No. 07-440

In The
Supreme Court of the United States

WALTER ALLEN ROTHGERY,

Petitioner,

v.

GILLESPIE COUNTY, TEXAS,

Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Can a municipality be liable for damages under 42 U.S.C. §1983 for failing to appoint counsel under the Sixth Amendment at a Preliminary Initial Appearance where the arrestee has not been subject to a formal charge, preliminary hearing, indictment, information or arraignment?

PARTIES TO THE PROCEEDING

Respondent:

Gillespie County, Texas by and through their attorneys of Record, Charles S. Frigerio and Hector X. Saenz, *Law Offices of Charles S. Frigerio, P.C.*, 111 Soledad, Suite 840, San Antonio, TX 78205.

Petitioners:

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The judgment of the Honorable Lee Yeakle, United States District Judge, Western District of Texas, Austin Division entered on February 2, 2006 is published at 413 F.Supp.2d 806 (W.D. 2006) (App. A – 1-18). The opinion of the United States Court of Appeals for the Fifth Circuit entered on June 28, 2007 is published at 419 F.3d 293 (5th Cir. 2007) (App. B – 19-44).

JURISDICTION

Rule 10 of the Rules of the Supreme Court of the United States provides that a review on a writ of certiorari is not a matter of right but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. Compelling reasons are indicated if the decision leading to the petition contributes to a conflict of authority between the Courts of Appeal or State Courts of last resort; reflects a departure from the usual course of proceedings; or presents an important question of federal law that has not been but should be settled by this Court.

Petitioner has not set forth an adequate basis to justify the exercise of this Court's discretionary jurisdiction. There is no conflict of authority which should be settled by this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. VI.

> *"In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence."*

42 U.S.C. §1983

> "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state . . . subjects or causes to be subjected, any citizen of the United States or person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, sued in equity or other proper proceeding. . . ."

STATEMENT OF THE CASE

1. Factual Background.

The case at bar concerns the warrantless arrest of Petitioner Rothgery on July 15, 2002. Rothgery was masquerading as a security guard wearing a holster and handgun at an RV park in Fredericksburg, Texas. Petitioner was charged with unlawful possession of a firearm by a felon which is a third degree felony under the Texas Penal Code, Chapter 46, §46.04.

On July 16, 2002, Rothgery was advised of his statutory warnings pursuant to the Tex. Code of Crim. Proc. Ann., art. 15.17(a) by Justice of the Peace Schoessow. In Texas, this is referred to as the Preliminary Initial Appearance (PIA). At the Preliminary Initial Appearance, the magistrate advised Rothgery of his rights under *Miranda*, informed him of the crime accused, advised him of his right to counsel, determined probable cause existed for his detention and set bond. Petitioner Rothgery waived his right to counsel and was released on bond. (See, App. C – 45-48). At some time subsequent to July 16, 2002, Petitioner Rothgery alleges he submitted a form requesting appointment of counsel to the Gillespie County Jail Administration. This form was evidently lost by the administration at the jail and not forwarded to the District Court. In any event, Petitioner Rothgery remained out on bond from the period of July 16, 2002 until January 18, 2003 when he was arrested subsequent to being indicted. During this time frame, Rothgery attempted to retain counsel but was unsuccessful. The fact is undisputed that no law enforcement officer or prosecutor attempted to interview Rothgery during said time frame.

2. Legal Issues.

Petitioner Rothgery alleges that his Sixth Amendment Right to Counsel attached at the Preliminary Initial Appearance conducted under Tex. Code of Crim. Proc. Ann., art. 15.17(a). However, in Texas, the Preliminary Initial Appearance under

Article 15.17(a) does not initiate adversary judicial proceedings. The Preliminary Initial Appearance under Article 15.17 is to obtain a probable cause determination as dictated by *Gerstein* v. *Pugh*, 420 U.S. 103, 125 (1974).

On July 16, 2002, Rothgery was not subject to a formal charge, preliminary hearing, indictment, information or arraignment and therefore, his Sixth Amendment right to counsel did not attach. Point in fact, Petitioner Rothgery waived his right to counsel at the Preliminary Initial Appearance. Subsequent to being released on bond, Rothgery claims to submitting request for counsel forms on at least one occasion to the Gillespie County Jail Administration. During the almost six months Petitioner was out on bond, he did not experience any critical pretrial proceedings where he was confronted, just as at trial, by the procedural system, or by his expert adversary in a situation where the results of the confrontation might well settle the accused's fate and reduce the trial itself to a mere formality as envisioned in *United States* v. *Wade*, 388 U.S. 218, 224 (1967).

Petitioner Rothgery's burden under *Monell* is to show that Gillespie County had a custom and policy that directly caused his alleged constitutional deprivation. *Bd. of County Comm'rs of Bryan County, Oklahoma* v. *Brown*, 520 U.S. 397 (1997). Petitioner Rothgery failed to put forth any evidence showing that a custom or policy of Gillespie County caused Plaintiff to sustain a violation of his civil rights under the Sixth Amendment. Rothgery waived his right to

counsel under the Sixth Amendment at the Preliminary Initial Appearance and Petitioner has failed to proffer evidence of municipal liability under 42 U.S.C. §1983 concerning Plaintiff's Sixth Amendment right to counsel.

3. Proceedings Below.

Petitioner Rothgery's Complaint is brought pursuant to 42 U.S.C. §1983 on the grounds that Gillespie County violated his Sixth Amendment Right to Counsel by not appointing Counsel for him at his Preliminary Initial Appearance on July 16, 2002. Rothgery, in fact, waived his right to counsel at the Preliminary Initial Appearance on July 16, 2002.

The District Court granted Respondent Gillespie County's Motion for Summary Judgment holding that the Petitioner's Sixth Amendment right to counsel did not attach at his Preliminary Initial Appearance under Article 15.17 on July 16, 2002. The trial court's holding is consistent with Texas law (*Green* v. *State*, 872 S.W.2d 717, 722 (Tex. Crim. App. 1994)), with this Court's precedent (*United States* v. *Gouveia*, 467 U.S. 180, 189 (1984)) and Fifth Circuit precedent (*McGee* v. *Estelle*, 625 F.2d 1206, 1208 (5th Cir. 1980). The Fifth Circuit affirmed the trial court's granting of summary judgment and affirmed its holding in *McGee* v. *Estelle*, 625 F.2d 1206 (5th Cir. 1980) that the Sixth and Fourteenth Amendment right to counsel does not attach in Texas on a warrantless arrest when the arrestee appears before a Magistrate for

statutory warnings. *Rothgery* v. *Gillespie County*, 491 F.3d 293, 294 (5th Cir. 2007).

REASONS FOR DENYING WRIT OF CERTIORARI

1. Fifth Circuit.

Both the Fifth Circuit in *Rothgery* v. *Gillespie County*, 491 F.3d 293 (5th Cir. 2007) and the trial court's opinion in *Rothgery* v. *Gillespie County*, 413 F.Supp.2d 806 (W.D. 2006) are consistent with this Court's precedent. In *Kirby* v. *Illinois*, 406 U.S. 682 (1972), this Court discussed the starting point for when the initiation of adversary judicial proceedings begins and reasoned as follows:

> *"The initiation of judicial proceedings is far from mere formalism. It is the starting point of our whole system of adversary criminal justice. For it is only then that the 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 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."* *Id.* at 689-690.

The Fifth Circuit's opinion in the case at bar is consistent not only with the literal language of the Sixth Amendment which requires both the existence of a criminal prosecution and an accused, but also with the purposes which this Court has recognized the right to counsel serves. 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. *Ash*, 413 U.S. 300, 309 (1973). While the right to counsel exists to protect the accused during trial type confrontations with the prosecutor, this Court has never held that the right to counsel attaches at the time of arrest. *United States* v. *Gouveia*, 467 U.S. 180, 190 (1984).

In *United States* v. *Gouveia*, 467 U.S. 180 (1984), the Court directly addressed the issue of when the Sixth Amendment right to counsel began in the context of the initiation of adversary judicial proceedings. In *Gouveia*, two federal inmates were convicted of murder. They based their appeal in part on the fact that their rights under the Sixth Amendment were violated when they were held in administrative detention unit without appointment of counsel for approximately nineteen (19) months prior to Grand Jury indictment. The Ninth Circuit Court of Appeals reversed the convictions holding that the prison inmates had a Sixth Amendment right to counsel during the period in which they were held in administrative detention before the return of the indictments. This Court granted a Certiorari and reversed the

Ninth Circuit holding. This Court held that the nineteen (19) month interval pre-indictment of the defendants was not the initiation of any adversary judicial proceedings and therefore, the Sixth Amendment had not attached. As in the case subjudice, Petitioner Rothgery was out on bond for a period of six months at which time no initiation of any adversary judicial proceedings had commenced and his Sixth Amendment right had not attached. As this Court held in *Gouveia*, 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. *Id.* at 191. (quoting *United States* v. *Marion*, 404 U.S. 307, 404 (1971).

The Fifth Circuit's holding in Rothgery reaffirms its previous opinion in *McGee* v. *Estelle*, 625 F.2d 1206 (5th Cir. 1980). In *McGee*, the Court posited the direct inquiry as "*We must determine when an adversary judicial criminal proceeding begins in Texas.*" *Id.* at 1206. The case concerned an arrested suspect apprehended without an arrest warrant for armed robbery. Ft. Worth police officers matched the description of the car McGee was driving at the time of the arrest. The Ft. Worth Detective took McGee before a Texas Magistrate for the requisite statutory warnings under Tex. Code of Crim. Proc. Ann., art. 15.17. Two hours after the magistrate warning, McGee was taken before a lineup where he was identified by the complaining witness. Two months later, McGee was indicted for the armed robbery. McGee asserted that

his appearance before the Magistrate triggered the adversary judicial process. The Court in *McGee* held:

> "*An appearance before the magistrate for statutory warnings under Texas law does not involve counsel for the state, nor is it a formal charge; rather, it is for the purpose of complying with the requirements set forth in Miranda* v. *Arizona. . . .*" *Id.* at 1209.

The Court reasoned that to accept *McGee's* argument would equate the initiation of adversary judicial proceedings under Texas law with the time of arrest. Such a conclusion would be antithetical to the results reached by this Court in *Kirby*.

Petitioner's assertion that the Fifth Circuit decision in the case at bar conflicts with both *Brewer* and *Jackson* is without merit. In *Brewer* v. *Williams*, 430 U.S. 387 (1977), the suspect was arrested in Davenport, Iowa pursuant to a warrant issued out of Des Moines, Iowa. The arrestee was arraigned in Davenport and was represented by counsel in Davenport as well as Des Moines, Iowa. Counsel informed the officers not to interrogate him during the transport from Davenport to Des Moines. Despite being warned not to interrogate arrestee Williams, Det. Leaming engaged in conversation with Williams during the 160 mile drive to Des Moines. During the conversation, Williams admitted to the murder and led police to the body of the victim. This Court held in *Brewer* that subsequent to plaintiff being arraigned in Davenport, Iowa that judicial proceedings had been initiated and the suspect's attorney specifically

related to the officers not to interrogate the arrestee. The Court held that the detectives' interrogation of the arrestee violated plaintiff's Sixth Amendment right to counsel and affirmed the writ of habeas corpus.

In stark contrast to *Brewer,* Rothgery was not arraigned, he waived his right to counsel, and was not questioned by officers or prosecutors. In short, no adversary judicial proceedings were initiated in the case at bar and Petitioner's rights were not violated under the Sixth Amendment.

In *Michigan* v. *Jackson*, 475 U.S. 625 (1986), this Court examined two murder cases out of the state of Michigan involving arrestees who were arraigned, requested counsel be appointed and were subsequently interrogated post arraignment. This Court held that the post arraignment confessions were improperly obtained and affirmed the reversal of their convictions.

In the case at bar, Petitioner was not arraigned, but only informed of the charges against him and bail was set. In *Jackson,* the prosecutor's office approved and issued the complaints and warrants that led to the arraignment. *See, People* v. *Bladell*, 365 N.W.2d 56, 71-72 (Mich. 1984). The arraignment under Michigan law is functionally different than a Preliminary Initial Appearance under Article 15.17 under Texas law. The Fifth Circuit in *McGee* v. *Estelle*, 625 F.2d 1206 (5th Cir. 1980), specifically addressed this issue and held that the Preliminary

Initial Appearance under Art. 15.17 did not initiate adversary judicial proceedings. This Honorable Court denied Certiorari in *McGee* at 449 U.S. 1089 (1981).

Petitioner Rothgery was not subject to a formal charge, preliminary hearing, indictment, information or arraignment at his Preliminary Initial Appearance of July 16, 2002, as a matter of law. *Kirby* v. *Illinois*, 406 U.S. 682, 689 (1972).

2. Other Circuits.

Petitioner's assertion of a conflict in the Sixth, Third and Eleventh Circuits is misplaced.

A. Sixth Circuit.

Petitioner Rothgery cites *Mitzel* v. *Tate*, 267 F.3d 524 (6th Cir. 2001) as an example of a conflict with the case at bar. However, *Mitzel* involved a habeas corpus petition wherein the question presented to the Court was whether or not Mitzel's Sixth Amendment right to counsel was violated by a post polygraph interrogation wherein a statement was taken without Mitzel's attorney being present. Mitzel had been placed under arrest, a complaint issued against him detailing the facts of the offense and he had made an initial appearance before a state judge. In the State of Ohio, the initial appearance is an arraignment wherein the defendant must plead to the charges and request a trial by jury or face waiver of that right. *State* v. *Garris*, 128 Ohio App.3d 126, 130, 713 N.E.2d

1135, 1138 (1998). In the State of Ohio the Initial Appearance is an arraignment under state precedent and therefore, is the initiation of adversary judicial proceedings. Petitioner's assertion to the contrary is not supported by Ohio case law. In any event, the Court in Mitzel determined that the post arraignment statement given by the Plaintiff without his counsel's knowledge was a violation of Mitzel's Sixth Amendment right to counsel but such error was harmless. The Sixth Circuit case of *Mitzel* v. *Tate* is not in conflict with the case at bar.

B. Third Circuit.

Petitioner Rothgery's reliance on *Matteo* v. *Superintendent, SCI Albion,* 171 F.3d 877 (3d Cir. 1991) (en banc) is misguided. In *Matteo,* the Court examined the Massiah Doctrine governing the constitutionality of so-called "secret interrogations". Case precedent establishes three basic requirements for finding of a Sixth Amendment violation in this context:

(1) The right to counsel must have attached at the time of the alleged infringement;

(2) The informant must have been acting as a government agent; and,

(3) The informant must have engaged in deliberate elicitation of incriminating information from the defendant. *Massiah* v. *United States*, 377 U.S. 201, 206 (1964).

In *Matteo* the so-called secret interrogations had occurred at a time subsequent to Matteo having been arrested, arraigned and having retained counsel. In *Matteo*, the Third Circuit held that even if petitioner's Sixth Amendment rights were violated, that the informant was not acting as a government agent and therefore, denied the habeas petition. Once again, Petitioner Rothgery misses the mark. The Third Circuit case of *Matteo* is not in conflict with the case at bar.

C. Eleventh Circuit.

Petitioner Rothgery's reliance on *Fleming* v. *Kemp,* 837 F.2d 940 (11th Cir. 1988), is misplaced. In *Fleming*, another habeas corpus proceeding, the Eleventh Circuit affirmed the denial of the prisoner's writ of habeas corpus finding that any error in admitting of two statements made in response to improper interrogation was harmless. The Fleming Court did not address a proceeding similar to the proceedings under Texas law, Tex. Code of Crim. Proc. Ann., art. 15.17. In *Fleming*, there was an arraignment under Georgia law which initiated adversary judicial proceedings. Under Georgia law, URMC 13.1 entitled, "Initial Appearance Hearing" the judicial officer, inter alia, informs the accused of the charges; informs the accused he has the right to remain silent; determines whether the accused desires and is in need of an appointed attorney; informs the accused of his right to a pre-indictment probable cause hearing . . . informs the accused that if he desires to waive these rights and

plead guilty, he shall so notify the judge. . . . *State* v. *Simmons*, 260 Ga. 92, 390 S.E.2d 43 (1990). As this Court reasoned in *Hamilton* v. *Alabama*, 368 U.S. 52 (1961), an arraignment is a pretrial stage under which the Sixth Amendment attaches since certain defenses can be waived if they are not raised.

Under Texas law, the Preliminary Initial Appearance is not a stage in the proceeding where the arrestee is subject to a formal charge, preliminary hearing, indictment, information or arraignment.

The Eleventh Circuit is not in conflict with the case at bar.

3. Courts of Last Resort.

Petitioner Rothgery's assertion of a conflict among state courts of last resort is misplaced. In *O'Kelly* v. *State*, 604 S.E.2d 509 (Ga. 2004) the Georgia Supreme Court held that the Sixth Amendment right to counsel attached at the arraignment. As previously noted, Georgia law allows for the arrestee to waive certain rights and plead guilty which is in marked contrast to the Texas preliminary appearance.

Similarly, Petitioner cites *State* v. *Jackson*, 380 N.W.2d 420 (Iowa 1986), as an example of a conflict with the Fifth Circuit. However, Petitioner misconstrues the Jackson case. Under Iowa law, the right to counsel attached upon the filing of a complaint by the county attorney followed by the issuance of a warrant. The Court noted that the significant level of

prosecutorial involvement showed that the State had committed itself to prosecution. Iowa case law is not in conflict with the Fifth Circuit.

Petitioner Rothgery further cites *State* v. *Tucker*, 645 A.2d 111 (N.J. 1994); *Bradford* v. *State*, 927 S.W.2d 329 (Ark. 1996); and *Owen* v. *State,* 596 So.2d 985 (Fla. 1992) for his position that a conflict exists. However, all three of these cases deal with arraignments where counsel had been appointed and subsequent statements taken. The cases cited by Petitioner are not analogous with Texas law and the workings of a Preliminary Initial Appearance under Tex. Code of Crim. Proc. Ann., art. 15.17, as a matter of law. There is no conflict between the Fifth Circuit's decision in the case at bar and the decisions of State Courts of last resort.

4. No Conflict.

The Fifth Circuit Opinion of *Rothgery* v. *Gillespie County*, 419 F.3d 293 (5th Cir. 2007) is not in conflict with any opinion of this Court, is not in conflict with any opinion of the Courts of Appeals, nor is it in conflict with any state courts of last resort. In the case at bar, Petitioner Rothgery brought his complaint pursuant to 42 U.S.C. §1983 for civil damages alleging that his civil rights under the Sixth Amendment were violated by not having counsel appointed for him at his Preliminary Initial Appearance on July 16, 2002. Rothgery, in fact, waived his right to counsel at the Preliminary Initial Appearance on July 16, 2002. (See, App. C – 45-48). Petitioner Rothgery failed

to proffer any evidence of a custom or policy of Gillespie County that was a direct proximate cause of Plaintiff's alleged constitutional deprivation. At most, Petitioner proffered evidence of negligence with regard to this single incident which fails to prove municipal liability under *Monell*, as a matter of law. *Bd. of County Comm'rs of Bryan County, Oklahoma* v. *Brown,* 520 U.S. 397 (1997).

CONCLUSION

The trial court properly held that Respondent Gillespie County did not violate Petitioner's Sixth Amendment Rights under 42 U.S.C. §1983 in granting Respondent's Motion for Summary Judgment. The Fifth Circuit Court of Appeals affirmed the trial court's granting of summary judgment to Respondent Gillespie County. There is no compelling reason to grant Petitioner's Writ of Certiorari. Respondent requests that the Petition be denied.

Respectfully submitted,

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