No. 07-440

In The
# Supreme Court of the United States

WALTER ALLEN ROTHGERY,

*Petitioner,*

v.

GILLESPIE COUNTY, TEXAS,

*Respondent.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## BRIEF OF AMICUS CURIAE TEXAS ASSOCIATION OF COUNTIES AND TEXAS DISTRICT AND COUNTY ATTORNEYS ASSOCIATION IN SUPPORT OF RESPONDENT

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## QUESTION PRESENTED

Whether the Petitioner's Sixth Amendment right to counsel attached when he was brought before a magistrate, as is required by statute for all arrested persons in Texas.

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## INTEREST OF AMICUS CURIAE[1]

This amicus brief is filed on the behalf of the Texas Association of Counties (TAC), which has been formed to represent county interests in the legislative process in Texas and to inform counties of issues that affect them. The mission of the TAC is to provide services to Texas counties and assistance to all county officials. This amicus brief is also filed on the behalf of the Texas District and County Attorneys Association (TDCAA), which is a non-profit organization dedicated to serving Texas prosecutors and attorneys in government representation. The TDCAA serves the people who work in the district and county attorneys offices across Texas.

## INTRODUCTION

In this case, the Petitioner has complained that county jail officials may not have honored requests that he be appointed an attorney, and he has claimed that he should not have been charged with a particular offense. The Petitioner should not be permitted to transform these claims into a violation of his Sixth

[1] Pursuant to this Court's Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus curiae* made a monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.3, *amicus curiae* states that the Petitioner and the Respondent have consented to the filing of this brief.

Amendment right to counsel. Such a transformation is not at all consistent with this Court's Sixth Amendment jurisprudence. The Petitioner has advocated a position that represents an unnecessary and inappropriate broadening of the Sixth Amendment right to counsel, as well as a fundamental misunderstanding of Texas law.

An arrested person's appearance before a magistrate under Article 14.06 and/or Article 15.17 of the Texas Code of Criminal Procedure does not constitute the initiation of adversarial judicial proceedings for the purposes of a criminal defendant's Sixth Amendment right to counsel. Furthermore, in Texas, there are statutory remedies that allow for the appointment of an attorney to an indigent defendant shortly after he has been arrested. There is no need to expand the Sixth Amendment right to counsel far beyond the long-standing parameters set by this Court.



## ARGUMENT

### The Sixth Amendment Right to Counsel Is Triggered by the Commencement of a Prosecution

In this case, this Court is once again squarely confronted with the fundamental basis for a criminal defendant's Sixth Amendment right to counsel.

> The Sixth Amendment's intended function . . . is to assure that in any "criminal prosecutio[n]," the accused shall not be left to his

> own devices in facing the "prosecutorial forces of organized society." By its very terms, it becomes applicable only when the government's role shifts from investigation to accusation. For it is only then that the assistance of one versed in the "intricacies . . . of law," is needed to assure that the prosecution's case encounters "the crucible of meaningful adversarial testing."

*Moran v. Burbine*, 475 U.S. 412, 430 (1986) (quoting *Maine v. Moulton*, 474 U.S. 159, 170 (1985); *United States v. Cronic*, 466 U.S. 648, 656 (1984); *Kirby v. Illinois*, 406 U.S. 682, 689 (1972)). "[U]ntil such time as the 'government has committed itself to prosecute, and . . . the adverse positions of government and defendant have solidified' the Sixth Amendment right to counsel does not attach." *Moran*, 475 U.S. at 431 (quoting *United States v. Gouveia*, 467 U.S. 180, 189 (1984); *Kirby v. Illinois*, 406 U.S. 682, 689 (1972)). Thus, for a defendant to have a Sixth Amendment right to counsel, there must be a "prosecution." The government must be "committed" to "prosecute" the defendant. And there must be a "solidified" adversarial relationship between the citizen accused and the prosecution. Nothing akin to a criminal prosecution took place or was even initiated at or near the time that the Petitioner was brought before a magistrate. The Petitioner's initial appearance before a magistrate was not adversarial, was not accompanied by the advocacy of a prosecutor, and was not accompanied by the filing of any formal charges. The Petitioner was merely informed of the reason that he had

been arrested, and he was informed of his rights at that time.

In order to bring his appearance before a magistrate into the Sixth Amendment context, the Petitioner has relied quite heavily upon a comparison with the "arraignments" that confronted this Court in *Brewer v. Williams*, 430 U.S. 387 (1977), and *Michigan v. Jackson,* 475 U.S. 625 (1986). But in neither of those cases was this Court primarily confronted with the question of the attachment of the Sixth Amendment right to counsel. Rather, in those cases, this Court was primarily confronted with the existence or validity of waivers of the defendants' Sixth Amendment right to counsel. Nevertheless, even when a comparison is drawn to those two cases, it is readily apparent that the Petitioner here was not "arraigned" before a "judge" in a courtroom. *Cf. Brewer*, 430 U.S. at 399. Nor had been "formally charged." *Cf. Jackson*, 475 U.S. at 626.

This Court's decisions have consistently required a criminal prosecution before the Sixth Amendment right to counsel attaches, and there was no criminal prosecution at or even immediately after the Petitioner's initial appearance before a magistrate. In *United States v. Gouveia,* this Court was primarily confronted with the question of the attachment of the Sixth Amendment right to counsel, and – as it would in *Moran v. Burbine* – this Court presented an interpretation of the Sixth Amendment right to counsel that was

> consistent not only with the literal language of the Amendment, which requires the existence of both a "criminal prosecutio[n]" and an "accused," but also with the purposes which we have recognized that the right to counsel serves. We have recognized that the "core purpose" of the counsel guarantee is to assure aid at trial, "when the accused [is] confronted with both the intricacies of the law and the advocacy of the public prosecutor."

*United States v. Gouveia*, 467 U.S. 180, 188-89 (1984) (quoting *United States v. Ash,* 413 U.S. 300, 309 (1973) (footnote omitted)). Thus, this Court has repeatedly reaffirmed that, before it can be said that a criminal defendant's Sixth Amendment right to counsel has attached, there must be a criminal prosecution. And there must be the involvement of the public prosecutor, who is committed to prosecute. Contrary to the Petitioner's repeated claims that the involvement or even existence of a prosecutor is unnecessary to the Sixth Amendment right to counsel, "the right to counsel exists to protect the accused during trial-type confrontations with the prosecutor . . . " *Gouveia*, 467 U.S. at 190 (emphasis added). *See also Anderson v. Alameida,* 397 F.3d 1175, 1180 (9th Cir.), *cert. denied,* 546 U.S. 846 (2005) (necessity of involvement of prosecutor before attachment of Sixth Amendment right to counsel can occur).

In *Gouveia*, this Court acknowledged concerns, similar to concerns articulated by the Petitioner in the instant case,

> that the Government may delay the initiation of formal charges, thus delaying the appointment of counsel, while it develops its case against the isolated and unaided inmate. By the time the Government decides to bring charges . . . witnesses' memories could have dimmed, alibi witnesses could have been transferred to other facilities, and physical evidence could have deteriorated.

*Gouveia*, 467 U.S. at 191. Those concerns do not trigger a defendant's Sixth Amendment right to counsel, however. "Those concerns, while certainly legitimate ones, are simply not concerns implicating the right to counsel, and. . . . the mere 'possibility of prejudice [to a defendant resulting from the passage of time] . . . is not itself sufficient reason to wrench the Sixth Amendment from its proper context.'" *Gouveia*, 467 U.S. at 191 (quoting *United States v. Marion,* 404 U.S. 307, 321-22 (1971)). Likewise, the concerns that the Petitioner has raised in this case may be serious. But the Petitioner's concerns do not implicate the Sixth Amendment right to counsel, and they certainly do not necessitate a broadening of a criminal defendant's Sixth Amendment right to counsel by the advancement of a new "bright line" rule.

This Court has repeatedly held that the Sixth Amendment right to counsel attaches only at the initiation of adversary criminal proceedings. Prior to the time that those proceedings are initiated, a suspect in a criminal investigation has no *constitutional*

right to the assistance of counsel. *Davis v. United States*, 512 U.S. 452, 456-57 (1994) (citing *United States v. Gouveia*, 467 U.S. 180, 188 (1984)). A defendant may be able to articulate a desire for an attorney prior to the time that those proceedings are initiated, but that defendant does not articulate a right to counsel that is recognized by the Sixth Amendment.

In this case, the Petitioner has argued that, if an attorney had been appointed for him after the time that he had been brought before a magistrate, "the mistake underlying his arrest would have been discovered at that time, and he would not have been subject to bond for a lengthy period and wrongfully rearrested and jailed for nearly three weeks." Pet'r Br. at 8. Whether or not these assertions are accurate, the Petitioner has not articulated a need for an attorney that justifies the broadening of a criminal defendant's Sixth Amendment right to counsel.

**Appearance Before a Magistrate in Texas**

The Petitioner's characterization of his appearance before a magistrate as the initiation of adversarial judicial proceedings also represents a flawed interpretation of Texas law. In Texas, after an "offender" is arrested without a warrant, as the Petitioner was in this case, the offender must be taken before a magistrate within 48 hours of the arrest at the very latest. The offender is then treated like all offenders who are arrested and then brought before a

magistrate, as set forth in Article 15.17 of the Texas Code of Criminal Procedure. *See* TEX. CODE CRIM. PROC. ANN. art. 14.06(a) (Vernon Supp. 2007). Chapter 15 of the Code of Criminal Procedure applies to those situations in which an offender has been arrested with a warrant, and Chapter 14 of the Code applies to those situations in which an offender has been arrested without a warrant. But all are treated the same, and all are provided with a statutory right to an attorney shortly after having been arrested.

Article 15.17(a) requires that the offender or arrested person be brought before "some" magistrate of the county where the person was arrested. If it is more "expeditious," the arrested person can be brought "before a magistrate in any other county of this state." *See* TEX. CODE CRIM. PROC. ANN. art. 15.17(a) (Vernon Supp. 2007). The ability of a law enforcement officer to take an arrested person before the nearest magistrate does not suggest that the officer is preparing to initiate a criminal "prosecution" against the suspect. There is no suggestion that, by the law enforcement officer's action, a prosecutor – or even the State of Texas in general – will become "committed to prosecute" the suspect. There is no suggestion that the law enforcement officer is confronting the suspect with the advocacy of the "public prosecutor."

It cannot truly be that the act of taking an arrested person before a magistrate, as required by Article 15.17 of the Texas Code of Criminal Procedure, constitutes the initiation of adversarial judicial

proceedings because the arrested person is to be taken before the magistrate in the county where he was arrested. *See* TEX. CODE CRIM. PROC. ANN. art. 15.17(a) (Vernon Supp. 2007). If the offense that is ultimately charged against that defendant was in fact committed in another county, adversarial judicial proceedings – for the purposes of the Sixth Amendment right to counsel – would have been initiated where the charged offense did not even occur.

The Fifth Circuit Court of Appeals, interpreting Texas law, has reached the same conclusion in a previous decision. In *McGee v. Estelle*, the defendant contended that his appearance before a magistrate in Texas triggered the adversary process and his Sixth Amendment right to counsel. As it has in this case, the Fifth Circuit Court of Appeals disagreed, instead holding that an appearance before a magistrate for statutory warnings under Texas law – specifically Article 14.06 of the Texas Code of Criminal Procedure – did not involve counsel for the State, and did not constitute a formal charge. Rather, the court of appeals held that the requirement of an appearance before a magistrate under Article 14.06 (as well as Article 15.17) was imposed in order to comply with the requirements set forth in *Miranda v. Arizona*, 384 U.S. 436 (1966). *McGee v. Estelle*, 625 F.2d 1206, 1209 (5th Cir. 1980), *cert. denied*, 449 U.S. 1089 (1981).

In support of this holding, the Fifth Circuit Court of Appeals in *McGee* relied upon the following language from this Court,

> The initiation of judicial criminal proceedings is far from a mere formalism. It is the starting point of our whole system of adversary criminal justice. For it is only then that government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law. It is this point, therefore, that marks the commencement of the 'criminal prosecutions' to which alone the explicit guarantees of the Sixth Amendment are applicable.

*McGee,* 625 F.2d at 1209 (quoting *Kirby v. Illinois*, 406 U.S. 682, 689-90 (1972)). Thus, well before the lower court's holding in this case, it has long been the law in the Fifth Circuit that an arrested person's appearance before a magistrate under Article 14.06 and/or Article 15.17 of the Texas Code of Criminal Procedure does not constitute the initiation of adversarial judicial proceedings for the purposes of a criminal defendant's Sixth Amendment right to counsel.

The Petitioner has insisted on characterizing his appearance before a magistrate as the appearance before a "court" or a "judge." The Petitioner has claimed that his Sixth Amendment right to counsel had attached at the time that he was brought before a magistrate because "a *court* ha[d] confronted the defendant with the accusation against him and

imposed restrictions on his liberty to ensure that he answer[ed] that accusation." Pet'r Br. at 19 (emphasis added). The Petitioner has claimed that he "underwent precisely the type of initial *court* appearance that this Court held in [*Brewer v. Williams,* 430 U.S. 387 (1977)] and [*Michigan v. Jackson,* 475 U.S. 625 (1986)] initiated adversary judicial proceedings and triggered the right to counsel." Pet'r Br. at 3 (emphasis added). The Petitioner has claimed, "A *court* had formally apprised him of that accusation and had imposed restrictions on his liberty to ensure his appearance at subsequent proceedings to answer that accusation." Pet'r Br. at 28 (emphasis added). The Petitioner claimed that he was "confronted by the sovereign authority of the State in the person of a *judge* . . . " Pet'r Br. at 38 (emphasis added).

But, in Texas, when an arrested person is brought before a "magistrate" in order to be informed of his rights under Article 14.06 or Article 15.17 of the Texas Code of Criminal Procedure, the arrested person is not brought before a "court" or "judge," and adversary *judicial* proceedings have not been initiated against that arrested person. Indeed, in Texas, when one appears before a magistrate, he may not be appearing before a judge at all. In addition to judges, a magistrate can be any number of individuals – such as a "hearing officer," a "justice of the peace," or a "mayor" or "recorder" of an incorporated city or town. *See* TEX. CODE CRIM. PROC. ANN. art. 2.09 (Vernon Supp. 2007). This is reflective of the fact that an offender's appearance before a magistrate in Texas is

a preliminary, investigatory event, and not a prosecutorial and judicial proceeding.

In light of the fact that all arrested persons in Texas are to be brought before a magistrate shortly after having been arrested, it would certainly be inappropriate to institute a "bright line" rule giving a Sixth Amendment right to counsel to an arrested person's appearance before a magistrate. In Texas, such a rule would essentially give a Sixth Amendment right to counsel to all who have been arrested – very shortly after they have been arrested. This Court has never held that the Sixth Amendment right to counsel attaches at or near the time of an offender's arrest. *See Gouveia*, 467 U.S. at 190.

**The Right to Counsel Is Protected by Texas Statute**

In the absence of being awarded a Sixth Amendment right to counsel at the time of an appearance before a magistrate, the Petitioner would leave this Court with the impression that a criminal defendant in Texas has no other remedy and no other means by which he can gain access to an attorney. Nothing could be further from the truth. In Texas, in addition to being entitled to representation of counsel during an adversarial judicial proceeding, a defendant is also entitled to consult with an attorney sufficiently in advance of the proceeding in order to allow for adequate preparation for that proceeding. *See* TEX. CODE CRIM. PROC. ANN. art. 1.051(a) (Vernon Supp. 2007).

Indigent defendants are entitled to the appointment of counsel, even if adversarial judicial proceedings have *not* been initiated against the defendant. Counsel must be appointed for an indigent defendant within three days of receiving a request for the appointment of counsel, or within one day in counties with a population of 250,000 or more. *See* TEX. CODE CRIM. PROC. ANN. art. 1.051(i) (Vernon Supp. 2007).

The Petitioner laments the fact that "Gillespie County followed a policy of not appointing counsel for indigent defendants released on bond until after their first court appearance following information or indictment." Pet'r Br. at 7. But Texas law in fact permits a county to not have counsel appointed for indigent defendants who are released on bond, until there is a court appearance or an adversarial judicial proceeding. *See* TEX. CODE CRIM. PROC. ANN. art. 1.051(j) (Vernon Supp. 2007) ("[I]f an indigent defendant is released from custody prior to the appointment of counsel . . . appointment of counsel is not required until the defendant's first court appearance or when adversarial judicial proceedings are initiated, whichever comes first."). But the fact remains that the Petitioner was statutorily entitled to the appointment of counsel within three days after having requested it, pursuant to Article 1.051(i). There is no need for this Court to provide a constitutional remedy to the Petitioner where such a remedy did not previously exist.

Furthermore, in compliance with TEX. CODE CRIM. PROC. ANN. art. 26.04(a) (Vernon Supp. 2007) – which

was enacted as part of the Fair Defense Act in Texas – several counties and their respective courts have adopted rules for the appointment of counsel to indigent defendants. For example, Bexar County Criminal District Court Rules 5.15 and 5.16 require the appointment of counsel for indigent defendants, as soon as they have made such a request after having been arrested and brought before a magistrate. *See also, e.g.,* Rule 6.13 of the Fort Bend County Courts at Law Local Rules; Rule 5.20 of the Local Administrative Rules of the District Courts and County Courts at Law of Lubbock County; Montgomery County Fair Defense Act Local Rules. The Respondent, Gillespie County, has rules of its own that have been adopted in compliance with the statute. There is no need to remove the flexibility of Texas counties – including small, rural counties like Gillespie County – to implement effective procedures for the appointment of counsel for arrested persons.

A criminal defendant may never be charged after having been brought before a magistrate. But the Petitioner's remedy advocated in this case would require each and every defendant to be afforded a Sixth Amendment right to counsel, even though formal charges are never actually initiated against the defendant. The unnecessary cost would not protect the Sixth Amendment right to counsel, as outlined by this Court. But it would impose a hardship upon Texas counties – especially small or rural counties that is not appropriate and is not required by this Court's Sixth Amendment jurisprudence.

Criminal defendants in Texas, particularly indigent criminal defendants, are well-protected with regard to their right to an attorney, even shortly after having been arrested. There is no need for this Court to adopt a "bright line" rule for Texas or the nation that would greatly expand a criminal defendant's Sixth Amendment right to an attorney. This Court should uphold the ruling of the Fifth Circuit Court of Appeals in this case that the Petitioner's Sixth Amendment right to counsel had not attached at the time that he was brought before a magistrate.

## CONCLUSION

For the foregoing reasons, the judgment of the Fifth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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