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

REPLY BRIEF FOR PETITIONER

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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." Petitioner Walter Rothgery was arrested for unlawful possession of a firearm by a felon—an offense of which he was innocent. Rothgery was brought before a magistrate, who informed him that he was accused of that offense and required him to post bond or remain in jail to ensure he answered the accusation. Rothgery knew he was innocent, but did not know how to prove it. He therefore requested counsel. His requests were ignored. Instead, he was indicted and jailed for three weeks before his belatedly appointed lawyer obtained his release and the dismissal of the false charge. The

Fifth Circuit nevertheless held that because no prosecutor was involved in Rothgery's arrest or magistration, a "criminal prosecution[]" had not commenced, and Rothgery was not an "accused" whose right to counsel attached, until indictment.

This case presents a single, narrow question: whether that holding is correct. It is not. This Court has repeatedly held that a criminal prosecution commences as soon as judicial criminal proceedings begin, even if that occurs before indictment. And the Court has specifically held that an initial appearance before a magistrate like that here, at which the defendant is informed of the accusation against him and committed to jail or bail, begins a criminal prosecution. Respondent's attempts to distinguish those decisions are nothing more than an ill-disguised plea to disregard them.

Even had this Court not already answered the question presented, the text and purpose of the Counsel Clause dictate the same outcome. Once a defendant appears before a judge who informs him of the charge against him and restricts his liberty to guarantee he answers that charge, he is "accused," and his right to counsel to defend against that accusation attaches. That is a question of federal constitutional law, whose answer is the same no matter how state law defines a "prosecution"—although application of Texas law would yield the same conclusion.

Perhaps recognizing the weakness of its arguments on the question presented, respondent focuses on a question not raised or considered below, contending that even if adversary judicial proceedings commenced at his magistration, Rothgery was not entitled to counsel because no "critical stage" of the prosecution occurred before his indictment. As this Court has made

clear, however, that question is distinct from, and logically subsequent to, the question presented: whether adversary judicial proceedings commenced upon Rothgery's magistration. Respondent's alternative argument is thus not properly presented, and this Court should not consider it. This Court addresses arguments not raised below and outside the question presented only in extraordinary circumstances. Respondent points to none here.

Respondent's new argument fails in any event. Respondent contends that the right to counsel ensures defendants only a "fair trial," and that because the charge against Rothgery was dismissed before trial (but after he had spent several months burdened with a pending false charge, including three weeks in jail), he suffered no harm against which the Sixth Amendment protects. But the right to counsel also assists defendants in combating "an erroneous or improper prosecution" prior to trial. *Coleman* v. *Alabama*, 399 U.S. 1, 9 (1970). Here, Rothgery had a right to an examining trial, which respondent concedes is a "critical stage" because it enables a defendant to contest improper charges *before* he is indicted and tried. As this Court has recognized, a defendant is entitled to counsel's assistance not only in preparing for and conducting such proceedings, but also in deciding whether to undergo them. Even if respondent were correct that appointment of counsel is required only for "critical stages," therefore, Rothgery was entitled to counsel's help in making an informed decision whether and how to invoke his right to an examining trial.

Ultimately, respondent's contention that a person who has been brought before a judge and informed of the accusation against him, has been required to post

bail, and has acquired the right to contest that accusation in court nevertheless is not "accused," and has no right to or need for counsel, cannot be reconciled with this Court's precedent. Nor can it be squared with the fundamental purposes of the Sixth Amendment, which include providing a defendant with counsel's help to "establish his innocence" and ensure that he is not "put on trial without a proper charge." *Powell* v. *Alabama*, 287 U.S. 45, 69 (1932).

ARGUMENT

I. RESPONDENT'S ARGUMENT DISTORTS THE QUESTION PRESENTED AND THIS COURT'S PRECEDENT

Respondent misapprehends both the question presented and the settled doctrine governing its resolution.

The sole question decided by the Fifth Circuit, and presented here, is whether a "criminal prosecution[]" commenced, and Rothgery became an "accused," upon his magistration. This Court has consistently held that a criminal prosecution commences upon the initiation of "adversary judicial proceedings" (or the synonymous "judicial criminal proceedings"). *Kirby* v. *Illinois*, 406 U.S. 682, 688-689 (1972) (plurality). At that point, "a person who had previously been just a 'suspect' has become an 'accused,'" *Michigan* v. *Jackson*, 475 U.S. 625, 632 (1986), and "the explicit guarantees of the Sixth Amendment are applicable," *Kirby*, 406 U.S. at 690.

Separately, this Court has held that once a prosecution commences, an accused is entitled to be represented by counsel at all "critical stages" of the prosecution, including pretrial proceedings at which he "require[s] aid in coping with legal problems or assistance in meeting his adversary." *United States* v. *Ash*, 413

U.S. 300, 313-314 (1973). The purpose of the critical-stage inquiry is not to determine the point at which a criminal prosecution begins and the protections of the Sixth Amendment first take effect, but to identify specific proceedings thereafter for which the accused is entitled to the assistance of counsel and which cannot, without a valid waiver, be conducted in counsel's absence. *Moore* v. *Illinois*, 434 U.S. 220, 224-225 (1977); *United States* v. *Wade*, 388 U.S. 218, 226-227 (1967). The critical-stage test thus asks whether a proceeding threatens "potential substantial prejudice" to the defendant's rights that counsel's assistance could help avoid. *Wade*, 388 U.S. at 227; *Coleman*, 399 U.S. at 7.

The question whether judicial criminal proceedings have begun, and a prosecution has commenced, is thus distinct from the question whether a particular proceeding is a "critical stage." The former question is logically antecedent to the latter: if no prosecution has begun, a proceeding cannot be a "critical stage" of a prosecution—even if counsel's assistance could prevent prejudice to the defendant. *Kirby*, 406 U.S. at 689-690; *Moran* v. *Burbine*, 475 U.S. 412, 428-429 (1986). Moreover, a judicial proceeding need not itself be a "critical stage" to mark the commencement of a prosecution. "The question whether [a proceeding] signals the initiation of adversary judicial proceedings … is distinct from the question whether [the proceeding] itself is a critical stage requiring the presence of counsel[.]" *Jackson*, 475 U.S. at 629 n.3.

Respondent conflates these two distinct inquiries throughout its brief. This case presents only the question whether judicial criminal proceedings began upon Rothgery's magistration. Rothgery has never contended that the magistration itself was a "critical

stage" at which he was entitled to counsel's presence. Yet much of respondent's brief (*e.g.*, Br. 1, 26-27, 40-41) addresses this irrelevant issue. Similarly, in disputing that a prosecution commenced at Rothgery's magistration, respondent makes arguments relevant only to the critical-stage analysis, contending (Br. 1-3, 10-11, 16-17, 26-30, 40-42) that the magistration was not "adversarial" and could not prejudice Rothgery's right to a fair trial.

Much of respondent's confusion stems from its misapprehension of *Kirby* and its progeny. Respondent interprets *Kirby* to establish a "general rule" that a felony prosecution commences only upon "formal charges" (Br. 10, 14)—which respondent equates with indictment or information—with exceptions for a "very limited set of specific preindictment situations" (Br. 23) when a critical stage occurs or a prosecutor's involvement signals the government's commitment to prosecute. Nothing in this Court's precedent, however, supports this tortured reading of *Kirby*—which asks simply whether "judicial criminal proceedings" have begun. 406 U.S. at 689.

First, there is no support in *Kirby* or elsewhere for respondent's "general rule" that judicial criminal proceedings commence only upon indictment. Indeed, *Moore* expressly rejected that rule, recognizing that it "cannot be squared with *Kirby*," which itself stated that a felony prosecution can begin before indictment. 434 U.S. at 228; *see Kirby*, 406 U.S. at 689. *Brewer* and *Jackson* likewise held that adversary judicial proceedings commenced upon pre-indictment initial arraignments before magistrates. *Brewer* v. *Williams*, 430 U.S. 387, 398-399 (1977); *Jackson*, 475 U.S. at 629. And in *McNeil* v. *Wisconsin*, it was undisputed that adver-

sary judicial proceedings commenced upon the defendant's initial appearance before a county court commissioner who scheduled a preliminary examination and set bail. 501 U.S. 171, 173, 175 (1991). As *McNeil* explained, the right to counsel "attaches at the first formal proceeding against an accused." *Id.* at 180-181.

Second, just as there is no "general rule" that prosecutions commence only upon indictment, there is no exception to that rule for pre-indictment "critical stages." Respondent is forced to posit such an exception to account for *Coleman*, which held that the right to counsel attached at a pre-indictment preliminary hearing. 399 U.S. at 8-10. But *Kirby* does not treat *Coleman* as an exception to any "general rule," instead citing *Coleman* as one of a line of cases that "established that [the] right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated." 406 U.S. at 688-689. Nor was it relevant to *Kirby*'s analysis that *Coleman* involved a "critical stage." Far from holding that prosecutions can commence only by indictment or, in exceptional circumstances, through a pre-indictment "critical stage," *Kirby* establishes that a prosecution commences as soon as "judicial criminal proceedings" begin, however they begin.

Third, contrary to respondent, *Kirby* did not establish a "functional analysis" (Br. 22) under which pre-indictment judicial proceedings initiate a prosecution only when the facts of a particular case show that "the government has committed itself to prosecute," 406 U.S. at 689—which respondent apparently takes to mean that a prosecutor must be involved. Respondent's lengthy discursion (Br. 21-33) on whether that "functional analysis" is satisfied here thus asks and an-

swers the wrong question. *Kirby* did not hold that courts should examine the government's "commitment to prosecute" in a particular case to determine whether adversary judicial proceedings had begun. Rather, it held that the right to counsel attaches upon the "initiation of judicial criminal proceedings" *because* such proceedings evidence a commitment to prosecute and demonstrate that the government and defendant are now adversaries. 406 U.S. at 689; *see* Pet. Br. 35-38. This Court has consistently adhered to that rule. *McNeil*, 501 U.S. at 180-181 (right to counsel attaches at "first formal proceeding against an accused"); *Jackson*, 475 U.S. at 629 n.3 ("initiation of formal legal proceedings"); *Brewer*, 430 U.S. at 398 ("judicial proceedings").

Far from being a "mere formalism," *Kirby*, 406 U.S. at 689, this rule makes sense: when a person is brought before a judicial officer who formally apprises him of the government's accusation and restricts his liberty to ensure he answers that accusation, that person is an "accused," with the State as his adversary. It makes no difference to the defendant whether a prosecutor is involved; once judicial proceedings have commenced, the accused faces "the prosecutorial forces of organized society" and must negotiate the "intricacies of substantive and procedural criminal law" to contest the charge against him. *Id.* At that point, a "criminal prosecution[]" has begun, and the Sixth Amendment right to counsel attaches.

II. ROTHGERY'S MAGISTRATION MARKED THE COMMENCEMENT OF ADVERSARY JUDICIAL PROCEEDINGS

A. *Brewer* And *Jackson* Control This Case

In *Brewer* and *Jackson*, this Court applied *Kirby*'s test to circumstances substantively identical to those here, holding that a defendant's initial appearance before a magistrate, who informed him of the accusation against him and committed him to custody, marked the commencement of adversary judicial proceedings. *Brewer*, 430 U.S. at 399; *Jackson*, 475 U.S. at 629. Those holdings control here. Respondent's only answer is to disparage *Brewer* and *Jackson* as lacking "careful consideration" (Br. 32 n.13), and to distinguish them based on purported facts that appear neither in the decisions nor in the record, but are simply respondent's invention. Ultimately, respondent's argument reduces to a thinly-veiled plea to overrule those decisions.

Respondent first contends (Br. 33) that *Brewer*'s discussion of the attachment issue is dicta. That is incorrect. Although the issue was undisputed, the Court expressly addressed it, concluding that "[t]here can be no doubt … that judicial proceedings [were] initiated" when Williams was arrested, "arraigned on [the arrest] warrant" before a magistrate, and "committed by the court to confinement." 430 U.S. at 399. That conclusion was necessary to the Court's holding that Williams' right to counsel was violated by his post-arraignment interrogation: had adversary judicial proceedings not commenced, there would have been no violation. *Id.* at 398-399.

Nor is it true that *Brewer* and *Jackson* "neither provide[d] nor appl[ied] an analytical framework for determining attachment," in "stark[] contrast[]" to "*Kirby*'s careful consideration" (Resp. Br. 32 n.13). In

his opinion for the Court in *Brewer*, Justice Stewart—who also authored *Kirby*—expressly applied *Kirby*'s analytical framework, holding that "[t]here [could] be no doubt" that it was satisfied on *Brewer*'s facts. 430 U.S. at 398-399. In *Jackson*, this Court similarly applied the *Kirby* test and found it easily met. 475 U.S. at 629 & n.3.

Respondent next contends that because *Brewer* stated that Williams was "arraigned," the proceeding must have differed from Rothgery's magistration. While acknowledging that nothing in the decision or record suggests that an indictment or information was filed before the arraignment *Brewer* describes, and that Williams was actually indicted several weeks *after* that arraignment, *State* v. *Williams*, 182 N.W.2d 396, 398-399 (Iowa 1970), respondent speculates (Br. 34-35) that "[b]ecause Williams was 'arraigned,' the Court would likely have … assumed" that the proceeding entailed entry of a plea to an information.

That argument is mere sleight-of-hand with nomenclature. As we previously explained (Pet. Br. 20-21 & n.7), the term "arraignment" has two meanings. It can mean a defendant's appearance to enter a plea to an indictment or information. Or it can mean a defendant's initial appearance before a magistrate, at which he is informed of the charges against him—in which case it may be called an "arraignment on the warrant," an "arraignment on the complaint," or a "preliminary arraignment" (or, in Texas, "magistration" or an "Article 15.17 hearing"). LaFave, 1 *Criminal Procedure* §1.3(k) (2d ed. 1999).[1] *Brewer* noted that Williams was

[1] In both Iowa and Texas—as in other jurisdictions—"arraignment" can carry either meaning. *State* v. *Tharp*, 138

"arraigned on [a] warrant," 430 U.S. at 399, indicating that the proceeding was a preliminary arraignment before a magistrate. *Brewer* has consistently been so understood. *See, e.g.*, Grano, *Rhode Island v. Innis*, 17 Am. Crim. L. Rev. 1, 30 (1979) ("[I]n [*Brewer*], Justice Stewart had no difficulty finding that adversary judicial proceedings had commenced with the preliminary arraignment."); Pet. Br. 24-26 & n.10.

Respondent's speculation that Williams entered a plea to an information at his "arraign[ment] on [the] warrant" is thus baseless. The record makes clear that Williams' "arraignment" took place in municipal court, *see* Appendix, *Brewer* v. *Williams*, No. 74-1263, at 106, and only later, following indictment, did he plead not guilty and stand trial in the district court, *Williams*, 182 N.W.2d at 398. A felony information could have been filed only in district court—not municipal court—and Iowa procedure did not provide for a plea until that stage. *State* v. *Jacobs*, 100 N.W.2d 601, 602-603 (Iowa 1960); Iowa Code §§769.2, 769.13, 775.1, 775.8 (1966) (repealed 1976). In short, all the evidence is that Williams' "arraign[ment] on [the] warrant" was substantively identical to Rothgery's magistration.

Respondent's efforts to distinguish *Jackson* likewise fail. Citing Michigan's brief in *Bladel* (the case consolidated with *Jackson*), respondent argues (Br. 37) that "the court entered a plea of not guilty on behalf of the defendant," while no plea was entered at Rothgery's appearance. But that contention is misleading: as Michigan's brief emphasized, the arraigning court—

N.W.2d 78, 79-80 (Iowa 1965); *Upton* v. *State*, 853 S.W.2d 548, 554-555 (Tex. Crim. App. 1993).

like the magistrate here—"ha[d] no jurisdiction to accept a plea of guilty to a felony charge" or "render a final decision in a felony case." Pet. Br., No. 84-1539, 1985 WL 669876, at *25.[2] The proceeding there, as here, was an initial arraignment before a magistrate who informs the defendant of the charge and his rights and sets bond—not an arraignment on an indictment or information, which could occur only in the general trial court with jurisdiction to enter final judgment in a felony case. *Id.* The State therefore argued that the initial arraignment could not initiate adversary judicial proceedings—precisely the same argument respondent makes here. This Court considered and rejected that argument as "untenable," holding that the initial arraignment "signal[ed] … the attachment of the Sixth Amendment." *Jackson*, 475 U.S. at 629 & n.3. That holding governs here.

B. Rothgery Was Charged At His Magistration, Which Commenced A Criminal Prosecution Under The Sixth Amendment

Just as in *Brewer* and *Jackson*, Rothgery was informed at his magistration that he was accused of a felony and committed to custody (pending posting of bond) to ensure he answered that accusation. Respondent nevertheless argues that Rothgery's Sixth Amendment rights had not attached because, under

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[2] Respondent also notes (Br. 36) that the *Jackson* defendants could have made a statement, but Rothgery could also have done so. Tex. Code Crim. Proc. art. 15.17 (magistrate must inform accused that "he is not required to make a statement and that any statement made by him may be used against him"). The magistrate in *Bladel* similarly advised the defendant to "stand mute." Pet. Br., No. 84-1539, at *4.

Texas law, there can be no felony "charge" or "prosecution" until a prosecutor files an indictment or information. That contention is meritless. *First*, whether a "criminal prosecution[]" exists under the Sixth Amendment is a question of federal law, answered by examining the substance of the proceedings against the defendant, not the label state law attaches to them. *Second*, even if Texas law did control, it would not support respondent's conclusion.

1. The question whether a "criminal prosecution[]" has begun, and a suspect has become an "accused," under the Sixth Amendment is one of federal law. *See Moran*, 475 U.S. at 429 n.3 ("[T]he type of circumstances that would give rise to the right [to counsel] would certainly have a federal definition."). Although, in answering that question, courts must examine state procedures and their consequences for the defendant, the labels state law gives those procedures cannot control. "[W]hat is most important is what the state does and the operative effects of its action and not what the state says about when a prosecution begins." *United States ex rel. Burton* v. *Cuyler*, 439 F. Supp. 1173, 1180 n.10 (E.D. Pa. 1977) (Becker, J.).[3]

The Court has employed this approach in a variety of analogous circumstances. For example, in determin-

[3] *Moore* is not to the contrary. There, although the Court noted that a prosecution "commenced under Illinois law when the victim's complaint was filed in court," that did not end the analysis; the Court went on to examine the objective nature and consequences of the subsequent judicial proceedings against the defendant before concluding that adversary judicial proceedings had begun. 434 U.S. at 228. It did not rely on Illinois law for that ultimate Sixth Amendment conclusion.

ing when the Sixth Amendment's jury-trial guarantee applies, the "dispositive question … 'is one not of form, but of effect.' If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt." *Ring* v. *Arizona*, 536 U.S. 584, 602 (2002). The jury-trial right thus does not turn on whether state law calls the relevant facts "elements of the offense, sentencing factors, or Mary Jane." *Id.* at 610 (Scalia, J., concurring). Similarly, in the double-jeopardy context, a State's characterization of a judge's not-guilty finding "as a legal rather than factual determination is … 'not binding.'" *Smith* v. *Massachusetts*, 543 U.S. 462, 468-469 (2005). Rather, what matters is what the judge actually did—*i.e.*, whether the judge "evaluated the … evidence and determined that it was legally insufficient to sustain a conviction." *Id.* at 469.

Applying that approach here, Rothgery's appearance before the magistrate rendered him an "accused," and commenced a "criminal prosecution[]." At that appearance, the magistrate was presented with a sworn affidavit by the arresting officer "charg[ing]" Rothgery, "in the name and by the authority of the State of Texas," with a felony. Pet. App. 33a. As required by statute, the magistrate informed Rothgery that he was "accused of the criminal offense of unlawful possession of a firearm." *Id.* 35a. And the magistrate required Rothgery to post bail to ensure he answered that accusation. *Id.*; Tex. Code Crim. Proc. ("TCCP") 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[.]"). Rothgery's bail bond—which was required by statute to indicate whether he was "charged" with a felony or misdemeanor, *id.* art.

17.08(3)—stated that he "stands charged by complaint duly filed in the Justice of Peace Court" with a felony. Pet. App. 39a. Moreover, upon his magistration, Rothgery—as the "accused in [a] felony case"—acquired the right to an examining trial, in which the magistrate must "examine into the truth of the accusation made" and discharge the defendant absent probable cause for the accusation. TCCP arts. 16.01, 16.17.[4]

Respondent's notion (Br. 11) that "[t]here was no case" and "no charge" against Rothgery following his magistration blinks reality. Had there been no case and no charge, there would have been no reason to inform him that he was accused of a felony, to require him to post bail to ensure he would "answer … the accusation," or to grant him the right to contest the accusation through an examining trial. Just as in *Brewer* and *Jackson*, and for the same reasons, Rothgery's magistration marked the commencement of adversary judicial proceedings and of a criminal prosecution. Indeed, "it would defy common sense to say that a criminal prosecution has not commenced against a defendant who, perhaps incarcerated and unable to afford judicially imposed bail, awaits preliminary examination on the authority of a charging document filed by the prosecutor, less typically by the police, and approved by a court of law." Grano, *supra*, at 31; *see Armstrong* v. *Squadrito*, 152 F.3d 564, 572 (7th Cir. 1998) (across jurisdictions, "the first appearance" before a magis-

[4] The Code further demonstrates that a prosecution exists once a defendant is magistrated and committed to jail or bail by providing that an information or indictment must be filed within a set period or "the prosecution" shall be "dismissed" absent good cause. TCCP art. 32.01; *see id.* art. 15.14.

trate, who informs "the defendant [of] the charges" against him, "marks the formal beginning of [a] criminal prosecution"). Respondent's view that nothing of significance was happening to Rothgery at this point and "there was no defense to prepare" (Br. 3) would come as quite a surprise to any ordinary citizen in Rothgery's shoes, and simply evidences respondent's refusal to engage with "realities, not nomenclature." *Senior* v. *Braden*, 295 U.S. 422, 429 (1935).[5]

2. Against this common-sense conclusion, respondent's primary argument (Br. 19-21) is that Texas law requires felony prosecutions to proceed by indictment or information. Even if Texas law controlled the analysis of the federal constitutional question, however, it would not aid respondent.

Felony prosecutions in Texas, as is common throughout the country, typically have two phases. A preliminary charging document (generally called a "complaint") is filed with a magistrate, who has jurisdiction over the charges, and any examining trial held to contest them, until an indictment or information is filed, when jurisdiction transfers to the district court. *Ex parte Clear*, 573 S.W.2d 224, 229 (Tex. Crim. App. 1978).[6] As respondent's own authority indicates, "the

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[5] Similarly, respondent repeatedly emphasizes (Br. 5, 26) that the magistration took place at a "little glass window." The magistration, however, was a statutorily prescribed proceeding that formally apprised Rothgery of the accusation against him. Its constitutional significance cannot turn on the trappings of the room where it was held.

[6] This explains why Rothgery's warning form stated: "You are accused of the criminal offense of: unlawful possession of a firearm … which will be filed in … District Court." Pet. App. 35a.

process of prosecution" thus can begin prior to indictment, with proceedings before a magistrate. *State* v. *Boseman*, 830 S.W.2d 588, 591 (Tex. Crim. App. 1992).[7]

The Texas Court of Criminal Appeals has recognized that felony prosecutions can commence for Sixth Amendment purposes upon pre-indictment proceedings before a magistrate, including an Article 15.17 appearance or the filing of a complaint. *Clark* v. *State*, 627 S.W.2d 693, 697 (1981); *Barnhill* v. *State*, 657 S.W.2d 131, 132 (1983); *Nehman* v. *State*, 721 S.W.2d 319, 321-323 (1986); *Fuller* v. *State*, 829 S.W.2d 191, 205 (1992); *Upton* v. *State*, 853 S.W.2d 548, 555 (1993). In *Green* v. *State*, 872 S.W.2d 717 (1994), the Court of Criminal Appeals declined to decide whether the Article 15.17 appearance in that case initiated adversary judicial proceedings, but noted that *Barnhill* and *Nehman* were "consistent with, if not dictated by, precedent from the United States Supreme Court." *Id.* at 720. Since *Green*, Texas intermediate appellate courts have continued to find that adversary judicial proceedings can commence before indictment, with a complaint or Article 15.17 appearance before a magistrate. *Terrell* v.

At magistration, the charge against Rothgery was pending before the magistrate; upon indictment, jurisdiction transferred to the district court.

[7] Like Texas, many States require indictment or information for a felony conviction. This Court has nevertheless found adversary judicial proceedings to commence before indictment or information in cases from such States. *Compare* Ala. Const. art. I, §8, *with Coleman*, 399 U.S. at 8-9; Iowa Code §769.1 (1966) (repealed 1976) *with Brewer*, 430 U.S. at 399; Ill. Comp. Stat. 38/111-2(a) (1967) *with Moore*, 434 U.S. at 228; Mich. Ct. R. 6.112(B) *with Jackson*, 475 U.S. at 629; Wis. Stat. §967.05 *with McNeil*, 501 U.S. at 173, 175.

State, 891 S.W.2d 307, 312 (Tex. App. 1994); *Neumuller* v. *State*, 953 S.W.2d 502, 512-514 (Tex. App. 1997); *Lemmons* v. *State*, 75 S.W.3d 513, 520 (Tex. App. 2002); *Arabzadegan* v. *State*, 240 S.W.3d 44, 48 (Tex App. 2007).[8] The leading treatise on Texas criminal procedure similarly recognizes that, under *Jackson*, "a defendant has a Sixth Amendment right to counsel … after the defendant has been presented before a magistrate for article 15.17 purposes." Dix & Dawson, 41 *Texas Practice* §14.22 (2d ed. 2001).

Respondent also argues (Br. 24) that a prosecution could not have commenced at Rothgery's magistration under Texas law because no prosecutor was involved. But respondent cites no authority for that claim other than the unremarkable proposition that prosecutors represent the State in all criminal cases and retain ultimate discretion over whether to prosecute. That

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[8] Here, the officer's sworn affidavit "charg[ing]" Rothgery with a felony (Pet. App. 33a) served the function of a complaint. TCCP art. 15.04 ("The affidavit made before the magistrate … is called a 'complaint' if it charges the commission of an offense."); *id.* art. 15.05 (complaint "shall be sufficient, without regard to form" if it states accused's name, shows he has committed an offense, states time and place of offense, and is signed by affiant). Although, as the Fifth Circuit observed (Pet. App. 11a n.14), these articles appear in a chapter entitled "Arrest Under Warrant," nothing limits their applicability to affidavits filed to obtain warrants. *Cf.* Tex. Gov't Code §311.024 (chapter headings do "not limit or expand the meaning of a statute"). The Texas Attorney General has recognized that an officer's affidavit following a warrantless arrest can be viewed as the functional equivalent of other "complaints" in felony cases, "all [of which] share a basic characteristic: they set forth the basis of the criminal charges against the accused." Tex. Atty. Gen. Op. LO-98-066, 1998 WL 537341, at *2-3 (Aug. 19, 1988).

proposition, however, is not inconsistent with the common-sense principle that a prosecution has been commenced when a defendant "awaits preliminary examination on the authority of a charging document filed by the prosecutor [or] by the police, and approved by a court of law." Grano, *supra*, at 31. Police in Texas can and do initiate criminal proceedings by filing such preliminary charging documents. *Clark*, 627 S.W.2d at 694, 697; *Felder* v. *McCotter*, 765 F.2d 1245, 1246-1248 (5th Cir. 1985); *supra* note 8. And, as a matter of Texas law, following magistration in a felony case, the defendant has become an "accused" with a statutory right to contest that accusation through an examining trial, whether or not a prosecutor was involved. TCCP art. 16.01.

Whether a defendant's initial court appearance is instigated by a prosecutor or by the police alone, its consequences for the defendant are the same: he has been formally accused of a crime, his liberty may be restrained, and he must negotiate the "intricacies of substantive and procedural criminal law," *Kirby*, 406 U.S. at 689, to defend against the charges. In either event, such a proceeding initiates a "criminal prosecution[]" under the Sixth Amendment.

C. Respondent's Parade Of Horribles Is Baseless

Respondent contends that holding that adversary judicial proceedings commenced upon Rothgery's magistration would implicitly overrule several of this Court's precedents and hamper law enforcement nationwide. That hyperbole has no basis in law or fact.

Rothgery's position does not call into question, still less "directly contradict[]" (Resp. Br. 46), any aspect of *Gerstein* v. *Pugh*, 420 U.S. 103 (1975). Nor, contrary to respondent (Br. 52), would accepting Rothgery's argu-

ment logically require the presence of counsel at bail hearings. Rothgery does not contend here that he was entitled to counsel's presence for the *Gerstein* determination that was combined with his magistration or for any aspect of the magistration itself, including the setting of bail. Nor does Rothgery argue that the deprivation of liberty, without more, necessarily constitutes the initiation of adversary judicial proceedings. Rather, he argues that his magistration initiated adversary judicial proceedings because, following it, he stood accused by the State of a crime—as evidenced in part by the requirement that he post bail to ensure he answered that accusation.

Similarly, Rothgery does not contend that the right to counsel attaches upon arrest (Resp. Br. 52), even if preceded by a judicial probable-cause determination, but upon the "initiation of judicial criminal proceedings," *Kirby*, 406 U.S. at 689. This Court has consistently recognized that the first judicial proceeding marks the attachment of the right to counsel. Whatever significance a mere arrest on a warrant may have—a question not presented here—this Court's cases make clear that "at least from the time defendant is brought into court and arraigned on the warrant (at which point it or the complaint underlying it becomes a tentative charging document) the Sixth Amendment right to counsel applies." 2 LaFave, *supra*, §6.4(e).

Respondent also wrongly claims (Br. 11-12, 46-47, 55) that Rothgery's position would require counsel at lineups and interrogations before a prosecution begins, and would grant suspects a right to pre-charge private investigators—thus contravening *Kirby* and *United States* v. *Gouveia*, 467 U.S. 180 (1984), and reinvigorating "the Sixth Amendment reading" of *Escobedo* v. *Il-*

linois, 378 U.S. 478 (1964). Respondent here merely assumes its own conclusion that adversary judicial proceedings do not commence until indictment. Rothgery argues that his magistration marked the initiation of adversary judicial proceedings, not that his right to counsel attached, or would apply at a lineup or interrogation, before the initiation of such proceedings. And, rather than a private investigator, Rothgery sought an attorney who could demonstrate that the charges against him were invalid.

Nor does Rothgery's position conflict with *Scott* v. *Illinois*, 440 U.S. 367 (1979) (Resp. Br. 46). *Scott* holds that a defendant charged with a misdemeanor is entitled to counsel only if he is sentenced to imprisonment. Rothgery, however, was charged with a felony at his magistration, and *Scott* therefore has no application. *Nichols* v. *United States*, 511 U.S. 738, 743 n.9 (1994). Moreover, the purported problem respondent identifies—that a prosecutor may reduce felony charges to misdemeanor charges, thus implicating *Scott*—exists both before and after indictment, and cannot support a rule that the right to counsel attaches only on indictment.

Finally, reaffirming that an initial appearance commences a prosecution would not work a sea-change in criminal procedure, create "significant" problems for law enforcement, or impose "substantial" costs on local government (Resp. Br. 53-56). At least 45 jurisdictions, including the federal government, currently appoint counsel at or promptly after the initial appearance and experience no apparent difficulty (NACDL Br. 12-16, 1a-7a)—a fact uncontested by respondent or its State amici.

Rather, it is the Fifth Circuit's rule that, by requiring a burdensome, intrusive, and often "elusive" (Pet. App. 6a) inquiry into the extent of prosecutorial involvement in a particular case, would present insurmountable practical problems. Respondent fails to dispute the many disadvantages of that approach catalogued in the opening brief. This Court should reject it and reaffirm that a "criminal prosecution[]" begins at the first judicial proceeding against an accused.

III. The Critical-Stage Doctrine Provides No Basis For Affirmance

A. Respondent's Critical-Stage Argument Is Not Properly Before The Court

Unable to prevail on the question presented, respondent resorts to an alternative argument—that even had adversary judicial proceedings commenced, Rothgery was not entitled to counsel because no "critical stage" occurred between his magistration and indictment. This argument was not raised or considered below, is outside the question presented, and is not properly before this Court.

The Fifth Circuit expressly noted that respondent made no critical-stage argument, and the court therefore refused to address the issue. Pet. App. 5a n.5 ("Gillespie County does not argue that the time between Rothgery's release on bond and his indictment … did not constitute a critical stage of the prosecution, and we do not decide that issue here."). Absent exceptional circumstances, this Court does not decide questions not raised or resolved below. *Travelers Cas. & Sur. Co.* v. *PG&E*, 127 S. Ct. 1199, 1207 (2007); *Glover* v. *United States*, 531 U.S. 198, 205 (2001). Respondent

articulates no justification for departing from that consistent practice here.

Moreover, respondent's critical-stage argument is outside the question presented: whether adversary judicial proceedings—and thus a "criminal prosecution[]"—commenced upon Rothgery's magistration. As discussed above, *see supra* Part I, that question is distinct from, and logically antecedent to, the question whether any "critical stages" of the prosecution occurred thereafter. *Jackson*, 475 U.S. at 629 n.3.

Respondent contends (Br. 37 n.15) that its critical-stage argument is fairly included within the question presented because this Court has "uniformly" addressed right-to-counsel questions "by deciding whether it was necessary to appoint counsel in the context of specific proceedings and events, not by deciding abstract questions about attachment." That contention is refuted by this Court's decisions rejecting right-to-counsel claims where the threshold requirement of attachment—*i.e.*, initiation of adversary judicial proceedings—was not met, even though the "specific proceedings and events" at issue would have required counsel's presence had the right attached. *See Moran*, 475 U.S. at 431-432; *Kirby*, 406 U.S. at 689-690.

Because there is no need to address respondent's critical-stage argument to resolve the question presented, it is not fairly included in that question. *See Yee* v. *City of Escondido*, 503 U.S. 519, 535-538 (1992) (alternative argument "related to" question presented was not fairly included therein because question presented could be resolved without reaching that argument). Accordingly, this Court should not consider it. S. Ct. R. 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by

the Court."); *Travelers*, 127 S. Ct. at 1207; *Yee*, 503 U.S. at 535.[9]

B. Respondent's Critical-Stage Argument Also Fails On The Merits

Were respondent's critical-stage argument properly before the Court, it would still provide no basis for affirmance.

As an initial matter, this Court has never held that once a prosecution commences and the "explicit guarantees of the Sixth Amendment" take effect, *Kirby*, 406 U.S. at 690, the right to counsel lies "dormant"—even while a defendant may spend months in jail or on bail due to pending criminal charges—until "activated" by an imminent "critical stage." Resp. Br. 11, 38-44. Indeed, the Court has repeatedly observed that "a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him" to assist in navigating the proceedings and preparing a defense. *Brewer*, 430 U.S. at 398; *Estelle* v. *Smith*, 451 U.S. 454, 469 (1981); *Maine* v. *Moulton*, 474 U.S. 159, 170 (1985); *see also Evitts* v. *Lucey*, 469 U.S. 387, 394 n.6 (1995) (noting that a defendant needs counsel not only "to meet the adversary presentation of the prosecutor," but to negotiate "a legal system governed

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[9] Nor did respondent argue in opposing certiorari that this Court should not reach the question presented because the judgment could be affirmed on this alternative ground. Respondent commented in passing in its statement of the case that while "Petitioner was out on bond, he did not experience any critical pretrial proceedings" (Opp. 4), but never cited that point as a reason for denying certiorari. For this reason, too, the Court should not consider this argument. S. Ct. R. 15.2; *Alabama* v. *Shelton*, 535 U.S. 654, 660 n.3 (2002).

by complex rules and procedures"); *Michigan* v. *Harvey*, 494 U.S. 344, 348 (1990) ("the essence" of the right to counsel "is the opportunity … to consult with an attorney and have him investigate the case and prepare a defense for trial"); *Powell*, 287 U.S. at 57.

Even if indigent defendants are entitled to counsel's aid only to negotiate critical stages, however, Rothgery was entitled to counsel well before indictment. Following his magistration, Rothgery stood accused of a crime he had not committed. He repeatedly requested a lawyer because he knew he was innocent, but did not know how to prove it. Texas law provides a mechanism by which defendants in that situation can contest erroneous charges before indictment: as "the accused in [a] felony case," Rothgery was entitled to an examining trial to challenge the probable cause for the accusation. TCCP art. 16.01. If, after an evidentiary hearing, the magistrate finds no probable cause, the defendant is discharged. *Id.* art. 16.17. As this Court's precedent dictates, *see Coleman*, 399 U.S. at 9-10, and respondent concedes (Br. 27 n.9, 29 n.10), the examining trial is a critical stage at which Rothgery would have been entitled to counsel's assistance.

Rothgery's right to an examining trial, however, existed only before indictment, and only if Rothgery requested it. TCCP art. 16.01. Rothgery accordingly needed a lawyer prior to indictment to help him understand his right to an examining trial, assess its possible benefits and costs, and navigate the procedure for invoking it. As this Court has made clear, a defendant is entitled to consult with counsel prior to critical-stage proceedings, not only to prepare for such proceedings, but also to decide whether to undergo them. In *Estelle*, for example, the Court found a Sixth Amendment viola-

tion where a capital defendant underwent a pretrial psychiatric examination—a critical stage of the proceedings—without first having the opportunity to consult with counsel regarding "the significant decision of whether to submit to the examination." 451 U.S. at 471. "[A] defendant should not be forced to resolve such an important issue without 'the guiding hand of counsel.'" *Id.*

Here, the magistrate informed Rothgery that "[i]n felony cases, you have a right to an examining trial." Pet. App. 35a. But, without counsel, Rothgery could not have been expected to understand that right or make an informed decision whether to invoke it. As this Court has repeatedly recognized, the right to counsel is so vital because it "affects [a defendant's] ability to assert any other rights he may have." *United States* v. *Cronic*, 466 U.S. 648, 653 (1984). "[I]t is through counsel that all other rights of the accused are protected." *Penson* v. *Ohio*, 488 U.S. 75, 84 (1988). "Because a layman may not be aware of the precise scope, the nuances, and the boundaries" of his rights, the assertion of those rights "often depends upon legal advice from someone who is trained and skilled in the subject matter." *Estelle*, 451 U.S. at 471. Even under respondent's critical-stage theory, then, Rothgery was entitled to counsel well before indictment.

Respondent's contrary claim is rooted in the erroneous view that a defendant's right to counsel exists solely to protect his right to a "fair trial," defined narrowly as the "'right meaningfully to cross-examine the witnesses against him [or] to have effective assistance of counsel at the trial itself.'" Br. 41-42 (quoting *Wade*, 388 U.S. at 227). But while "the purpose of the [right to counsel] is to ensure a fair trial[,] … it does not follow

that the right[] can be disregarded so long as the trial is, on the whole, fair." *United States* v. *Gonzalez-Lopez*, 126 S. Ct. 2557, 2562 (2006). As in *Gonzalez-Lopez*, by arguing that because Rothgery was not deprived of a fair trial, his right to counsel could not have been violated, respondent "abstracts from the right to its purposes, and then eliminates the right." *Id.*

Respondent is wrong to suggest that the right to counsel has no role in helping an accused prove his innocence, prior to trial, of false charges against him. To the contrary, the Court has recognized that counsel is "essential to protect the indigent accused against an erroneous or improper prosecution." *Coleman*, 399 U.S. at 9. Thus, even though the preliminary hearing in *Coleman* did not require the defendant to advance any defenses, and, if the defendant lacked counsel, nothing occurring at the hearing could be used against him at trial, the Court held that the preliminary hearing was a "critical stage," threatening "potential substantial prejudice" to the defendant's rights, in part because the assistance of counsel at that hearing could "expose fatal weaknesses in the State's case that [might] lead the magistrate to refuse to bind the accused over." *Id.* Here, just as in *Coleman*, counsel's assistance could have "expose[d] fatal weaknesses" in the case against Rothgery that would have terminated the prosecution prior to indictment and trial. Requiring appointment of counsel in these circumstances is thus fully consistent with, and indeed central to, the purposes of the Sixth Amendment.

Nor, contrary to respondent's contentions (Br. 47-51), does recognizing that right confuse the protections afforded by the Counsel Clause with those granted by the Fourth Amendment and Speedy Trial Clause. To

be sure, permitting defendants access to counsel to contest charges against them prior to trial may result in freeing innocent persons from pretrial detention. But it does not follow that, because the Fourth Amendment and Speedy Trial Clause impose wholly different limitations on the scope and duration of pretrial detention, the right to counsel plays no role in protecting a defendant's liberty by assisting him in contesting false charges. Nothing in *Gerstein* or *Gouveia* is to the contrary. Indeed, *Gerstein* expressly distinguished the situation here, in which counsel's assistance "could mean that [a defendant] would not be tried at all," from a *Gerstein* hearing in which "only … pretrial custody" is at issue. 420 U.S. at 123. Similarly, while *Gouveia* stated that the right to counsel is not triggered by arrest alone, 467 U.S. at 190, it does not follow that the right is irrelevant to "protecting the liberty interests of the accused" (Resp. Br. 49). On the contrary, that is the fundamental purpose of the right to counsel, accomplished by providing the accused in a criminal prosecution with counsel's assistance in contesting the accusation against him.

Ultimately, respondent's constricted vision of the right to counsel cannot be reconciled either with the Sixth Amendment's text—under which the right "is triggered when and because a person is 'accused' of 'criminal' wrongdoing"—or with its ultimate purpose: to act as an "engine[] by which an innocent man can make the truth of his innocence visible." Amar, *Sixth Amendment First Principles*, 84 Geo. L.J. 641, 643, 705 (1996). The right to counsel serves not only to protect a defendant at trial itself, but to assist him in determining whether the charges against him are "good or bad," and to protect him from being "put on trial without a proper charge." *Powell*, 287 U.S. at 69. As this case

demonstrates, once a person is erroneously accused of a crime, even "though he [is] not guilty," and "his defense [is] a perfect one," he "requires"—and is entitled to—"the guiding hand of counsel" "to establish his innocence." *Id.*

CONCLUSION

The judgment of the Fifth Circuit should be reversed.

Respectfully submitted.

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