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Contacts:

Andrea Marsh, Texas Fair Defense Project: (512) 637-5221 | amarsh@texasfairdefenseproject.org

Jeff Miller: (202) 557-7584 | jmiller@thejusticeproject.org

U.S. Supreme Court Rebukes Texas for Denying Indigent Defendants the Right to Counsel

The U.S. Supreme Court ruled 8-1 today in *Rothgery v. Gillespie County* that Texas is violating the Sixth Amendment by failing to appoint counsel within a reasonable time after indigent defendants have their initial appearance before a judge or magistrate and are informed of the charges against them.

Writing for the majority, Justice Souter noted that the practice in Texas is out-of-step with clear Supreme Court precedent on when the right to counsel attaches, and with the practice of at least 43 states and the federal government, which provide counsel to defendants before, at, or soon after their initial appearance before a magistrate or judge.

“A criminal defendant’s initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger the attachment of the Sixth Amendment right to counsel,” Souter said.

Under current Texas practice, indigent defendants often are denied appointed counsel until they are indicted, which could come weeks or months after an arrest and initial appearance. The Court today rejected the government’s argument that appointment of counsel is not required until an indictment or information is filed, holding that the constitutional right to counsel attaches soon after arrest.

“The U.S. Supreme Court today reaffirmed loud and clear that the Sixth Amendment right to counsel applies everywhere, including in the state of Texas,” said Andrea Marsh, Rothgery’s attorney and Executive Director of the Texas Fair Defense Project. “The Court’s decision ratifies the most basic right of a person accused of a crime – the right to a lawyer to defend against the government’s charges.”

Marsh represents Walter Rothgery, an innocent man who was trapped in the criminal justice system for months because Gillespie County denied his repeated requests for a lawyer. In July 2002, Rothgery was arrested on a charge of being a felon in possession of a firearm when he was not, in fact, a felon. He made an initial appearance before a magistrate. Despite his repeated requests, Rothgery was not appointed counsel for six months, until after he had been indicted, rearrested and spent three weeks in jail. Once appointed, the lawyer proved his innocence.

Rothgery lost his job as a property manager the day before he was wrongfully arrested. He was unable to find a new job while the charge was pending because the employers in

his small Texas community knew of his arrest and believed, based on the nature of the charge, that he had a prior felony conviction. Rothgery and his wife currently live in Llano, Texas, where Rothgery manages an equipment rental business. The couple still struggle, however, to recover and to pay off the debt accumulated during the six months that Rothgery, now 57, was denied his constitutional right to counsel and unable to work.

Rothgery said, "I'm ecstatic. This is how I thought the system was supposed to work. It's just a shame that I had to go this far to get Texas to do what it's supposed to."

Today's ruling overturned a decision by the Fifth Circuit Court of Appeals that found that the right to counsel does not attach until a prosecutor becomes involved in the case. The Supreme Court said this "prosecutorial involvement" standard "is wrong" and highly "unworkable."

The Court said, "Under the federal standard, an accusation filed with a judicial officer is sufficiently formal, and the government's commitment to prosecute it sufficiently concrete, when the accusation prompts arraignment and restrictions on the accused's liberty to facilitate the prosecution. From that point on, the defendant is 'faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law' that define his capacity and control his actual ability to defend himself against a formal accusation that he is a criminal."

The case was argued on March 17, 2008. Rothgery was represented before the Court by Danielle Spinelli of Wilmer Cutler Pickering Hale and Dorr LLP.

Additional information about *Rothgery v. Gillespie County* is available at <http://www.texasfairdefenseproject.org/>.

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