

Supreme Court takes Hill Country case

Mistaken Fredericksburg arrest could prompt changes in Texas court proceedings.

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In a case that could retool a key element of the Texas criminal justice system, the U.S. Supreme Court agreed Monday to review the mistaken arrest and jailing of a Fredericksburg man to determine when a suspect is entitled to a lawyer.

At issue are these questions: Should Texas be required to appoint a lawyer during a suspect's first court appearance, when a trip to jail is possible? Or is Texas correct in maintaining that the right to a lawyer begins upon formal indictment, which can occur months later?

The answers could change a practice that has been going on in state courts for at least five decades, lawyers said.

The case, Rothgery v. Gillespie County, arose from the 2002 arrest of Walter Rothgery, who was accused of carrying a firearm as a felon. Insisting that he had no felony record and could not afford to hire a lawyer, Rothgery asked for a county-paid attorney during his initial court appearance. The request was denied.

Rothgery posted bail and was released from jail. Six months later, he was indicted by a Gillespie County grand jury and arrested again. At that point, he qualified for a court-appointed lawyer, who cleared up a mistake in California's felony database to secure Rothgery's freedom after he had spent three weeks in jail. His charge was dropped.

Had Rothgery been provided a lawyer from the start, he could have skipped jail and preserved his reputation, which was left in tatters, said Andrea Marsh, executive director of the Texas Fair Defense Project, an Austin nonprofit group representing Rothgery.

Rothgery is asking the court to declare that the right to legal representation begins during that first hearing, when suspects appear before a magistrate shortly after their arrest to learn of the charges against them. The judge, who determines whether there is probable cause that a crime was committed, also can order jail time and set bail.

"If we prevail in the Supreme Court, it means defendants will get lawyers as soon as the state restrains their liberty and says, 'We think you committed a crime,' " Marsh said.

Monday's announcement by the Supreme Court, which accepts 60 to 80 cases each year, was a welcome surprise, Marsh said.

Rothgery, who now lives in Llano, declined to comment. "He doesn't feel ready to talk to the press yet. He's sort of in shock," Marsh said.

Charles Frigerio, a San Antonio attorney hired by Gillespie County, said requiring lawyers so early in a case would be ponderous and expensive. "I think we have done it appropriately and constitutionally," he said.

The Supreme Court case will turn on how a 1972 ruling — establishing that the right to legal representation begins when "adversary judicial proceedings" commence — is interpreted now.

Gillespie County says the first court appearance is not adversarial because no plea is taken; the right to counsel begins when prosecutors become involved, such as at the time of indictment, Frigerio said. "That's when defendants need legal expertise of their own."

But Marsh said the majority of the nation's appellate courts have held that adversary proceedings begin when a defendant is arrested and jailed or released on bail. That means a ruling in favor of Rothgery would probably be limited to Texas court proceedings, she said.

The requested practice is good for defendants, who can build a defense while witnesses are available and facts are fresh, Marsh said, as well as for local governments, which can quickly weed out cases such as Rothgery's that should not have been filed. "I think it helps all of the players in the system," she said.

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