Sixth Amendment is to provide meaningful protection to the accused.

The recent Texas experience suggests that appointing counsel early on has minimal cost and substantial benefits.[10] But without a constitutional requirement, there could be resistance to adopting similar procedures in other jurisdictions. Indeed, affirmation of the Fifth Circuit's approach could encourage jurisdictions currently providing counsel upon the initial appearance to succumb to common misperceptions concerning the cost of providing counsel in such circumstances and change course. That would dramatically undermine the Sixth Amendment's protections.

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[10] *See* Carmichael 2005, *supra*, at 27-28.

In sum, "[w]hatever 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*, 430 U.S. at 398 (quotation omitted). Given the constitutional issues at stake, using an objective standard to determine when the right to counsel attaches is far preferable to relying on the subjective, arbitrary, and elusive "focus," "awareness," or "involvement" of government officials.

The objective test applied by this Court in *Brewer* and *Jackson* is straightforward, well-reasoned, and workable. The Fifth Circuit's subjective test, on the other hand, cannot be reconciled with *Brewer* and *Jackson*, is inconsistent with this Court's Fourth and Fifth Amendment jurisprudence, and denies a poor defendant an essential right: "the guiding hand of counsel at every step in the proceedings against him." *Powell v. Alabama*, 287 U.S. 45, 69 (1932). This Court should reject the Fifth Circuit's subjective test and reverse.

CONCLUSION

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

Respectfully submitted,

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