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

BRIEF OF *AMICI CURIAE* TWENTY-TWO PROFESSORS OF LAW IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether Petitioner's right to counsel under the Sixth Amendment had attached after he was arrested and brought before a magistrate who informed him of his rights and of the accusation against him, found probable cause that he had committed the offense he was accused of, and committed him to jail pending trial or the posting of bail.

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INTEREST OF *AMICI CURIAE*[1]

Amici are law professors[2] whose teaching and research interests include matters of criminal procedure. *Amici* have an interest in this case because the lower court's decision undermines the right to counsel protected under the Sixth Amendment. As professors of law, *amici* are keenly aware of the essential role that counsel play in

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[1] The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the *amici curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

[2] This brief represents the views of the following professors of law: Susan Bandes, DePaul University School of Law; John Blume, Cornell Law School; Craig Bradley, Indiana University School of Law–Bloomington; Joshua Dressler, Ohio State University Moritz School of Law; Stuart Green, Louisiana State University Paul M. Hebert Law Center; Bernard Harcourt, University of Chicago Law School; Susan N. Herman, Brooklyn Law School; John Junker, University of Washington School of Law; Yale Kamisar, University of Michigan Law School; Arnold Loewy, Texas Tech University School of Law; Eric Luna, University of Utah S.J. Quinney College of Law; Bridget McCormack, University of Michigan Law School; Tracey Meares, Yale Law School; David Moran, Wayne State University Law School; Daniel Richman, Columbia Law School; Stephen Saltzberg, George Washington University Law School; Christopher Slobogin, University of Florida Levin College of Law; Carol Steiker, Harvard Law School; Jordan Steiker, University of Texas School of Law; George Thomas, Rutgers School of Law–Newark; James Tomkovicz, University of Iowa College of Law; and Charles Whitebread, University of Southern California Law School. They do not join this brief as representatives of their respective institutions.

protecting the integrity of our criminal justice system. Our nation relies upon its lawyers to defend those whose freedom is at stake and to ensure that justice is done to all persons, innocent and guilty, wealthy and poor. *Amici* file this brief to urge this Court to grant the petition and clarify the rule governing attachment of the right to counsel to reduce the risk of erroneous decisions.

INTRODUCTION

In this case, an innocent man was arrested and jailed twice for a crime it was legally impossible for him to commit—he was accused of being a felon in possession of a firearm, though he was not in fact a felon at all.[3] Once his oft-repeated request for appointed counsel was finally granted, the charges against him were determined to be baseless and dropped—but not before Petitioner Walter Rothgery spent weeks in jail. Pet. 3. This case presents the Court with an opportunity to prevent such injustices in the future by clarifying its rule regarding when the Sixth Amendment right to counsel attaches.

This Court has consistently held that the right to counsel under the Sixth Amendment[4] attaches at the initiation of adversary judicial proceedings. But because such proceedings may commence in a variety of ways—*e.g.,* by charge, indictment, information, or

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[3] *Amici* do not separately recite the facts of this case, but rely on the statement of facts in the Petition.

[4] Rothgery's right to counsel arose under the Fourteenth Amendment, which incorporates the protection of the Sixth Amendment. *See Gideon v. Wainwright*, 372 U.S. 335, 342 (1963). For simplicity's sake, this brief refers to the right to counsel as a Sixth Amendment right.

arraignment—that rule is not always easy to apply. The result is lower court confusion and error, as illustrated by the Fifth Circuit's decision below. Indeed, as the Petition shows, that decision reflects a division of authority among the lower courts regarding when the right to counsel attaches.

This Court should grant review to address that split. *Amici* further urge, however, that in doing so the Court should adopt a clear rule that will simplify the analysis of when the right to counsel attaches. The history and purposes of the Sixth Amendment, as well as this Court's precedents, support the conclusion that the Sixth Amendment guarantees a right to counsel to defend a person's liberty when that liberty is threatened. The current "initiation of judicial proceedings" rule attempts to get at when such defense is needed. *Amici* submit that a modest refinement of the test would dramatically improve it.

Specifically, *amici* propose that the Court make explicit what is already implicit in the cases. The Court should hold that, following a warrantless arrest, adversary judicial proceedings have commenced when there has been a judicial determination of probable cause and the government has imposed significant restrictions on a person's liberty. Such a rule is consistent with this Court's precedents and readily applicable notwithstanding the vagaries of state procedure.

The holding *amici* suggest draws upon two lines of authority. In one, this Court has explained that the right to counsel attaches at the initiation of adversary judicial proceedings—the point at which a "suspect" becomes an "accused." *Michigan v. Jackson*, 475 U.S. 625, 632 (1986); *see also Brewer v.*

Williams, 430 U.S. 387, 398 (1977). In the second line of authority, this Court has held that the government may not impose significant restraints upon a person's liberty for more than 48 hours following arrest without a judicial determination of probable cause. *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991); *Gerstein v. Pugh*, 420 U.S. 103 (1975). These two lines of authority, read together, support a simple, bright-line rule: at the latest, once a *Gerstein* hearing is complete and the magistrate has found probable cause to believe the accused has committed a crime, the right to counsel attaches. Such a rule is supported by the Court's decisions in *Argersinger v. Hamlin*, 407 U.S. 25 (1972), and its progeny, which hold that a person is entitled to appointed counsel if the government intends to deprive him of his freedom for even a single day.

The proposed rule would not require counsel to be appointed for the *Gerstein* hearing; it would simply recognize that the right has attached once the hearing is complete. Such a rule, in accord with this Court's precedents, would ensure that when the government has significantly restrained an accused's liberty and has no intention to release him, he will have the assistance of counsel to defend himself.

ARGUMENT

I. The Court Should Grant the Petition to Clarify When the Right to Counsel Attaches.

The Court should grant review in this case because the rule for determining when the right to counsel attaches has created confusion in the lower courts—confusion only this Court can resolve.

Moreover, this case presents an opportunity for the Court to provide clear guidance for future cases.

A. Under this Court's precedents, the right to counsel attaches at the initiation of adversary proceedings.

This Court has long held that the right to counsel attaches at the initiation of adversary judicial proceedings. *See, e.g.*, *Brewer v. Williams*, 430 U.S. 387, 398 (1977) (citing cases). The Court has made clear that adversary proceedings might commence in any number of ways, such as by "formal charge, preliminary hearing, indictment, information, or arraignment." *Id.* But no matter *how* proceedings might commence, this Court has consistently said that the right to counsel attaches *as soon as they do*.

Thus, in *Michigan v. Jackson*, 475 U.S. 625 (1986), the Court summarily rejected the argument that under Michigan's particular procedures, arraignment did not sufficiently affect the defendant's rights to justify attachment of the right to counsel. *See id.* at 629 n.3. The Court explained that the Sixth Amendment provides a right to counsel once "a person who had previously been just a 'suspect' has become an 'accused,'" including by formal accusation at an arraignment. *Id.* at 632.

In contrast, *before* the initiation of adversary judicial proceedings, there is no right to counsel. In *Kirby v. Illinois*, 406 U.S. 682 (1972), for example, the Court held that the right to counsel had not attached when Kirby was identified in a police lineup shortly after arrest. *Id.* at 684-85 (plurality op). In *Jackson*'s terms, Kirby—who had been picked up by the police for carrying another man's social security

card and travelers' checks—was merely a suspect when his victim came in and identified him. *See id*.

This Court's focus on the initiation of adversary judicial proceedings—the moment of transition between "suspect" and "accused"—reflects an understanding that varied state procedures, and the varied facts of specific cases, make it hard to identify a single, specific triggering event at which the right to counsel attaches in all cases. Instead, the Court's rule is essentially that the right to counsel attaches *whenever* the state determines that it shall be adverse to an individual, seeking to deprive him of his liberty. *See Brewer*, 430 U.S. at 398; *Kirby*, 406 U.S. at 689.

B. The decision below illustrates the need for a clear rule.

The Fifth Circuit's decision below cannot be squared with this Court's precedents. It is clear that Rothgery was, in fact, arraigned when he appeared in front of the magistrate. *See* Pet. 6 n.1 (explaining meaning of arraignment); Pet. App. 14a-15a (describing Rothgery's appearance before the magistrate). In light of the Court's statement in *Jackson* about the importance of arraignment, the fact that Rothgery had been arraigned should have ended the inquiry into the commencement of proceedings. *See Jackson*, 475 U.S. at 629 n.3 (noting the "clear language in our decisions about the significance of arraignment"). Similarly, the *Jackson* Court's discussion of the Sixth Amendment significance of the line between being a "suspect" and an "accused" should have dispelled any doubt that Rothgery's right had attached. *See id*. at 632 (distinguishing between being an accused and a

suspect); Pet. App. 15a (court below noting that the magistrate "informed Rothgery that Rothgery was *accused* of the criminal offense of unlawful possession of a firearm by a felon") (emphasis added).

The Fifth Circuit, however, declined to recognize the significance of the fact that Rothgery's arraignment made him an "accused."[5] Instead, the lower court—focusing on language from Justice Stewart's plurality opinion in *Kirby*—concluded that the right to counsel attaches only when "the government has committed itself to prosecute and a defendant finds himself faced with the prosecutorial forces of organized society." Pet. App. 5a-6a (citations and quotation marks omitted). Because Rothgery had not proved that the *prosecutor* knew about the arrest and the arraignment, the Fifth Circuit held that Rothgery's right to counsel had not attached. *See* Pet. App. 12a.[6]

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[5] The Fifth Circuit also decided that it was not clear that the police officer's affidavit filed against Rothgery "charged" him in a manner sufficient to constitute the initiation of adversary proceedings. *See* Pet. App. 9a-11a. It is unclear how the court below reconciled the fact that Rothgery was not free to go following his arraignment with its conclusion that he had not been charged. *Amici* submit that, as a general matter, the Constitution entitles a person to be released if he is not charged with a crime for which there has been a judicial determination of probable cause within 48 hours of being arrested. *See County of Riverside v. McLaughlin*, 500 U.S. 44, 55-56 (1991).

[6] Even on its own terms, the Fifth Circuit's decision is incorrect. This Court has held that the knowledge of one state actor must be imputed to another in the Sixth Amendment context. *See Jackson*, 475 U.S. at 634 (stating that, in the Sixth Amendment context, "we impute the State's knowledge from one state actor to another"). The Court explained: "the Sixth Amendment concerns the confrontation between the State and the

What a prosecutor happens to know has little to do with whether an individual has been accused, and *Kirby* does not suggest otherwise. There, Justice Stewart was merely explaining why the right to counsel does not apply when a person has been arrested but *not* charged, as in *Kirby*. Again, as the *Jackson* Court would have put it, Kirby was a mere suspect rather than an accused. *See Jackson*, 475 U.S. at 632. Rothgery was plainly an accused.

The Fifth Circuit's decision, however, is not merely erroneous; it demonstrates the need for this Court to adopt a clear rule. The flexibility of this Court's rule—which acknowledges that adversary proceedings might commence in any number of ways—contributed to the Fifth Circuit's confusion. The lower court saw its task as anything but easy, seeking to discern the "sometimes elusive degree to which the prosecutorial forces of the state have focused on an individual." Pet. App. 5a-6a. In other words, instead of recognizing Rothgery's need for counsel when counsel could have kept him from jail, the Fifth Circuit felt impelled to comb the record to see who in the state government knew what about

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individual. One set of state actors (the police) may not claim ignorance of defendants' unequivocal request for counsel to another state actor (the court)." *Id*. If the police cannot claim ignorance of what occurs in court, there is no justification for permitting a prosecutor, an officer of the court, to claim ignorance of an arraignment that occurred in court, especially since it is the prosecutor's job to learn about such charges and to decide whether to press or drop them. In any event, the Fifth Circuit's innovative prosecutorial-involvement test is barred by *Jackson*. Moreover, even if the Court had not already rejected such a test, Petitioner is right that a prosecutorial-involvement test is unworkable in practice. *See* Pet. 3-4.

Rothgery's case when. Such an approach could hardly be less true to the Sixth Amendment's purpose or this Court's precedents. But in the absence of clearer guidance from this Court, errors such as the one committed in the court below are likely to be repeated. Indeed, as the Petition demonstrated, the Fifth Circuit is not the first court to have made such a mistake. *See* Pet. 12-18.

This Court, then, should grant review to address the split among the lower courts and to adopt a clear rule. *Amici* propose that consistent with the purposes and history of the Sixth Amendment and this Court's precedents, the Court should hold that following a warrantless arrest, the right to counsel attaches, at the latest, once a court has found probable cause to commit an accused to custody or set bail.

II. This Court Should Hold that the Right to Counsel Attaches, at the Latest, Once a Court Has Found Probable Cause to Commit an Accused to Custody.

A. The Sixth Amendment guarantees a right to counsel to defend an accused's liberty.

Under the common law, while parties in civil cases and misdemeanor defendants were entitled to counsel, defendants in felony cases had no right to the assistance of counsel. Francis H. Heller, *The Sixth Amendment to the Constitution of the United States* 9-10 (1951). *Cf.* William M. Beaney, *The Right to Counsel in American Courts*, 8-11 (1955) (noting that judges in England recognized the injustice of the rule and sometimes permitted counsel to play a role in the defense). That rule changed only slightly after the Glorious Revolution, when defendants in treason

cases gained the right to counsel (a matter of special concern to the political classes). Heller, *supra*, at 10. But it was not until 1836 that those accused of other felonies were granted the right to counsel. *Id.*[7]

The Sixth Amendment rejected the common law approach. *Id.* at 109; *see also Powell v. Alabama*, 287 U.S. 45 (1932). This Court, in explaining that the common law rule never gained traction in America, assessed it harshly: "An affirmation of the right to the aid of counsel in petty offenses, and its denial in the case of crimes of the gravest character, where such aid is most needed, is … outrageous and … obviously a perversion of all sense of proportion." *Powell*, 287 U.S. at 60. In America, the Court noted, the right to be heard by counsel has always been seen to be "fundamental." *Id.* at 68, 70, 73.

The American rule, embodied in the Sixth Amendment, recognizes that "the right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." *Id.* at 68-69. Indeed, in our Nation's tradition, the importance of having counsel to represent one's interests can hardly be overstated. This Court has approvingly quoted the adage that "a lawyer who represents himself has a fool for a client." *Kay v. Ehrler*, 499 U.S. 432, 438 (1991). The layman is in

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[7] The common law deprived the accused of other rights that are now explicitly protected by the Sixth Amendment. For example, until 1606, an accused was not permitted to present witnesses at all in his defense. Heller, *supra*, at 9. Even then, defense witnesses could not be sworn; that right was denied until the beginning of the eighteenth century for felony trials. *Id.* & n.34. At common law, an accused felon was not even entitled to receive a copy of the indictment against him. *Id.* at 10.

even greater need of counsel. Justice Sutherland, writing for the Court in *Powell*, explained:

> Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.

287 U.S. at 69. Justice Sutherland continued: "If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect." *Id.*

Those words aptly describe the situation of indigent defendants today, who depend on the court to protect their right to counsel. As this Court is aware, approximately eighty percent of state felony defendants use court-appointed lawyers. *Kowalski v. Tesmer*, 543 U.S. 125, 140 (2004) (Ginsburg, J., dissenting) (citing U.S. Dept. of Justice, Bureau of Justice Statistics, C. Harlow, Defense Counsel in Criminal Cases 1, 5 (2000), available at http://www.ojp.usdoj.gov/bjs/pub/pdf/dccc.pdf). Many

of those defendants, like sixty-eight percent of the state prison population, did not complete high school; many lack basic literacy skills. *Halbert v. Michigan*, 545 U.S. 605, 621 (2005) (citations omitted). Indeed, this Court has observed that seven of ten inmates are unable to perform such basic tasks as writing a letter to explain an error on a credit card bill, using a bus schedule, or stating in writing an argument made in a newspaper article. *Id.*; *see also* U.S. Dept. of Ed., National Center for Education Statistics, Literacy Behind Bars: Results from the 2003 National Assessment of Adult Literacy Prison Survey, 5-7, 13 (2007), available at http://nces.ed.gov/pubs2007/2007473.pdf.

In light of the history of the Sixth Amendment and recognizing the fact that lawyers are "necessities, not luxuries," *Gideon*, 372 U.S. at 344, courts have insisted on a broad understanding of the right to counsel. On its face, the Sixth Amendment provides only that "[i]n all criminal prosecutions, the accused shall enjoy the right … to have the Assistance of Counsel for his defence." But this Court has construed "prosecution" to comprehend the pre-trial period, "when consultation, thorough-going investigation and preparation [are] vitally important," in addition to the trial. *Powell*, 287 U.S. at 57 (citing *Burgess v. Riseley*, 13 Abb. N. Cas. 186 (N.Y. Sup. Ct. 1883); *Batchelor v. State*, 125 N.E. 773 (Ind. 1920)). The relevant question, this Court has explained, is whether counsel would be able to assist an individual in protecting "*any* rights [he] did possess." *United States v. Wade*, 388 U.S. 218, 223-24 (1967) (emphasis added, citation and quotation marks omitted).

The Court's statement in *Powell* that the right to counsel applies beyond the confines of trial was hardly novel. In *Burgess*, the New York case on which the *Powell* Court relied, the court rejected the argument that a person "committed by a magistrate" and confined before an indictment was returned was not entitled to see his lawyer. 13 Abb. N. Cas. at 186. The court pointed out that the accused, even before indictment, has rights: "He may claim, perhaps, that his detention is illegal; that the evidence taken before the magistrate was insufficient, and may desire, through counsel, to obtain a writ of *habeas corpus*, or some other process to inquire into the legality of his imprisonment." *Id.* at 188. To protect these rights, the right to counsel should "be so construed as to give every one accused of or arrested for crime the benefit of counsel at every step and stage of the proceeding. This construction is demanded by every consideration of humanity, and the enlightened views of personal rights resulting from Christian civilization." *Id*. at 188-89.

In *Batchelor*, too, the court held that an accused had been denied the right to counsel when, after arrest but before indictment or arraignment, he had repeatedly asked to see a lawyer, and had been refused. Though he was explicitly told that he had a right to a lawyer at his arraignment, the court held that his right to counsel had been denied, noting the time he had been in custody without being permitted to see a lawyer. 125 N.E. at 776.

These and other cases confirm that the underlying purpose of the Sixth Amendment is the assistance of counsel to contest government-imposed restraints on liberty, and not merely a right to legal

assistance at trial. That is why, as the *Burgess* court explained, a person may meet with his lawyer to ask the lawyer to file a petition for a writ of habeas corpus prior to an indictment. *See also* Akhil Reed Amar, *Twenty-Fifth Annual Review of Criminal Procedure: Foreward: Sixth Amendment First Principles*, 84 Geo. L.J. 641, 705 (1996) (explaining that an accused may need to file a petition for a writ of habeas corpus if he is detained prior to trial). As discussed in Part I, *supra*, consistent with this broad understanding of the right to counsel, this Court has long held that the right attaches at the beginning of adversary proceedings—that is, as soon as a person truly needs counsel to protect his interests. *See Brewer*, 430 U.S. at 398.

Indeed, it would be contrary to the most fundamental postulates of our legal system to conclude that, in a garden-variety criminal case, a person could be arrested and denied access to a lawyer to file a petition for habeas corpus simply *because* the state decided to hold the person without indictment or trial. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 539 (2004) (plurality opinion) (noting that, even in the context of an alleged enemy combatant seeking habeas relief, the petitioner "unquestionably has the right to access to counsel"); *id.* at 554-55 (Scalia, J., dissenting) ("The very core of liberty secured by our Anglo-Saxon system of separated powers has been freedom from indefinite imprisonment at the will of the Executive."). Yet that is effectively what the court below decided—that Rothgery had *no right to counsel at all* until the indictment was filed. *See* Pet. App. 12a. The Sixth Amendment's history and purpose compel a much broader understanding of the right to counsel: the

right to counsel must be understood to be a right to not be denied counsel when counsel is necessary to defend one's freedom.

B. This Court should declare that adversary judicial proceedings commence once a court has found probable cause to commit an accused to custody.

There is a very straightforward way of determining whether counsel is necessary to defend an individual's freedom—look to whether a court has imposed restrictions on that freedom. Specifically, *amici* urge this Court (consistent with the history and purposes of the Sixth Amendment set forth above) to hold that, following a warrantless arrest, the right to counsel attaches at the latest once there has been a judicial determination that there is probable cause to impose significant restrictions on a person's liberty.[8]

Such a rule is supported by this Court's approach in *Gerstein v. Pugh*, 420 U.S. 103 (1975), and *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991). *Gerstein* held that a person arrested without a warrant must be "promptly" brought before a magistrate for a determination of probable cause, if the state wishes to impose any significant restraint on him prior to trial. *Gerstein*, 420 U.S. at 125. *Riverside* clarified what qualified as "prompt" under *Gerstein*, holding that a person presumptively may not be held more than 48 hours following arrest without a judicial determination of probable cause. *Riverside*, 500 U.S. at 47, 56. The Court's decision in

[8] The right to counsel would attach earlier if adversary proceedings had already been initiated.

Riverside simplified the determination required under *Gerstein*, and a similar clarification for when the right to counsel attaches will likewise reduce uncertainty and assist the lower courts.

Additionally, the reasoning of *Gerstein* and *Riverside* is substantially applicable here. *Gerstein* explained: "The consequences of prolonged detention may be more serious than the interference occasioned by arrest. Pretrial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships. Even pretrial release may be accompanied by burdensome conditions that effect a significant restraint of liberty." *Gerstein*, 420 U.S. at 114 (citations omitted). *Riverside* held that 48 hours is a reasonable measure of the "prolonged detention" that cannot constitutionally be imposed without a judicial probable cause determination. *Riverside*, 500 U.S. at 56; *see also Gerstein*, 420 U.S. at 125 n.26 (explaining that the "key factor is [whether there is] significant restraint on liberty"). These decisions recognize that, while a person does not have a right to counsel at an informal initial probable cause determination, a person's right to liberty speaks more forcefully after 48 hours have passed. He is, therefore, entitled to a judicial proceeding before his liberty can continue to be significantly restrained. And, as set forth above, once a person's liberty has been restrained in a judicial proceeding, he has need of, and is entitled to, counsel to defend that liberty.

Accordingly, this Court should declare that after a *Gerstein* hearing, at the latest, the right to counsel has attached. Such a rule is consistent with this Court's precedents. *See Jackson*, 475 U.S. at 629 n.3

(noting the "clear language in our decisions about the significance of arraignment" and affirming that the right to counsel had attached once the defendant was arraigned); *see also Brewer*, 430 U.S. at 398 ("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—*whether by way of formal charge, preliminary hearing, indictment, information, or arraignment*") (emphasis added, citations and quotation marks omitted). But it would also greatly simplify the determination a court must make—a determination that, as the Petition showed, has bedeviled the lower courts. *See* Pet. 12-18 (discussing split of authority among the lower courts); *see also* Pet. App. 5a-6a (the court below discussing its need to discern the "sometimes elusive degree to which the prosecutorial forces of the state have focused on an individual") (citation and quotation marks omitted).

Amici do not suggest that a person is entitled to appointed counsel at a *Gerstein* hearing. *See Gerstein*, 420 U.S. at 122. Rather, it is *after* the government has determined that it will restrain a person's liberty for more than 48 hours, and thus has provided him with a *Gerstein* hearing, that the right to counsel attaches. Again, that this is the appropriate timeframe follows from *Riverside* and *Gerstein*. In effect, if the government does not unconditionally release a person following his *Gerstein* hearing, it has said: "We are restraining you because we believe you have probably committed a crime." It is at that point that a person needs counsel

to defend his liberty. The Sixth Amendment, properly understood, protects that right.

The proposed rule is also consistent with this Court's decisions in *Argersinger v. Hamlin*, 407 U.S. 25 (1972), and its progeny. Those cases hold that, in any criminal prosecution where a person's freedom is at stake, even for a single day, he is entitled to counsel. *Id.* at 33; *see also Glover v. United States*, 531 U.S. 198, 203 (2001) ("*any* amount of actual jail time has Sixth Amendment significance") (emphasis added). As the Court explained, "incarceration [is] so severe a sanction that it should not be imposed … unless an indigent defendant ha[s] been offered appointed counsel." *Scott v. Illinois*, 440 U.S. 367, 372-73 (1979). Indeed, a person may not even be given a suspended sentence of imprisonment without first being provided counsel. *Alabama v. Shelton*, 535 U.S. 654 (2002).

So long as an uncounseled accused may not be sentenced to even a day's confinement, the only justification for denying a jailed person a lawyer *prior* to trial should be that, for all the practical reasons that underlay *Riverside*, the government is entitled to hold him for up to 48 hours based on a police officer's reasonable determination of probable cause. After that point, however, he should be entitled to the protections of the judicial system, including a neutral magistrate's determination of probable cause and counsel to defend his freedom.

Even assuming that the right to counsel applies to a person *held* for more than 48 hours, it might be argued that bail is different—that the right to counsel should not necessarily attach if a person is admitted to bail following a judicial determination of

probable cause.[9] Yet such an argument would be mistaken for three reasons. Most fundamentally, this Court has made clear that the right to counsel attaches at the initiation of adversary proceedings. *See Brewer*, 430 U.S. at 398. Whether an accused is admitted to bail or not at a judicial proceeding does not change whether the government is "adverse" to him in any meaningful sense. Second, to argue that a person is not entitled to counsel if he is admitted to bail ignores the substantial restraints on liberty such a status can imply. *See Gerstein*, 420 U.S. at 114. Third, this Court has held that a person cannot be subjected to a suspended sentence of confinement without having a right to counsel. *Shelton*, 535 U.S. 654. A person admitted to bail is in a similar state. He may face the prospect of jail at any moment, including, for example, if he should commit a crime (even one for which he could not be imprisoned), or if he should lose his job. *See* 18 U.S.C. § 3142(c)(1)(A), (B)(ii). There is no justification for denying a person in such circumstances the right to have a lawyer challenge the terms of his bail.[10]

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[9] The decision below is inconsistent even with that result. The Fifth Circuit concluded that Rothgery's right to counsel attached only once the prosecutor obtained an indictment against him. *See* Pet. App. 5a-6a, 12a (asserting that the right to counsel attaches "when the government has committed itself to prosecute" and emphasizing that only a prosecutor was "empowered to commit the state to prosecute") (citations and quotation marks omitted). Thus, it appears the Fifth Circuit believed Rothgery could have sat in jail, awaiting indictment, and suffered more of a deprivation of liberty than contemplated in *Argersinger* and its progeny, but not been entitled to counsel to help him challenge his detention—for a crime, it bears emphasizing, he was legally incapable of committing.

[10] *Amici* do not suggest that the right to counsel attaches when

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Some have criticized this Court's criminal procedure jurisprudence as being more protective of the guilty than the innocent. *See* Amar, *supra*, at 644-48. This is a case where an innocent man spent weeks in jail only because he could not afford a lawyer and the state refused to provide him with one. Unless this Court grants review in this case, he will not be the last. The Sixth Amendment should be, and traditionally has been, seen to protect such an innocent person's right to the assistance of counsel in defending his freedom.

This case presents a question that divides the courts and that will not be resolved without action by this Court. The Court should reverse the judgment of the Fifth Circuit and hold that, following a warrantless arrest, the right to counsel attaches at the latest once a judicial determination of probable cause has been made and the government has imposed significant restrictions on a person's liberty.

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a person is admitted to bail if there has not been a judicial determination of probable cause. That is, if a person is admitted to bail by the police following a misdemeanor arrest, required merely to appear before a judge at a later time at which he may be charged, there has been no judicial decision to restrain his liberty. In such a situation, the right to counsel would not have attached. It is the *judicial* determination of probable cause and commitment to jail (or bail) that initiates adversary judicial proceedings, and which therefore causes the right to counsel to attach. Likewise, if the government does not wish to subject the accused to a risk of imprisonment, the right to counsel does not attach (although it should attach if, not being able to make bail, the person is confined). *See Scott*, 440 U.S. at 373-74 (a person has a right to counsel if he may be subject to imprisonment).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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