NO. 06-50267

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

WALTER ALLEN ROTHGERY,
Plaintiff-Appellant,

VS.

GILLESPIE COUNTY, TX,
Defendant-Appellee

On Appeal from the United States District Court
for the Western District of Texas
Austin Division

BRIEF ON THE MERITS OF APPELLANT WALTER ALLEN ROTHGERY

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CERTIFICATE OF INTERESTED PERSONS

WALTER ALLEN ROTHGERY,
Plaintiff-Appellant,

V. NO. 06-50267

GILLESPIE COUNTY, TX,
Respondent-Appellee.

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. Walter Allen Rothgery, plaintiff-appellant.
2. Gillespie County, TX, defendant-appellee.

The names of opposing law firms and/or counsel in the case are as follows: Charles S. Frigerio and Hector X. Saenz, with the Law Offices of Charles S. Frigerio.

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REQUEST FOR ORAL ARGUMENT

Mr. Rothgery respectfully requests oral argument. This case raises important issues of constitutional law concerning the point at which indigent criminal defendants in Texas are entitled to appointment of counsel under the Sixth Amendment. Discussion of the record and applicable precedent would benefit the Court in reaching its decision.

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STATEMENT OF JURISDICTION

This is an appeal from a final judgment in a civil case. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291. The basis for the district court's subject matter jurisdiction over the case below is 28 U.S.C. § 1331, because Mr. Rothgery alleges violations of his rights under the U.S. Constitution. On February 2, 2006, the district court entered a take-nothing final judgment disposing of all claims asserted by Mr. Rothgery. App. 7.[1] On February 9, 2006, Mr. Rothgery timely filed notice of appeal. App. 8.

STATEMENT OF THE CASE

This case is an action under 42 U.S.C. § 1983, alleging that Defendant Gillespie County, Texas violated Mr. Rothgery's right to counsel under the Sixth and Fourteenth Amendments to the U.S. Constitution.

In a memorandum opinion, the district court granted Gillespie County's motion for summary judgment. App. 2. The district court accordingly entered a take-nothing final judgment on all claims asserted by Mr. Rothgery. App. 7.

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[1] Citations to the Record Excerpts are "App. [Tab No.]" Citations to items in the record that are not reproduced in the Record Excerpts are "[Vol. No.] R [Page No.]."

STATEMENT OF THE ISSUE

The Sixth Amendment right to counsel attaches upon the initiation of adversary judicial proceedings, whether by way of formal charge, preliminary hearing, indictment, information, or arraignment. On July 16, 2002, (1) Mr. Rothgery was charged with a felony offense, (2) a magistrate judge found probable cause that Mr. Rothgery had committed the crime charged, and (3) the magistrate judge set bail and committed Mr. Rothgery to jail pending the posting of bail or disposition of the charge.

Did Mr. Rothgery's Sixth Amendment right to counsel attach on July 16, 2002?

STATEMENT OF FACTS

This is a civil-rights action under 42 U.S.C. § 1983 for damages caused by Gillespie County's failure to promptly afford Mr. Rothgery an attorney, as required by the Sixth and Fourteenth Amendments to the U.S. Constitution.

A. Mr. Rothgery's Arrest and July 16, 2002 Appearance Before the Magistrate

On July 15, 2002, Mr. Rothgery was arrested in Gillespie County on suspicion of being a felon in possession of a firearm, App. 3, when he was not, in fact, a felon. As soon as he was booked into the Gillespie County Jail, Mr. Rothgery requested an appointed attorney, but none was appointed. 4 R 467, 474 (Rothgery Depo., at 62:2-62:20; 70:3-70:10).

The next day, July 16, 2002, Mr. Rothgery was taken before a Gillespie County Justice of the Peace. The arresting officer presented a sworn affidavit titled "Affidavit of Probable Cause." App. 3. The affidavit was presented "in the name and by the authority of the State of Texas"; described the factual basis for the accusation against Mr. Rothgery; and concluded, "I charge that . . . Defendant Walter A. Rothgery did . . . commit the offense of unlawful possession of a firearm by a felon – 3rd degree felony [Penal Code §] 46.04 – against the peace and dignity of the State." App. 3.

As part of its factual basis, the affidavit alleged that Mr. Rothgery had a 1996 felony conviction in the State of California. App. 3. In fact, however, the

California charges against Mr. Rothgery had been dismissed after he completed a diversionary program. 4 R 462 (order dismissing California charges). Mr. Rothgery has no felony convictions.

Based on the arresting officer's affidavit, the magistrate judge signed an order finding that probable cause existed for Mr. Rothgery's arrest. App. 3. The magistrate judge informed Mr. Rothgery of his rights, including his right to an appointed attorney, as required by Articles 14.06 and 15.17 of the Texas Code of Criminal Procedure.[2] App. 4. Mr. Rothgery asked the magistrate about his previous request for an appointed attorney. The magistrate told Mr. Rothgery that if Mr. Rothgery wanted to proceed with the hearing to set bail that morning, he would have to waive his right to an attorney for purposes of the hearing – otherwise, Mr. Rothgery would have to wait in jail until an attorney was appointed, and only then would the court set bail. 4 R 468-72 (Rothgery Depo., at 64:21-68:2). Mr. Rothgery agreed to waive his right to an attorney for the limited purpose of allowing the bail hearing to be held without counsel. The

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[2] Article 15.17 warnings must be given within 48 hours of arrest in all cases. TEX. CODE CRIM. PROC. arts 14.06(a), 15.17(a). Texas magistrates often combine the Article 15.17 magistrate warnings proceeding with the complaint and commitment proceedings described in Articles 15.04 and 16.20 of the Texas Code of Criminal Procedure. The practice of combining all three proceedings evolved in response to *Gerstein v. Pugh*, 420 U.S. 103 (1975) and *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991), where the Court held that the Fourth Amendment requires local authorities to make a probable cause determination within 48 hours of arrest before any person may be subject to extended pretrial incarceration on state criminal charges. These combined proceedings are referred to as "magistration," a "magistrate hearing," or, imprecisely, an "Article 15.17 hearing."

magistrate recorded that waiver on the warnings form, underlining that Mr. Rothgery was waiving counsel "at this time" to document that his waiver was limited to the right to counsel at the magistration hearing only. App. 4; 4 R 470-72 (Rothgery Depo., at 66:10-68:2).

The magistrate judge set bail for Mr. Rothgery at $5000 and committed Mr. Rothgery to jail pending the posting of bail or disposition of the charges against him. App. 4. Mr. Rothgery posted a surety bond and was released from the Gillespie County Jail on July 16, 2002. App. 5. The surety bond stated that Mr. Rothgery "stands charged by complaint duly filed in the Justice of the Peace Court" with the felony charge of unlawful carrying of a weapon by a felon, and conditioned his release on his personal appearance in court on the charge.[3] *Id.*

B. Mr. Rothgery's July 24, 2002 Request for Counsel

After Mr. Rothgery posted bail, he continued to inquire about the status of his initial request for appointment of counsel. 4 R 473-74 (Rothgery Depo., at 69:18-70:1). Gillespie County employees working at the jail informed Mr. Rothgery that they could not locate his request and provided him with another

[3] In its opinion, the district court stated that the magistrate warnings form reflects "that formal charges had not yet been filed against Mr. Rothgery." App. 2 at 2. What the warnings form in fact states is that "[Mr. Rothgery is] accused of the criminal offense of: Unlawful Possession of a Firearm by a Felon which (*will be*) *filed in the 216th District Court*." App. 4 (emphasis added). The charge against Mr. Rothgery was not yet pending in the district court because an indictment had not yet been filed. However, the charge was pending in the Justice of the Peace Court upon the filing of the peace officer complaint. App. 3, App. 5; *see also infra* Section III.A.

counsel request form. 4 R 474-76 (Rothgery Depo., at 70:14-72:2). Mr. Rothgery completed that form, had it notarized on July 24, 2002, and submitted the form to County employees working at the jail. 4 R 476-78, 480-82 (Rothgery Depo., at 72:20-74:22; 76:20-78:13). No action was taken on this request either, and all that remains of the form itself is the County's record of its notarization. 4 R 503-525 (deposition of notary and record of notarization).

Mr. Rothgery repeatedly contacted Gillespie County employees throughout the fall of 2002 to inquire as to the status of his requests for appointed counsel. 4 R 483-84, 488-89 (Rothgery Depo., at 81:24-82:19; 86:20-87:9). All of the Gillespie County employees with whom Mr. Rothgery spoke regarding this matter simply informed him that no appointment had been made. 4 R 486 (Rothgery Depo. 84:12-84:17). Unbeknownst to Mr. Rothgery at the time, Gillespie County follows a policy and practice of denying counsel to indigent defendants released on bond until after their first court appearance subsequent to information or indictment. 4 R 539-42 (deposition of Gillespie County Judge).

C. Mr. Rothgery's January 2003 Indictment, Re-Arrest, and the Appointment of Counsel

In January 2003, a Gillespie County grand jury returned an indictment against Mr. Rothgery for the offense of Unlawfully Carrying a Firearm by a Felon, App. 6, mistakenly premised on the California case that had been dismissed. Mr. Rothgery's bail was increased to $15,000 after indictment, and

Mr. Rothgery was re-arrested due to the bail increase. 4 R 577. When Mr. Rothgery was brought before the magistrate after this second arrest, he again asked the magistrate about the status of his request for appointed counsel. 4 R 490-91 (Rothgery Depo., at 92:6-93:21). The magistrate speculated that Mr. Rothgery did not get an appointed lawyer because he did not deserve one. *Id.* Mr. Rothgery completed yet another form requesting the appointment of counsel and returned it to Gillespie County employees working at the jail. 4 R 490 (Rothgery Depo., at 92:14-92:16). Although the district court remarked that Mr. Rothgery's "request is not in the summary-judgment record," App. 2 at 4 & 18 n.14, the magistration form clearly indicates that Mr. Rothgery requested appointed counsel at this hearing. 3 R 346.

Three days later, and still with no attorney, Mr. Rothgery was transferred to the Comanche County Jail due to overcrowding in the Gillespie County Jail. When Mr. Rothgery arrived at the Comanche County Jail, he again inquired about the status of his pending request for counsel. 4 R 493-94 (Rothgery Depo., at 95:5-96:3). Comanche County employees informed him that they did not know anything about his request for counsel and provided Mr. Rothgery with another counsel request form faxed from Gillespie County. *Id.*; 4 R 581-83, 586-88. Mr. Rothgery completed this form – the fourth written request for appointed counsel he had completed since his initial arrest – and, on January 23, 2003, a lawyer

finally was appointed to represent Mr. Rothgery. 4 R 589; 4 R 493-94 (Rothgery Depo., at 95:5-96:3).

D. After the Appointment of Counsel, the Charges Against Mr. Rothgery Were Promptly Dropped

Mr. Rothgery's appointed attorney secured an order reducing Mr. Rothgery's bail, allowing Mr. Rothgery's release from jail. 4 R 495-96 (Rothgery Depo., at 97:25-98:4). The attorney promptly obtained the records from California proving that Mr. Rothgery was not a felon. 4 R 113-14. The District Attorney filed a motion to dismiss the indictment for the reason that, because the California case described in the indictment had been dismissed, "Defendant was not a felon at the time of this offense." 4 R 593. The charge against Mr. Rothgery of Unlawfully Carrying a Firearm by a Felon was dismissed. 4 R 593.

E. Proceedings Below

Mr. Rothgery filed the action below under 42 U.S.C. § 1983, contending that Mr. Rothgery's Sixth and Fourteenth Amendment rights to counsel were violated by Gillespie County's policy of not appointing counsel to defendants charged and released on bond until indictment. 1 R 1. Had Mr. Rothgery been appointed counsel in a timely manner – promptly after adversary judicial proceedings against him commenced on July 16, 2002 – then the charges against him would have been resolved before his indictment and re-arrest, avoiding the

substantial injury caused by the delay in resolution of the pending charge and his consequent re-incarceration.

Gillespie County moved for summary judgment, contending, *inter alia*, that Mr. Rothgery's right to counsel did not attach until his indictment on January 3, 2003, because that event marked the initiation of adversary judicial proceedings against Mr. Rothgery. 3 R 326, 330-32. After a hearing, the district court issued a memorandum opinion granting the motion for summary judgment and finding that Mr. Rothgery's right to counsel did not attach on July 16, 2002. App. 2. The district court rendered a take-nothing final judgment against Mr. Rothgery. App. 7.

SUMMARY OF THE ARGUMENT

The Sixth Amendment right to counsel attaches upon the initiation of adversary judicial proceedings, whether by way of formal charge, preliminary hearing, indictment, information, or arraignment. On July 16, 2002, (1) Mr. Rothgery was charged with a felony offense, (2) a magistrate judge found probable cause that Mr. Rothgery had committed the crime charged, and (3) the magistrate judge set bail and committed Mr. Rothgery to jail pending the posting of bail or disposition of the charge. Precedent from the Supreme Court and this Court hold that, taken together, these three events – filing of a complaint, determination of probable cause, and commitment to custody – initiate adversary judicial proceedings and trigger attachment of the Sixth Amendment right to counsel. Mr. Rothgery's Sixth Amendment right to counsel therefore attached on July 16, 2002.

The district court's asserted reasons for its contrary finding are erroneous. First, the district court determined that no "formal charge" was filed, because Mr. Rothgery was arrested without a warrant. Mr. Rothgery's Sixth Amendment rights, however, do not depend on whether he was arrested with or without a warrant. The filing of felony charges in the Justice of the Peace Court initiated formal criminal proceedings against Mr. Rothgery, regardless of whether Mr. Rothgery's initial arrest was with or without a warrant. Second, the district court

held that a defendant's right to counsel cannot attach without the involvement of a prosecutor. The Supreme Court and this Court, however, have held that adversary judicial proceedings commenced at hearings without the involvement of a prosecutor. Third, the district court improperly conflated the Sixth Amendment's "adversary judicial proceedings" inquiry with the Sixth Amendment's "critical stage" inquiry, two issues which the Supreme Court has made clear are distinct. Mr. Rothgery does not contend that the July 16 hearing was a "critical stage" requiring the presence of counsel at that hearing. He contends that the July 16 hearing initiated "adversary judicial proceedings," after which he was entitled to the appointment of counsel. Finally, the district court erroneously found that Mr. Rothgery's argument is "dangerously close" to a claim that the Sixth Amendment right to counsel attaches at the time of arrest. Mr. Rothgery has never claimed that his right to counsel attached upon his arrest, but rather, consistent with authority from the Supreme Court and this Court, only after the filing of formal charges, a judicial finding of probable cause, and commitment to custody.

Because controlling precedent from the Supreme Court and this Court holds that adversary judicial proceedings were initiated against Mr. Rothgery on July 16, 2002, the district court's judgment must be reversed and the case remanded for trial.

ARGUMENT

On July 16, 2002, a police-officer witness filed an affidavit charging Walter Allen Rothgery with a crime in the name and by the authority of the State of Texas. App. 3. After this charging document was filed, Mr. Rothgery was taken before a judge who weighed the evidence against him, evaluated the validity of the charge in light of the evidence, and restricted Mr. Rothgery's liberty, also in the name of the State of Texas. App. 3; App. 4.

When the state charges a person with a crime, makes judicial findings of probable cause, and restricts the accused person's liberty, the Supreme Court has consistently held that adversary judicial proceedings are initiated and the Sixth Amendment right to counsel attaches. Following Supreme Court precedent, this Court and the Texas Court of Criminal Appeals also consistently hold that adversary judicial proceedings commence with the filing of a criminal charge found to be supported by probable cause and commitment of the accused upon the charge. The events initiating adversary judicial proceedings occurred in Mr. Rothgery's case on July 16, 2002. The district court's conclusion that adversary judicial proceedings did not commence on that date must be reversed.

I. The Standard of Review Is *De Novo*

This Court owes no deference to the district court's ruling on a summary judgment motion, but instead reviews the motion *de novo* under the same standards as the trial court. *FDIC v. Ernst & Young*, 967 F.2d 166, 169 (5th Cir 1992). Summary judgment is proper only if there are "no genuine issues as to any material fact" and "the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56. In applying this standard, the record must be viewed in the light most favorable to Mr. Rothgery. *Ayo v. Johns-Mansville Sales Corp.*, 771 F.2d 902, 904 (5th Cir. 1985).

II. Adversary Judicial Proceedings Against Mr. Rothgery Commenced on July 16, 2002

On July 16, 2002, the State of Texas filed a sworn complaint against Mr. Rothgery, a judge made a finding of probable cause, and the judge committed Mr. Rothgery to custody pending the posting of bail. App. 3; App. 4. These three events combined to initiate adversary judicial proceedings against Mr. Rothgery and trigger his Sixth Amendment right to counsel.

The Sixth Amendment guarantees that in "all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense." U.S. CONST., amend. VI. In *Kirby v. Illinois*, 406 U.S. 682 (1972), the Supreme Court fashioned a bright-line rule: the right to counsel attaches as of

"the initiation of criminal proceedings – whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Id*. at 689. Any *one* of these five events is sufficient to commence adversary judicial proceedings. *See*, *e.g.*, *Moore v. Illinois*, 434 U.S. 220, 228 (1977) (Sixth Amendment triggered by "formal charge" before indictment "when the victim's complaint was filed in court"). The Sixth Amendment applies to the States through the Fourteenth Amendment's due process clause. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

A. The Supreme Court Holds That (1) Filing of a Sworn Accusation, (2) Finding of Probable Cause, and (3) Commitment to Custody Initiate Adversary Judicial Proceedings Prior to Indictment

Supreme Court precedent instructs that adversary judicial proceedings are initiated prior to indictment when: (1) a sworn accusation is filed against a person; (2) a magistrate finds the sworn accusation to be supported by probable cause; and (3) the magistrate commits the person to jail pending bail and court disposition of the accusation.

In this case, all three of these predicates occurred on July 16, 2002. First, the complaint filed that day "charge[s] that … Defendant Walter A. Rothgery did … commit the offense of unlawful possession of a firearm by a felon – 3rd degree felony P.C. 46.04 – against the peace and dignity of the State." App. 3. On its face, the document is a formal charge: it was presented to a judicial officer and accused Mr. Rothgery of a crime in the name of the State of Texas. After this

charging document was filed, the magistrate judge held a hearing to evaluate the factual basis for the charge and to determine whether Mr. Rothgery should maintain his liberty, or, alternatively, to determine what restrictions on his liberty were warranted through the setting of bail. The magistrate judge determined that there was probable cause for Mr. Rothgery's arrest and detention on the charge and conditioned his release from jail on the posting of $5,000 bail. App. 3; App. 4. These events – a charge, a finding of probable cause, and binding over through incarceration or bail – are sufficient to constitute the initiation of adversary judicial proceedings under *Kirby*.

This conclusion is supported by Supreme Court cases that apply *Kirby* to decide, as a matter of federal constitutional law, when adversary judicial proceedings commence under state criminal procedures. For example, in *Brewer v. Williams*, 430 U.S. 387 (1977), a 10-year-old girl disappeared in Des Moines, Iowa. Defendant Williams was an immediate suspect, and a warrant was issued for his arrest on the charge of abduction. *Id*. at 390. The following day, Williams turned himself in to the Davenport, Iowa police department. Once in custody, he was booked, read his Miranda rights, and committed to jail. *Id*. The Supreme Court held that there "*can be no doubt*" "that judicial proceedings had been initiated against Williams" as a result of these state procedures. *Id*. at 399 (emphasis added).

Three events triggered adversary judicial proceedings against Williams: First, he was charged with abduction; second, a warrant was issued for his arrest on that charge, indicating a finding of probable cause; and third, he was committed by the court to confinement in jail. *Id*.

The three triggering events supporting the Court's finding that adversary judicial proceedings had commenced in *Brewer* all occurred in Mr. Rothgery's case by July 16, 2002. On that date, Mr. Rothgery was charged pursuant to the affidavit of a complaining peace officer witness and appeared before the magistrate judge, who made a probable cause finding and set bail. App. 3; App. 4. The events in Mr. Rothgery's case are the same events that the Supreme Court held initiated adversary judicial proceedings in *Brewer*, and thus Supreme Court precedent requires a determination that adversary judicial proceedings were initiated in Mr. Rothgery's case no later than July 16, 2002.[4]

After *Brewer* and *Kirby*, the Supreme Court has consistently held, upon careful examination of state criminal procedures, that a charge, a determination of probable cause, and commitment or imposition of bail signal that the state has initiated adversary judicial proceedings. For instance, in *Moore v. Illinois*, 434

[4] The only difference between this case and *Brewer* is that, here, probable cause was determined after arrest, while in *Brewer* the charge and probable cause determination happened prior to arrest. While a determination of probable cause is required to initiate adversary judicial proceedings, whether that determination was made before or after arrest is immaterial for purposes of the Sixth Amendment right to counsel. *See infra* Section III.A.

U.S. 220 (1977), the Supreme Court considered whether the right to counsel had attached upon the filing of a complaint subscribed by the victim. Moore had been arrested for rape, was held in jail overnight, and was brought to court the next morning. *Id*. at 222. A police officer accompanied the victim to court and "had her sign a complaint that named [Moore] as the assailant." *Id*. The judge then informed Moore "that he was charged with rape and deviate sexual behavior." *Id*. Moore was unrepresented at the hearing, but an attorney for the state was present and asked the victim to identify the defendant; this identification was introduced at a subsequent trial. *Id*. at 223.

The Supreme Court held that the identification was made in violation of the defendant's right to counsel, which had attached with the filing of the victim's complaint. *Id*. at 228. Where the lower court read *Kirby* as requiring an indictment to trigger adversary judicial proceedings, the Supreme Court instructed that "[s]uch a reading cannot be squared with *Kirby* itself, which held that an accused's rights" attach "at or after the initiation of adversary judicial criminal proceedings, including proceedings instituted by way of formal charge [or] preliminary hearing." *Id*. (internal citations omitted). After examining the Illinois court procedures, the Court held that the "prosecution in this case was commenced under Illinois law when the victim's complaint was filed in court." *Id*.

Michigan v. Jackson, 475 U.S. 625 (1986), also compels reversal of the district court's decision. In *Jackson*, the Supreme Court held that the "Sixth Amendment guarantee of the assistance of counsel also provides the right to counsel at post-arraignment interrogations" because the "arraignment signals the initiation of adversary judicial proceedings and thus the attachment of the Sixth Amendment." *Id.* at 629. Although the *Jackson* Court and Michigan use the term "arraignment" differently than Texas does, an analysis of the "arraignment" in *Jackson* demonstrates that this proceeding is directly comparable to the actions taken against Mr. Rothgery on July 16, 2002.

Jackson consolidated two Michigan cases. In defendant Jackson's case, the police arrested the defendant without a warrant on July 30, 1979, and on the next day he appeared before a magistrate for proceedings under MICH. STAT. ANN. §§ 28.871 and 28.885 and requested counsel. *Jackson*, 475 U.S. at 628-629 & n.3; *People v. Jackson*, 319 N.W.2d 613, 614-15 (Mich. App. 1982). These Michigan statutory magistration procedures are, just like the procedures Mr. Rothgery faced, "designed to advise the arrestee of his constitutional rights and the nature of the charges against him … to provide a judicial determination of probable cause [and to afford] the arrestee an opportunity to have his right to liberty on bail determined." *People v. Mallory*, 365 N.W.2d 673, 678 (Mich. 1984). The Supreme Court held that these procedures (what Michigan calls an

"arraignment") "signal[] 'the initiation of adversary proceedings' and thus attachment of the Sixth Amendment." *Jackson*, 475 U.S. at 629 & n.3. The proceedings that the Supreme Court held signaled the initiation of adversary judicial proceedings in *Jackson* – filing of a charge following an arrest without a warrant, probable cause determination, and opportunity to have bail determined – are functionally identical to the proceedings that Mr. Rothgery faced on July 16, 2002.

B. This Court's Decision in *Felder v. McCotter* Compels Reversal of the District Court's Decision

This Court has applied *Brewer* to Texas criminal procedure and found that adversary judicial proceedings were initiated prior to indictment on facts essentially indistinguishable from the case here. In *Felder v. McCotter*, 765 F.2d 1245 (5th Cir. 1985), "a Houston police officer filed an affidavit and felony complaint in the Harris County Justice of the Peace court charging Sammie Felder, Jr., with capital murder." *Id.* at 1246. This Court held that this event marked the initiation of adversary judicial proceedings: "Here, as in *Brewer*, there can be no doubt that judicial proceedings had been initiated against Felder. . . . The filing of an affidavit and criminal complaint in a Justice of the Peace court

constitutes the institution of formal judicial criminal proceedings in Texas." *Id.* at 1247-48.[5]

Other circuits have interpreted *Brewer* and *Jackson* in the same way as this Court, holding that complaint, magistration, and commitment trigger the Sixth Amendment right to counsel. *Mitzel v. Tate*, 267 F.3d 524, 532-33 (6th Cir. 2001) (following *Brewer* to hold that filing of complaint by police, appearance before state judge, and commitment to jail triggered Sixth Amendment); *Fleming v. Kemp*, 837 F.2d 940, 947-48 (11th Cir. 1988) (relying on *Jackson* to hold that adversary judicial proceedings are initiated by complaint, magistration, and commitment); *Wilson v. Murray*, 806 F.2d 1232, 1234, 1236-38 (4th Cir. 1986) (following *Jackson* to hold that the initial appearance before a magistrate triggered the Sixth Amendment right to counsel).

Applying *Brewer*, *Jackson*, and *Felder* to the facts viewed in the light most favorable to Mr. Rothgery, adversary judicial proceedings were initiated against

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[5] *See also Jurek v. Estelle*, 623 F.2d 929, 952 n.27 (5th Cir. 1980) (Johnson, J., specially concurring) ("Prior to the interrogation sessions that produced the two written confessions, Jurek had been brought before a magistrate, formally charged with "murder with malice," and denied bail. There can be no question that adversary proceedings can be said to have commenced against Jurek at least at the time of this appearance."); *Montoya v. Collins*, 955 F.2d 279, 282 (5th Cir. 1992) (defendant's Sixth Amendment right attached at magistrate hearing); *Daigre v. Maggio*, 705 F.2d 786, 788 (5th Cir. 1983) (finding that *Kirby* compels conclusion that arrest combined with probable cause determination initiates adversary judicial proceedings).

Mr. Rothgery on June 16, 2002 as a matter of law. The district court's holding to the contrary was erroneous, and its summary judgment must be reversed.

C. Texas Case Law Demonstrates That Adversary Judicial Proceedings Against Mr. Rothgery Began On July 16, 2002

Texas case law supports Mr. Rothgery's position in this case in two distinct ways. First, although this Court is not bound by Texas's interpretation of the Sixth Amendment, it is instructive that the Texas Court of Criminal Appeals has held at least seven times that the Sixth Amendment right to counsel attaches by the time that complaint, magistration, and commitment proceedings are completed.[6] Second, Texas case law makes clear that the filing of felony charges

[6] *Nehman v. State*, 721 S.W.2d 319, 322 (Tex. Crim. App. 1986) (en banc); *Fuller v. State*, 829 S.W.2d 191, 205 (Tex. Crim. App. 1992) (In Texas, "a criminal prosecution is variously considered to be in progress after the accused has been formally arrested and taken before a magistrate, or when he has been indicted or charged by complaint and information with a criminal offense."); *Lucas v. State*, 791 S.W.2d 35, 44-45 (Tex. Crim. App. 1989) (defendant arrested, taken before magistrate for *Miranda* warnings, and requested attorney; "There is no doubt … adversarial proceedings had commenced against him for the purposes of the Sixth and Fourteenth Amendments."); *Miffleton v. State*, 777 S.W.2d 76, 78 (Tex. Crim. App. 1989) (Sixth Amendment right to counsel attaches when complaint is filed); *Forte v. State*, 707 S.W.2d 89, 92 (Tex. Crim. App. 1986) (same); *Janecka v. State*, 739 S.W.2d 813, 825-826 (Tex. Crim. App. 1987) (attorney appointed at magistrate hearing and "State concedes that appellant's Sixth Amendment right to counsel was in force…"); *Barnhill v. State*, 657 S.W.2d 131, 132 (Tex. Crim. App. [Panel Op.] 1983) (relying on *Kirby* and *Moore* and holding that the Sixth Amendment right to counsel in Texas attaches by way of formal charge upon "the filing of a felony complaint."). *See also* cases holding that when one of the three requirements were not, met adversary judicial proceedings had not commenced: *McCambridge v. State*, 712 S.W.2d 499, 502 (Tex. Crim. App. 1986) (Sixth Amendment right to counsel did not attach when no complaint had been filed.); *Merritt v. State*, 76 S.W.3d 632, 634 (Tex. App.—Hous. [14th Dist.] 2002, no pet.) (adversary judicial proceedings not initiated where "no felony complaint or indictment had been filed").

with a Justice of Peace gives that court dominant jurisdiction over the criminal prosecution until disposition of the charge or action by the grand jury.

1. Texas Courts' Application of the Sixth Amendment Right to Counsel. The leading Texas case is *Nehman v. State*, 721 S.W.2d 319 (Tex. Crim. App. 1986). Nehman was arrested in Iowa after a state trooper ran a license plate and discovered that a truck parked at a rest stop was reported stolen and was wanted in Texas in connection with a homicide investigation. *Id.* at 320. The trooper arrested the defendant, and, after this initial arrest, a warrant was issued in Texas for Nehman's arrest on a homicide charge. *Id.* Once back in Texas, Nehman gave a statement to the police but, before signing the statement, was taken for his Article 15.17 hearing. *Id*. at 321. At the Article 15.17 hearing, the defendant requested an attorney, but no attorney was present at the hearing. *Id*. Following the hearing, the defendant signed the written statement. The Court of Criminal Appeals found that "since charges were filed against" Nehman, "formal judicial proceedings had been initiated by the time of [Nehman's] Art. 15.17 'warning hearing.'" *Id*. at 323 n.2.

All of the proceedings on which the *Nehman* ruling is based occurred in Mr. Rothgery's case on July 16, 2002. In *Nehman*, a charge was filed, a magistrate determined probable cause (to issue the Texas arrest warrant), and Nehman was taken before a magistrate where he asked for an attorney. The Texas Court of

Criminal Appeals held that, taken together, these proceedings initiated adversary judicial proceedings. *Id.* The *Nehman* court's analysis and holding conform to Supreme Court precedent and *Felder*, all of which require reversal of the district court.

The district court overlooked the significance of *Nehman* and other Texas cases finding that adversary judicial proceedings commence upon the occurrence of procedural events identical to those that occurred in Mr. Rothgery's case on July 16, 2002. Instead, the district court relied heavily on the Texas Court of Criminal Appeals' decision in *Wyatt v. State*, 566 S.W.2d 597 (Tex. Crim. App. 1978). *Wyatt*, however, is distinguishable from Mr. Rothgery's case. As the court in *Wyatt* emphasized, no affidavit charging Wyatt with a crime had been filed at the time of the magistration: "An affidavit charging you with this offense (has not) been filed in this court." *Id.* at 600 (quoting magistration form). No charges at all were filed against Wyatt until the day *after* the magistration hearing. *Id*. Here, in contrast, an affidavit charging Mr. Rothgery with a crime was filed at the time of his magistration. App. 3. In addition, *Wyatt* was decided before *Michigan v. Jackson*, and *Jackson*, "best read, is simply inconsistent with *Wyatt*, and *Nehman*

should be viewed as implicitly recognizing this." GEORGE E. DIX AND ROBERT O. DAWSON, 41 TEXAS PRACTICE (CRIM. PRAC. & PROC.) § 14.22 (2nd ed. 2001).[7]

One Texas case, *DeBlanc v. State*, 799 S.W.2d 701 (Tex. Crim. App. 1990), is arguably inconsistent with *Nehman*. In that case, the court's entire analysis consists of the following sentence: "We summarily dismiss appellant's Sixth Amendment claims since his right to an attorney under that Amendment did not arise until after he was indicted." *Id*. at 706. *DeBlanc* does not apply here for two reasons. First, the Supreme Court made clear in *Moore* that indictment was not required to initiate adversary judicial proceedings. 434 U.S. at 228. *DeBlanc*'s cursory statement certainly cannot overrule the U.S. Supreme Court's clear holding. Nor can *DeBlanc* change the Texas court opinions, before and since *DeBlanc*, that have consistently held, after careful analysis, that adversary judicial proceedings were initiated prior to indictment. *See* cases cited in footnote 6 *supra*.

Second, *DeBlanc* can be distinguished on its facts because there is no indication that DeBlanc was formally charged before his indictment. The Supreme Court's use of the disjunctive "or" in *Kirby*'s description of the events

[7] Professors Dix and Dawson go on to state, "Thus a defendant has a Sixth Amendment right to counsel . . . after the defendant has been presented before a magistrate for article 15.17 purposes, regardless of whether a complaint has been filed." *Id.; see also Green v. State*, 872 S.W.2d 717, 720 (Tex. Crim. App. 1994) (discussing that the holding in *Nehman* is "at least consistent with, if not dictated by, precedent from the United States Supreme Court." (citing *Moore*, *Brewer*, and *Jackson*)).

that trigger the right to counsel explicitly allows for various ways to trigger "adversary judicial proceedings" depending on how the prosecution in question began. *See Kirby*, 406 U.S. at 689 ("formal charge, preliminary hearing, indictment, information, *or* arraignment") (emphasis added). Indeed, in *Fuller v. State*, 829 S.W.2d 191 (Tex. Crim. App. 1992), the Court of Criminal Appeals later reconciled *DeBlanc* and *Nehman* by recognizing this distinction: "a criminal prosecution is *variously* considered to be in progress after the accused has been formally arrested and taken before a magistrate, *or* when he has been indicted *or* charged by complaint and information with a criminal offense." *Id.* at 205 (emphasis added). At most, therefore, *DeBlanc* stands for the proposition that the Sixth Amendment right to counsel is triggered by indictment, when (unlike Mr. Rothgery) the defendant has not been previously arrested, magistrated, and committed to custody pending the posting of bail or disposition of the charge.

2. The Filing of Charges Initiated a Criminal Case Over Which the Magistrate Had Dominant Jurisdiction. A second line of Texas authority further demonstrates that Mr. Rothgery's Sixth Amendment right attached on July 16, 2002, through the initiation of a judicial criminal proceeding against Mr. Rothgery. This line of cases examines the jurisdiction of justice of the peace courts, holding that the filing of a criminal complaint gives the magistrate jurisdiction over the resulting criminal case to the exclusion of all other courts.

Because a magistrate can acquire jurisdiction only through commencement of a case, and because the criminal case is necessarily adversarial, the invocation of the magistrate's jurisdiction marks the initiation of adversary judicial proceedings.

In *Ex parte Smalley*, 127 S.W. 225 (Tex. Crim. App. 1910), the Court of Criminal Appeals first held that a felony "prosecution had commenced" when a complaint was filed with a magistrate. *Id.* at 226. In *Ex parte Clear*, 573 S.W.2d 224 (Tex. Crim. App. 1978), the Court held that the filing of a felony complaint with a magistrate "was the initial step of an action instituted to secure [the defendant's] conviction and punishment." *Id.* at 228.

In *Clear*, a felony complaint was filed against Clear in a Harris County Justice of the Peace court. Clear was arrested, and the magistrate set bond. *Id.* at 225. The next day, Clear appeared for his Article 15.17 hearing in a different court, the Harris County District Court, but the hearing was continued while Clear attempted to retain counsel. *Id*. at 226. When Clear appeared at the continuance of the Article 15.17 hearing having failed to retain counsel, the district court revoked the bond that had been set by the justice of the peace court and increased Clear's bail. *Id*. at 227. The Court held that the justice of the peace court possessed jurisdiction over the defendant's criminal case "to the exclusion of all other courts, until the time that the complaint was either dismissed by the court or superseded by the action of the grand jury, or until the time that the requirements

of Article 1.141 of the Code of Criminal Procedure [allowing a defendant to waive indictment in a non-capital felony] had been met." *Id.* at 229. *Clear* demonstrates that, in Texas, the filing of felony charges before a justice of the peace court initiates the State's prosecution of, and adversary judicial proceedings against, a criminal defendant. Indeed, this conclusion is entirely consistent with this Court's application of the Sixth Amendment right to counsel to Texas procedure: "The filing of an affidavit and criminal complaint in a Justice of the Peace court constitutes the institution of formal judicial criminal proceedings in Texas." *Felder*, 765 F.2d at 1247-48.

Here, just as in *Clear*, the State invoked the jurisdiction of the Gillespie County Justice of the Peace court by filing felony charges against Mr. Rothgery. App. 3. Mr. Rothgery's surety bond expressly states that "Walter Allen Rothgery stands charged by complaint duly filed in the Justice of the Peace Court . . . of Gillespie County, Texas," with "Unlawful Possession of a Firearm by a Felon." App. 5. Until Mr. Rothgery was indicted by the grand jury, moreover, the Justice of the Peace court had jurisdiction over Mr. Rothgery's case to the exclusion of all other courts. As a matter of law, therefore, adversary judicial proceedings were initiated against Mr. Rothgery on July 16, 2002, "the initial step of an action instituted to secure [Mr. Rothgery's] conviction and punishment." *Ex parte Clear*, 573 S.W.2d at 228.

III. The District Court's Asserted Reasons for Holding Mr. Rothgery's Sixth Amendment Rights Did Not Attach on July 16, 2002 Are Erroneous

The district court relied on a variety of factors to hold that Mr. Rothgery's Sixth Amendment right to counsel did not attach on July 16, 2002: (1) Mr. Rothgery was arrested without a warrant, (2) there was no prosecutor involved in the magistration hearing, (3) the magistration hearing was not a "critical stage," and (4) Mr. Rothgery had no right to counsel upon his arrest. None of these reasons alter the holdings of *Brewer*, *Jackson*, and *Felder* as applied to the facts of this case: adversary judicial proceedings were initiated when Mr. Rothgery was charged, magistrated, and committed to jail pending disposition of the charges against him.

A. Mr. Rothgery's Right to Counsel Does Not Depend on Whether He Was Arrested With or Without a Warrant

The district court held that the affidavit charging Mr. Rothgery with a crime was not a "formal charge" for Sixth Amendment purposes because the affidavit was not filed in connection with an arrest warrant. App. 2 at 10-13. In reaching this conclusion, the district court focused on the definition of Article 15.04 of the Texas Code of Criminal Procedure, which defines a "complaint" as an affidavit filed with a magistrate "charg[ing] the commission of an offense." TEX. CODE CRIM. P. art. 15.04; *see also id.* art. 15.05 (identifying requisites for complaint). Although the affidavit filed in Mr. Rothgery's case meets all of the statutory

requirements for a complaint under Articles 15.04 and 15.05, the court noted that these articles appear in a chapter entitled "Arrest Under Warrant." Relying on several Texas cases interpreting this article, the district court held that the word "complaint" as used Article 15.04 referred only to affidavits offered in support of arrest warrants. App. 2 at 11. Because Mr. Rothgery had been arrested without a warrant, the district court concluded that the affidavit filed in this case was not a "complaint" under Article 15.04 and therefore not a "formal charge" for purposes of the Sixth Amendment. App. 2 at 12-13. This was error for several reasons.

First, although it is certainly necessary to look to Texas criminal procedure to determine when adversary judicial proceedings begin, it is the *function or effect* of the criminal process that ultimately controls, not the particular label a State places on the process. The Supreme Court has identified "formal charge, preliminary hearing, indictment, information, or arraignment" as specific triggers for the Sixth Amendment, but those words can have very different meanings in different jurisdictions. The word "arraignment," for example, can refer to either an initial appearance or a hearing to receive a plea to an indictment. *See* 5 WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 21.4(a) (2nd ed. 1999) ("arraignment" sometimes used to refer to defendant's first appearance before magistrate and other times used to refer to plea on formal charge). Whatever label the State places on a particular procedure, the controlling inquiry remains the

point at which "a formal accusation has been made – and a person who had previously been just a 'suspect' has become an 'accused.'" *Jackson*, 475 U.S. at 632. The Eleventh Circuit has emphasized this very point:

> [A]lthough Kemp is correct that formal arraignment had not occurred, *Jackson*'s holding is not so limited. The *Jackson* Court focused on a time "after a formal accusation has been made – and a person who had previously been just a 'suspect' has become an 'accused' within the meaning of the Sixth Amendment."

Fleming, 837 F.2d at 948 (quoting *Jackson*, 475 U.S. at 632); *see also United States ex rel. Burton v. Cuyler*, 439 F. Supp. 1173, 1180 n.10 (E.D. Pa. 1977) ("[I]n focusing on the purposes of the *Kirby* limitation, what is most important is what the state does and the operative effects of its actions and not what the state says about when a prosecution begins.").

Whether or not the affidavit in this case qualifies as a "complaint" under Article 15.04, the undeniable fact is that the affidavit explicitly charges Mr. Rothgery with commission of a criminal offense "in the name and by the authority of the State." App. 3. It is – by any definition – a "formal accusation." *Jackson*, 475 U.S. at 632. Together with the judicial finding of probable cause that Mr. Rothgery had committed the charged offense, App. 3, and Mr. Rothgery's commitment to jail pending the posting of bail, App. 4, this accusation caused Mr. Rothgery to go from "suspect" to "accused" for purposes of the Sixth Amendment. *Jackson*, 475 U.S. at 632.

Indeed, Texas law itself rejects the narrow, formalistic reading of its procedural law relied upon by the district court to support its holding. While the district court seized on the title of the chapter in which Article 15.04 appears, the Texas Legislature does not allow such titles to affect a statute's meaning. TEX. GOV'T CODE § 311.024 (Texas Code Construction Act) ("The heading of a title, subtitle, chapter, subchapter, or section does not limit or expand the meaning of a statute."). Although the district court concluded that the affidavit filed in this case was not a "complaint" initiating Mr. Rothgery's prosecution, the Texas Attorney General has reached the opposite conclusion. *See* Tex. Att'y. Gen. Op. No. 98-066, at 5 (1998) (determining that a post-arrest "affidavit showing why a person should be detained" functioned as a "complaint" and "a prosecution is pending before the court or magistrate who properly received a complaint, whether the complaint is a formal charging instrument, the basis of an arrest warrant, or some other "complaint" charging the commission of an offense.). The surety bond in Mr. Rothgery's own case explicitly states that, "Walter Allen Rothgery stands charged by complaint duly filed in the Justice of the Peace Court . . . of Gillespie County, Texas," with "Unlawful Possession of a Firearm by a Felon." App. 5.

Second, the district court's distinction between arrests with and without warrants conflicts with the Supreme Court's application of the Sixth Amendment. The Court has never suggested, much less held, that the presence or absence of a

warrant prior to arrest has any constitutional significance, and the underlying facts in the Court's decision in *Jackson* show that Jackson was arrested *without a warrant*. *People v. Bladel*, 365 N.W.2d 56, 70 (Mich. 1984). The Supreme Court squarely held that Jackson's Sixth Amendment rights attached, after his warrantless arrest, upon a finding of probable cause and commitment to jail. 475 U.S. at 629 & n.3. The Texas procedure Mr. Rothgery went through at his magistration was functionally indistinguishable from Michigan's "arraignment" in *Jackson*.

As a practical matter, it makes no sense to say that a defendant's Sixth Amendment right to counsel turns on whether his original arrest was made with or without a warrant. Whether a judicial officer finds probable cause on a sworn accusation before arrest (through issuance of a warrant) or after arrest (through a finding such as the one made by the magistrate here), the Sixth Amendment right attaches upon the magistrate's finding that the accusation is supported by probable cause and the defendant's commitment to jail. Regardless of the order in which these events occur, once they all have occurred, the defendant has gone from "suspect" to "accused" and adversary judicial proceedings have begun. *Jackson*, 475 U.S. at 632.

B. The Involvement of a Prosecutor Is Not Necessary to Trigger Sixth Amendment Rights at a Magistration Hearing

In holding that adversary judicial proceedings did not attach on July 12, 2006, the district court relied heavily on this Court's decision in *McGee v. Estelle*, 625 F.2d 1206 (5th Cir. 1980). The district court read *McGee* to require the involvement of a prosecuting attorney before adversary judicial proceedings could begin. App. 2 at 15-16. This is a misreading of *McGee*'s holding and a misapplication of the Sixth Amendment.

In *McGee*, the defendant was arrested without a warrant on suspicion of robbery, taken before a magistrate who gave the defendant *Miranda* warnings, and then taken to a line-up where the victim identified the defendant. *Id.* at 1207. The defendant contended that adversary judicial proceedings had begun at two separate points in time: (1) the pretrial line-up, and (2) the defendant's magistration hearing where he received *Miranda* warnings, but was not charged with a crime.

This Court held that adversary judicial proceedings do not begin at a pre-trial line-up when "[o]nly the police were involved in the lineup" and "the prosecution had no involvement." *Id.* at 1208. In context, *McGee*'s holding was the unremarkable one that a pretrial line-up after arrest alone is part of an investigation and does not constitute the initiation of adversary judicial

proceedings. This Court emphasized this point by stating that its decision was dictated by a previous opinion:

> Thus, this case falls under the rubric of *Caver v. Alabama*, 577 F.2d 1188 (5th Cir. 1978). There, this Court held:
>
> "An arrest on probable cause without a warrant, even though the arrest is for the crime with which the defendant is eventually charged, does not initiate adversary judicial proceedings, and therefore Caver had no constitutional right to counsel at the lineup conducted after his arrest but before he was formally charged."

Id. (quoting *Caver v. Alabama*, 577 F.2d 1188, 1195 (5th Cir. 1978)); *see also id.* ("To accept McGee's argument would mean that adversary proceedings would begin under Texas law at the time of arrest."). In sum, this Court in *McGee* rejected the contention that adversary judicial proceedings begin "*at a pretrial lineup*" after a defendant's arrest "*before he was formally charged*." *Id.* (emphasis added). Mr. Rothgery contends, by contrast, that adversary judicial proceedings were initiated *at a hearing before the magistrate* and *after he was formally charged*.

The Court in *McGee* also separately addressed the defendant's contention that his appearance before the magistrate initiated adversary judicial proceedings. The Court rejected this contention too, because the defendant had merely received only *Miranda* warnings from the magistrate – *i.e.*, no charges were filed and no probable cause was found. *Id.* at 1209. In this respect, this Court cited with approval the Texas Court of Criminal Appeals decision in *Wyatt v. State*, 566

S.W.2d 597 (Tex. Crim. App. 1978), which rejected a Sixth Amendment claim because the magistration form made clear that, "An affidavit charging you with this offense (has not) been filed in this court."[8] *Id.* at 600. Here, by contrast, it is undisputed that an affidavit charging Mr. Rothgery with an offense *was* filed at the time of his appearance before the magistrate, and probable cause was found. App. 3. Indeed, the Texas Court of Criminal Appeals itself later distinguished *McGee* on the basis that no complaint had been filed in *McGee*. *Green v. State*, 872 S.W.2d 717, 720 (Tex. Crim. App. 1994).

The district court, therefore, took *McGee*'s holding out of context to hold that a prosecutor must be involved to transform a magistration hearing into adversary judicial proceedings. What is necessary to transform a defendant from a "suspect to an accused" is the filing of charges, a finding of probable cause, and commitment to jail pending disposition of the charges – whether or not a prosecutor, a police officer, or any particular state actor is involved in any of those steps. *See Jackson*, 475 U.S. at 34 ("Sixth Amendment principles require that we impute the State's knowledge from state actor to another. For the Sixth Amendment concerns the confrontation between the State and the individual.").

Finally, even if *McGee*'s holding properly could be read to require the involvement of a prosecutor in the presentation of charges against a defendant,

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[8] For additional discussion of *Wyatt*, see pages 23-24 *supra*.

this Court must disregard such a holding as inconsistent with both this Court's prior precedent and with later Supreme Court authority. In *United States v. Banks*, 485 F.2d 545 (5th Cir. 1973), this Court held that the filing of a complaint by a law-enforcement agency triggered the initiation of adversary judicial proceedings: "The FBI had initiated adversary judicial proceedings against Dollar and Banks by filing a criminal complaint charging them with the robbery of the Commissary." *Id.* at 547 n.1. Similarly, in *Govt. of Canal Zone v. Peach*, 602 F.2d 101 (5th Cir. 1979), after a defendant was arrested by detectives, charged by complaint, and taken before a magistrate, this Court held that the defendant "had a right to the assistance of counsel beginning at least with his first appearance before the magistrate . . . ." *Id.* at 103. "Where two previous holdings or lines of precedent conflict, 'the earlier opinion controls and is the binding precedent in the circuit.'" *Society of Separationists, Inc. v. Herman*, 939 F.2d 1207, 1211 (5th Cir. 1991) (quoting *Boyd v. Puckett*, 905 F.2d 895, 897 (5th Cir. 1990)).

In addition, *McGee* – as interpreted by the district court – is inconsistent with the U.S. Supreme Court's later decision in *Michigan v. Jackson*. *See Society of Separationists, Inc.*, 939 F.2d at 1211 (prior panel decision may be overruled based on "superseding decision by . . . the Supreme Court"). In *Jackson*, the Supreme Court held that adversary judicial proceedings were initiated at a hearing where only "the detective in charge of the . . . investigation" was present.

Jackson, 475 U.S. at 627. Indeed, this Court has relied on *Jackson* in holding that a Texas defendant's right to counsel attached at a magistration hearing after being arrested on felony charges, without any mention of prosecutorial involvement: "When Montoya was taken before the magistrate, his Sixth Amendment rights attached." *Montoya v. Collins*, 955 F.2d 279, 282 (5th Cir. 1992) (citing *Jackson*, 475 U.S. at 629-30)); *see also Hargrove v. State*, 162 S.W.3d 313, 371 (Tex. App.—Fort Worth 2005, pet. denied) (holding that adversary judicial proceedings began when Sheriff Department "deputies decided to formally charge" the defendant).

C. The "Initiation of Adversary Judicial Proceedings" Is Distinct from a "Critical Stage" for Purposes of the Sixth Amendment Right to Counsel

At several points in its opinion, the district court erred by conflating the Sixth Amendment's "adversary judicial proceedings" inquiry with the Sixth Amendment's "critical stage" inquiry.[9] As the Supreme Court has emphasized, the two inquiries are distinct: "The question whether [an event] signals the initiation of adversary judicial proceedings . . . is distinct from the question whether the [event] itself is a critical stage requiring the presence of counsel,

[9] *See, e.g.*, App. 2 at 9-10 ("Rather than following a bright-line rule as to when adversary judicial proceedings have begun, Texas courts focus on whether a particular event is a critical stage to which a person's Sixth Amendment right to counsel attaches."); App. 2 at 14 ("Although not bound by the state court's critical-stage determination, the Court is persuaded that the determination is reflective of the Texas Court of Criminal Appeals' view that adversary judicial proceedings are not initiated by an appearance before a magistrate for Article 15.17 warnings and the setting of bail.").

absent a valid waiver." *Jackson*, 475 U.S. at 630 n.3. Mr. Rothgery here argues that his magistration "signal[led] the initiation of adversary judicial proceedings." *Id.* Mr. Rothgery does not argue that the hearing itself was a "critical stage."

The "initiation of adversary judicial proceedings" marks the point at which the Sixth Amendment right to counsel attaches. After that point, an indigent criminal defendant is entitled to appointment of a lawyer: "Whatever else it may mean, the right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him . . . ." *Brewer*, 430 U.S. at 398. The failure to appoint counsel after the right attaches and after counsel has been requested is a violation of the Sixth Amendment. *See Maine v. Moulton*, 474 U.S. 159, 170 (1985) ("Once the right to counsel has attached and been asserted, the State must of course honor it.").

Separately, there are "critical stages" throughout a criminal prosecution that cannot go forward unless a defendant has knowingly and intelligently waived the Sixth Amendment right to counsel. But, as the Supreme Court itself has stressed, a defendant is entitled to the assistance of a lawyer not only at critical stages, but at all times after the initiation of adversary judicial proceedings:

> '(D)uring perhaps the most critical period of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thorough-going investigation and preparation were vitally important, the defendants

> did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself.'

Kirby, 406 U.S. at 688 n.6 (quoting *Powell v. Alabama*, 298 U.S. 45, 57 (1936)).

Here, Mr. Rothgery does not contend that the July 16, 2002 magistration hearing was a "critical stage" that required the presence of defense counsel. He contends that the hearing "signal[ed] the initiation of adversary judicial proceedings," *Jackson*, 475 U.S. at 630 n.3, *after which* he was entitled to the assistance of a lawyer under the Sixth Amendment. The failure to appoint a lawyer after adversary judicial proceedings commenced against Mr. Rothgery on July 16, 2002, and he requested counsel, was a violation of his Sixth Amendment rights. If he had had a lawyer during the pretrial period "when consultation, thorough-going investigation and preparation were vitally important," *Kirby*, 406 U.S. at 688 n.6, then his case would have been resolved without his indictment and re-incarceration.

D. Mr. Rothgery Does Not Contend that the Right to Counsel Attaches at the Time of Arrest or Before the Initiation of Adversary Judicial Proceedings

The district court found that a conclusion that Mr. Rothgery was entitled to counsel after the July 16 magistration hearing "would be dangerously close to violating the clear statement in [*United States v.*] *Gouveia*[, 467 U.S. 180 (1984)] that the Sixth Amendment right to counsel does not attach at the time of arrest." App. 2 at 17.

Mr. Rothgery has never contended that the Sixth Amendment attached at the time of his arrest on July 15. Rather, consistent with the Supreme Court's decision in *Brewer* and *Jackson* and this Court's decision in *Felder*, adversary judicial proceedings were initiated upon (1) the filing of a sworn accusation, (2) the finding of probable cause, and (3) commitment to jail. *Gouveia* – relied on by the district court – does nothing to alter the Sixth Amendment analysis as it applies to Mr. Rothgery.

Gouveia simply reaffirms the Supreme Court's longstanding precedent that the right to counsel attaches upon the initiation of adversary judicial proceedings. In *Gouveia*, prison inmates suspected of murdering another inmate were placed in administrative segregation during an investigation of the crime, but the inmates were never charged, accused or even arrested for the murder until after they were indicted. 467 U.S. at 182-85. The Ninth Circuit had held that, because of unique concerns present in placing a prison inmate in administrative segregation, the defendants' Sixth Amendment right to counsel had attached *before* the initiation of adversary judicial proceedings. *Id.* at 185-87. The Court rejected this argument, and simply reaffirmed its general rule that the Sixth Amendment right to counsel attaches at or after judicial proceedings have been initiated "by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Id.* at 188 (citations omitted).

In *Michigan v. Jackson*, the Court cited *Gouveia* for its holding that the pre-indictment proceeding at issue in that case marked the "'the initiation of adversary judicial proceedings' and thus the attachment of the Sixth Amendment." *Jackson*, 475 U.S. at 629 (citing *Gouveia*, 467 U.S. at 187-88). As explained above, the hearing in *Jackson* was functionally indistinguishable from Mr. Rothgery's magistration. Finding that Mr. Rothgery's Sixth Amendment right to counsel attached on July 16, 2002, requires nothing more than the application of existing Supreme Court precedent and certainly violates no holding of *Gouveia.*

CONCLUSION

The district court erred in granting summary judgment, because Mr. Rothgery's Sixth Amendment right to counsel attached on July 16, 2002, after he was charged, magistrated, and committed to jail. Mr. Rothgery therefore prays that this Court reverse the final judgment of the district court and remand for trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing brief has been served in both paper and electronic form by U.S. mail on this the 30th day of June, 2006 to counsel of record for Appellee Gillespie County as follows:

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because this brief contains 9781 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word XP in 14 point Times New Roman.

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Dated: June 30, 2006