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Prosecution Without Representation

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INTRODUCTION

> Justice Souter: "I want to know whether your position is that an individual may be brought by a police officer before a magistrate, charged with no crime, required to post bail, and if he doesn't post bail, be held for three weeks without charge. . . . I'm asking whether it would be constitutional without appointing counsel."[1]
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> Texas Solicitor General: "It would be—not be a violation of the Sixth Amendment right to counsel."[2]

Nearly a half-century since *Gideon v. Wainwright*[3] and its progeny guaranteed counsel to every poor person charged with a felony or misdemeanor crime, a critical question remained unanswered. After a criminal prosecution begins, what is the precise moment when a state must guarantee that an accused receives a lawyer's in-court representation? While counsel's early entry is crucial to gain freedom, start an investigation, and guard against

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1. Transcript of Oral Argument at 29-30, Rothgery v. Gillespie Cnty., 554 U.S. 191 (2008) (No. 07-440).

2. *Id.* at 30 (Tex. Solicitor Gen. Gregory S. Coleman).

3. 372 U.S. 335 (1963).

coerced pleas, the Supreme Court had never made clear if *Gideon* mandates representation when lower-income defendants initially appear before a judicial officer for a determination of bail or pretrial release. In light of the lack of a definitive holding by the Court, a checkered pattern exists across the nation where states conduct bail hearings without a defense counsel's presence and indigent defendants often do not gain the benefit of a lawyer's representation for many days, weeks, and even months thereafter.

Recently, the Supreme Court made significant progress toward declaring explicitly that *Gideon*'s guarantee includes representation once a prosecution begins and an accused appears before a judicial officer for a determination of bail.[4] The Court ruled that an accused's right to counsel attached at the first appearance hearing and that states cannot unreasonably delay assigning a lawyer to an indigent defendant.[5] The holding came in the case of Walter Rothgery, who spent weeks in jail due to an error in computer records, combined with the lack of timely appointment of counsel until six months after his bail hearing.[6] As a result, Rothgery lost his home and opportunity for employment.[7] Rothgery's use of civil rights § 1983 action[8] led to a decision that illuminated the Supreme Court's current thinking about representation at initial bail hearings.[9] The Justices' responses during oral

4. Rothgery v. Gillespie Cnty., 554 U.S. 191, 213 (2008).

5. *Id.*

6. *Id.* at 195-97.

7. *Id.* at 208; *see infra* p. 350.

8. "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other 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, suit in equity, or other proper proceeding for redress . . . ." 42 U.S.C. § 1983 (2006). The § 1983 civil rights statute was originally included as part of the Civil Rights Act of 1871, to provide a remedy against racially motivated violence by white supremacist groups, such as the Ku Klux Klan. *See* Linda E. Fisher, *Anatomy of An Affirmative Duty to Protect: 42 U.S.C. Section 1986*, 56 WASH. & LEE L. REV. 461, 471-74 (1999).

9. *See generally Rothgery*, 554 U.S. 191. This Article highlights the importance of the bail determination at the defendant's first judicial

argument suggest that the narrow issue decided in *Rothgery v. Gillespie County* could indicate that the Court is ready to consider closing this fundamental post-*Gideon* gap—states declining to guarantee a lawyer to represent an indigent incarcerated defendant at the initial bail hearing and for significant periods thereafter. When the Supreme Court again considers this question, the criminal law and human rights bar must stand ready to provide amicus support to ensure that the Court understands the plight of unrepresented state criminal defendants, and that the outcome of the next key case promotes a just system by strengthening the protection of individuals accused of crimes.

A. Gideon v. Wainwright

Within the legal culture, few decisions are more revered than the 1963 ruling in *Gideon v. Wainwright*, which established an accused poor person's guaranteed right to a lawyer when charged with a felony.[10] This landmark case was decided at a moment in history when substantial numbers of people supported human rights protests against a system of racial segregation and class bias against the poor.[11] The case addressed the longstanding denial of

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appearance. It recognizes the lack of uniformity among the fifty states regarding the "label" used to characterize the initial judicial proceeding where a judge or magistrate decides whether a defendant should be detained, released on bail or other conditions, or released on his or her recognizance. For these reasons, this Article uses "bail hearing" to emphasize what occurred at Rothgery's, and other defendants, first appearance. In *Rothgery*, the Supreme Court explained that, "Texas law has no formal label for this initial appearance before a magistrate, which is sometimes called the 'article 15.17 hearing'; it combines the Fourth Amendment's required probable-cause determination with the setting of bail, and is the point at which the arrestee is formally apprised of the accusation against him." *Id.* at 195 (citations omitted).

10. 372 U.S. 335, 344-45.

11. *See, e.g.*, Plessy v. Ferguson, 163 U.S. 537 (1896) (upholding the constitutionality of a Louisiana law that segregated train passengers on the basis of their race). Many states applied *Plessy's* "separate but equal" doctrine to the public arena to maintain American-style "racial apartheid" for almost six decades until 1954 when the Supreme Court ruled racial segregation unconstitutional in *Brown v. Board of Education*, 347 U.S. 483 (1954). The post-*Brown* civil rights struggle to gain citizenship and freedom rights for African-Americans eventually led to a national March against Poverty in Washington,

counsel violations embedded in a criminal justice system that disproportionately impacted the rights of minority and indigent defendants. The unanimous opinion declared that a lawyer's role is essential for guaranteeing fairness and protecting the liberty of a poor person accused of committing a crime.[12] Reversing a 175-year-old practice, the Court in *Gideon* recognized that "[t]he right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours."[13]

During the next decade, the Supreme Court extended indigent defendants' guarantee of counsel to misdemeanors[14] and to certain pretrial proceedings considered to be "critical"[15] stages of state criminal proceedings. Beginning in 1974, however, the momentum toward guaranteeing poor people access to counsel before trial came to a sudden halt when the Court ruled in *Gerstein v. Pugh* that indigent defendants were not entitled

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D.C., during the summer of 1963. TAYLOR BRANCH, PILLAR OF FIRE: AMERICA IN THE KING YEARS 1963-65, at 102-03, 131-34 (1998).

12. *Gideon*, 372 U.S. at 344.

13. *Id.*

14. *See* Argersinger v. Hamlin, 407 U.S. 25, 34 (1972) (holding that the right to a trial lawyer includes counsel at a pretrial proceeding). "Counsel is needed so that the accused may know precisely what he is doing, so that he is fully aware of the prospect of going to jail or prison, and so that he is treated fairly by the prosecution." *Id.*

15. The standard focuses on the importance of the rights of an accused that are at risk without counsel's presence, such as pretrial liberty and the privilege against self-incrimination, rather than on the ultimate outcome of the infrequent trial. The *Rothgery* Court explained that "what makes a stage critical is what shows the need for counsel's presence." Rothgery v. Gillespie Cnty., 554 U.S. 191, 212 (2008). The Court referred to "critical stages as proceedings between an individual and agents of the State (whether 'formal or informal, in court or out,') that amount to 'trial-like confrontations,' at which counsel would help the accused 'in coping with legal problems or . . . meeting his adversary." *Id.* at 212 n.16 (citations omitted); *see also* Coleman v. Alabama, 399 U.S. 1, 9-11 (1970) (mandating counsel at the critical stage of a felony preliminary hearing); United States v. Wade, 388 U.S. 218, 223-27 (1967) (post-indictment lineup is a critical stage triggering right to counsel); Hamilton v. Alabama, 368 U.S. 52, 53-55 (1961) (arraignment on indictment is a critical stage). For an argument that bail is a critical stage, see Douglas L. Colbert, *Thirty-Five Years After* Gideon*: The Illusory Right to Counsel on Bail Proceedings*, 1998 U. ILL. L. REV. 1, 35-37 [hereinafter Colbert, *Illusory Right to Counsel*].

to representation for the initial probable cause determination.[16]

Following *Gerstein*, many states' practices denied indigent defendants assigned counsel at the defendant's initial bail hearing to protect liberty and to commence preparing a defense. Look inside most state and local criminal courtrooms today and you are likely to find defendants appearing alone and without a lawyer when first facing a judicial officer,[17] whether present in court or via video broadcast.[18] States' pretrial jails are filled with detainees who have no lawyer to advocate for their pretrial freedom[19] and who often wait in jail for days, weeks, and sometimes even months following arrest before obtaining in-court representation.[20] In contrast, the Federal Rules of Criminal Procedure guarantee counsel at an indigent defendant's bail hearing.[21]

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16. 420 U.S. 103, 122-23 (1975).

17. *See infra* Part II.A.2 showing only ten states' criminal procedure laws and practices uniformly guarantee counsel at a defendant's initial appearance proceeding; *see also* app. tbl.I.

18. Commentators describe the "tremendous benefits" of video conferencing to the state by reducing prisoners' transportation costs, enhancing courtroom security, and increasing judicial efficiency when judges can hear more cases in a shorter time period. *See, e.g.*, Anne Brown Poulin, *Criminal Justice and Video-conferencing Technology: The Remote Defendant*, 78 TUL. L. REV. 1089, 1100, 1098-1103 (2004). Professor Poulin recognizes that "the use of videoconferencing for bail hearing may have a negative impact on the defendant." *Id.* at 1148. Since the defendant is a primary source of information at a bail hearing, the use of videoconferencing may impede the court's ability to assess the defendant's credibility, and prevent the defendant from participating through questioning of family or witnesses who can provide assurance at the bail stage. *Id.* at 1147-48. Should counsel be present, the defendant cannot confer directly when facing questions from the court or preparing what to say. *Id.*

19. The Bureau of Justice Statistics indicates that nationally, there were 477,500 incarcerated defendants awaiting trial in the states' local jails between 2008 and 2009. *See* TODD D. MINTON, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, JAIL INMATES AT MIDYEAR 2009—STATISTICAL TABLES 16 tbl.12 (June 2010), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/jim09st.pdf; *infra* Part II.A.3 (describing delays before assigned counsel's in-court representation in states that do not guarantee counsel at the initial appearance).

20. *See infra* Part II.A.3.

21. Since 1966, Federal Rule of Criminal Procedure 44(a) guarantees counsel to an indigent defendant "at every stage of the proceeding from initial appearance through appeal." FED. R. CRIM. P. 44(a).

B. Rothgery's *Challenge: An Overview*

The Supreme Court's grant of certiorari in *Rothgery v. Gillespie County*[22] represented a rare opportunity to address a vital question: Is a poor person entitled to immediate representation when first appearing at a bail hearing before a judicial officer? The criminal prosecution of Walter Rothgery dramatically illustrates why the answer is "yes." Rothgery was denied a courtroom advocate after being arrested and wrongfully charged for being an ex-felon in possession of a loaded gun.[23] The fifty-two-year-old former West Point cadet was never previously convicted of *any* crime.[24] The only blemish on his prior record was a 1996 felony drug arrest that was dismissed after he completed a court diversion program.[25] However, the computerized criminal background check erroneously suggested that the earlier arrest had resulted in a felony conviction.[26] Rothgery needed a lawyer's assistance to show that an error occurred but he lacked funds to hire one, and no court-appointed attorney appeared when he faced the magistrate.[27]

Like most states,[28] Texas did not guarantee counsel for indigent defendants at their initial bail hearing. Consequently, it was predictable that when Rothgery asked a Texas magistrate to appoint a free attorney, the judicial officer denied the request—using similar reasoning as the judge in *Gideon* when he rejected Clarence Earl Gideon's plea for a lawyer nearly forty-five years earlier.[29] The Texas

22. 554 U.S. 191 (2008).

23. *Id.* at 194-95.

24. *See id.* at 195.

25. *Id.* at 195 n.1.

26. *Id*. at 195.

27. *Id*. at 196.

28. *See infra* Part II.A.3.b.

29. *See* Gideon v. Wainwright, 372 U.S. 335, 337 (1963). "Mr. Gideon, I am sorry, but I cannot appoint Counsel to represent you in this case. Under the laws of the State of Florida, the only time the Court can appoint Counsel to represent a Defendant is when that person is charged with a capital offense. I am sorry, but I will have to deny your request to appoint Counsel to defend you in this case[,]" replied the trial judge to Mr. Gideon's application for counsel in 1961. *Id.* During oral argument before the Supreme Court, Florida's Assistant Attorney General explained the judge's ruling that justified requiring Mr. Gideon to defend himself without a defense lawyer:

magistrate told Rothgery that eventually he could have an assigned lawyer, but he would remain in jail without bail until counsel was assigned and appeared.[30] Rothgery opted to represent himself. The Texas magistrate ordered $5,000 bail and the defendant's return to his jail cell.[31]

Rothgery was more fortunate than many other unrepresented defendants. Instead of remaining incarcerated while the prosecution deliberated for ninety days about whether to charge him with a felony,[32] Rothgery regained his liberty after his wife posted bail for him. Once released, Rothgery persisted in making "several oral and written requests for appointed counsel."[33] His efforts failed. Rothgery remained without an attorney *for six months* until indictment, when he was re-arrested and learned his bail increased to $15,000.[34] Unable to afford the amount,

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> Now, on its face, that [ruling] appears to be a misstatement of the law because Florida does follow *Betts* versus *Brady* and in Florida a man is entitled to counsel if he can show, if he is indigent and also he is ignorant, illiterate or incompetent in some way. Since our brief has been printed, I have received a letter from the trial judge who handled this case. I asked him what happened at arraignment because I just couldn't believe that a judge would make this statement at the trial without examining the man and finding out whether he really was incompetent or unable to handle his own defense. And Judge McCurry wrote back and said . . . "After talking with this defendant, it was my opinion that he had both the mental capacity and the experience in the courtroom at previous trials to adequately conduct his defense. This was later borne out at the trial, as you can determine from examination of the record in this case."

Transcript of Oral Argument at 31-32, Gideon v. Wainwright, 372 U.S. 335 (1963) (No. 155) (Fla. Ass't Att'y Gen. Bruce R. Jacob).

30. *Rothgery*, 554 U.S. at 196.

31. *Id.*

32. In felony cases, Texas law gives a prosecutor ninety days to be ready for trial or the defendant must be released from jail. TEX. CODE CRIM. PROC. ANN. art. 17.151 (West 2009). For an accused released on recognizance or bond and awaiting trial, Texas prosecutors may present a felony charge to a grand jury within "three years from the date of the commission of the offense." *Id.* art. 12.01.

33. *Rothgery*, 554 U.S. at 196; Interview with M. Patrick Maguire, Walter Rothgery's assigned Trial Attorney, in Balt., Md. (Nov. 11, 2008) [hereinafter Maguire Interview].

34. *Rothgery*, 554 U.S. at 196. Upon indictment, Texas criminal procedure calls for an automatic review of the previous bail. TEX. CODE CRIM. PROC. ANN.

Rothgery again asked the presiding judicial officer to assign counsel.[35] This time, the judge agreed, but Rothgery remained in custody for the next three weeks, waiting for his lawyer's appointment and appearance.[36]

Once Rothgery's assigned counsel, M. Patrick Maguire, entered the case, the advocate acted "promptly."[37] First, he succeeded in persuading the prosecutor to consent to a bail reduction, allowing Rothgery to regain his freedom.[38] Thereafter, the attorney confirmed that his client *had* told the arresting officer the truth about not having a prior felony conviction. More than nine months following arrest, Rothgery's prosecutor dismissed the indictment.[39]

Rothgery then took an unusual step. Not satisfied that the dismissal provided an adequate remedy, he pursued justice through a civil action. With the able assistance of the Texas Fair Defense Project, Rothgery sued the County.[40] In

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art. 17.09 (West 2009). According to Rothgery's appellate counsel, William Christian, a Texas judge granted the prosecutor's request to raise Rothgery's bail. Shortly thereafter, he was arrested on the indictment. Telephone Interview with William Christian, Walter Rothgery's Appellate Counsel (Nov. 5, 2008). Rothgery's assigned trial lawyer, M. Patrick Maguire, indicated that a prosecuting attorney made an ex parte application for a bail increase after considering the potential danger of Rothgery's gun possession. Maguire Interview, *supra* note 33.

35. *Rothgery*, 554 U.S. at 196.

36. *Id.* The presiding judge at Rothgery's arraignment provided a form request for counsel, which Rothgery claimed he submitted, but then learned that it was misplaced. Maguire Interview, *supra* note 33. He filed a second application four days later. *Id*. When assigned counsel Maguire received notice of his appointment, he was engaged in a trial that prevented him from seeing Rothgery until three weeks after Rothgery's felony arraignment. *See infra* Part I.B.

37. The Supreme Court opinion gave the impression that counsel corrected the wrongful arrest and gained Rothgery's release from jail soon after his assignment, rather than three weeks later. The Court stated, "Rothgery was finally assigned a lawyer, who promptly obtained a bail reduction (so Rothgery could get out of jail) . . . . Counsel relayed . . . information to the district attorney, who in turn filed a motion to dismiss the indictment, which was granted." *Rothgery*, 554 U.S. at 196-97; *see also infra* notes 91-93 and accompanying text.

38. *Rothgery*, 554 U.S. at 196-97.

39. *Id.* at 197.

40. Telephone Interview with Andrea Marsh, Esq., Texas Fair Defense Project (Nov. 12, 2008) [hereinafter Marsh Interview].

his § 1983 civil rights claim, Rothgery did not contend that he had a constitutional right to counsel when he first appeared before the Texas magistrate.[41] Instead, Rothgery argued that he was denied a constitutional right to obtain counsel's future assistance when County officials refused to *assign* him a lawyer at his initial bail hearing and during the six months he remained free on bond.[42]

During the Supreme Court oral argument, most Justices indicated an interest in deciding the broad issue of whether an indigent's right to counsel included immediate representation, particularly for the jailed defendant.[43] Ultimately, the Court did not directly address the question and reached consensus on Rothgery's narrower position. The 8-1 majority agreed that, when a police officer files a criminal charge and a defendant appears before a judicial officer, an adversarial criminal prosecution has commenced and triggered the attachment of counsel.[44] Once the magistrate informed him of the charge, Rothgery's right to counsel "attached" and it was not necessary that a prosecutor was aware of or participated in initiating the prosecution. At a minimum, indigent defendants like Rothgery were entitled to know their appointed lawyer's identity during a "reasonable" period following the first bail hearing and the county could not delay counsel's appointment indefinitely.[45]

In reaching this conclusion, the Supreme Court considered Texas out of step with forty-three other states that assigned counsel before, at, or following the initial bail

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41. *See infra* Part I.C.

42. Complaint ¶¶ 23-32, Rothgery v. Gillespie Cnty., 413 F. Supp. 2d 806 (W.D. Tex. 2006) (No. A-04-CA-456LY) [hereinafter Civil Rights Complaint]; *see also infra* Part I.C.

43. *See infra* Part I.E.

44. *Rothgery*, 554 U.S. at 191, 213.

45. *Id.* at 212. Following the Supreme Court's ruling, the Fifth Circuit remanded Rothgery's suit to the trial court where the presiding judge's instructions to the jury will address the issue of reasonableness of the county's delay in assigning counsel. *See* Rothgery v. Gillespie Cnty., 537 F.3d 716, 716 (5th Cir. 2008) ("Under the circumstances, we think it advisable to vacate the district court's judgment and to remand for further proceedings that, from the beginning, are consistent with the Court's opinion.").

hearing.[46] It left for another day the determination of what is a "reasonable" delay following the filing of criminal charges before a state must ensure representation for an incarcerated and a released defendant.

Though *Rothgery's* specific holding of when the right to counsel attaches affirmed prior right to counsel rulings, its "critical stage"[47] analysis goes further and makes clear that counsel must be provided at any proceeding that addresses important rights of the defendant or involves a quasi-adversarial confrontation with the state, such as Rothgery's first appearance before the magistrate. Initial bail proceedings meet these tests, and guaranteeing counsel would provide tremendous benefits for the criminal justice system. Appointing counsel at a bail proceeding would result in pretrial release for many indigent defendants currently languishing in jail and produce a more streamlined and just system. Counsel's entry permits immediate investigation, preparation of a defense, and evaluation of the charge. It also provides a trial alternative to defendants inclined to accept prosecutors' "let's make a deal" plea offer to regain freedom. Counsel's representation also lessens the risk that an unrepresented defendant will utter an inculpatory statement while speaking for himself that a prosecutor subsequently uses at trial.[48] In short, counsel's presence enhances the fairness and efficiency of state criminal proceedings. Had Texas assigned a lawyer to a released defendant like Rothgery, he likely would have gained a speedy dismissal of the gun charge and been spared the loss of liberty and economic losses flowing from his pending weapons charge.

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46. Brief for The Nat'l Ass'n of Criminal Def. Lawyers as Amici Curiae in Support of Petitioner at 13, Rothgery v. Gillespie Cnty., 554 U.S. 191 (2008) (No. 07-440) [hereinafter NACDL Brief].

47. *See generally* Colbert, *Illusory Right to Counsel*, *supra* note 15. This Article focuses on the long delays indigent defendants face before obtaining an assigned counsel's assistance in court. The issue of bail as a critical stage, not argued in *Rothgery*, is deserving of careful analysis of the Court's clarification and will be the subject of future scholarship. For a pre-*Rothgery* constitutional discussion, see *id.*

48. *See* State v. Fenner, 846 A.2d 1020, 1034-35 (Md. 2004) (ruling admissible the prosecutor's use of an unrepresented defendant's inculpatory statement at a bail hearing that the defendant offered to mitigate the charge and to reduce the bail amount).

Though *Rothgery* took an important step,[49] it deferred answering two crucial questions. First, are states constitutionally required to provide for counsel's representation and advocacy at the initial bail hearing? And second, how long may states "reasonably" delay a lawyer's assistance to an incarcerated and released defendant awaiting trial?

When these issues reach the Court in a subsequent case, the Justices should consider the impact of denying representation at the bail determination, and examine how long indigent defendants have been waiting, following the setting of bail, before gaining the benefit of an appointed lawyer's in-court representation. In *Rothgery*, this information was not made available. This Article seeks to fill the glaring gap by presenting a national survey of states' current practices in lower criminal court proceedings.[50] Examining the reality in each state presents a picture of the often non-existent assigned counsel when lower-income defendants enter the system and first appear before a judicial officer. Most members of the bar and public may be surprised to learn how many people are not represented by a lawyer and that many wait five, ten, twenty, thirty days, or longer before appointed counsel is present in court. The

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49. *See The Supreme Court 2007 Term: Leading Cases*, 122 HARV. L. REV. 276, 306, 312 (2008) ("*Rothgery* will protect a subset of defendants—those charged and released on bail—who currently do not have their right to counsel activated when the prosecutor is unaware of their charges."). The *Rothgery* Court identified seven states—Alabama, Colorado, Kansas, Oklahoma, South Carolina, Texas, and Virginia—that did not assign counsel "at, or [shortly] after" the initial appearance. Rothgery v. Gillespie Cnty., 554 U.S. 191, 204-05 (2008). Additionally, Michigan, Mississippi, and New Hampshire do not provide counsel at the initial appearance and delay counsel's in-court appearance. *See* app. tbl.II. In local courts in forty states, counsel is not present at the first appearance but enters the proceedings at varying time periods ranging from as few as two to seventy days. *See* app. tbls.II-IV.

50. *See infra* Part II. Federal court procedures are considerably different than state procedures; since 1966, an accused is guaranteed counsel "at every stage of the proceeding from initial appearance through appeal." FED. R. CRIM. P. 44(a). Supreme Court Justices' limited experience with state court proceedings has led some commentators to call for greater diversity to the Court's composition. *See, e.g.*, Sherrilyn A. Ifill, *Who the Supreme Court Needs Now*, ROOT (May 1, 2009, 10:19 AM), http://www.theroot.com/views/who-supreme-court-needs-now?page=0,1. During oral argument in *Rothgery*, several Supreme Court Justices indicated they were not aware of state court practices of delaying assigning counsel to indigent defendants. *See infra* Part II.E.2.

Court, too, will have the opportunity to revisit its previous assumption that most people charged with a felony have access to counsel at the bail stage.[51]

This Article is also a call to action. The legal community should take an active role as *amici* as it did in *Rothgery*, where the Supreme Court acknowledged the criminal justice and national bar's significant contribution regarding state practices in *assigning* counsel to indigent defendants.[52] When the next post-*Gideon* issue reaches the Court, defenders should likewise describe the reality and infrequency of counsel standing with an assigned client at the initial bail hearing, as well as how long indigent defendants must wait before obtaining in-court representation. They should explain the critical difference a lawyer's immediate appearance makes in protecting an accused's liberty and limiting the state's expense of maintaining a growing pretrial jail population. Revealing this rarely told story will assist the Court in choosing between two starkly divergent, post-*Gideon* paths. The first path brings *Gideon* full circle by guaranteeing representation at an initial bail hearing for "any person haled into court."[53] The second path justifies appointed counsel's delayed arrival until a "reasonable" period after arrest. Because pretrial detention is considered a "carefully limited exception"[54] to the presumption of liberty before trial, the *amicus* community should inform the Court about the high stakes that await an accused, particularly defendants who cannot afford bail and remain in jail.

Part I of this Article analyzes the Supreme Court ruling in *Rothgery v. Gillespie County*. It recounts Rothgery's life

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51. *See* McNeil v. Wisconsin, 501 U.S. 171, 180-81 (1991) ("The Sixth Amendment right to counsel attaches at the first formal proceeding against an accused, and *in most States, at least with respect to serious offenses, free counsel is made available at that time* and ordinarily requested.") (emphasis added). Defendant McNeil had been represented by a public defender at his initial bail appearance. *Id.* at 173; *see also infra* pp. 372-73, 383.

52. *See infra* Part IV.C.

53. Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

54. United States v. Salerno, 481 U.S. 739, 755 (1987). In upholding a congressional preventive detention law, Chief Justice Rehnquist indicated that an accused's pretrial release before trial is the usual practice. "In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *Id.*

and experience in the Texas criminal justice system. After reviewing the lower federal court rulings, Part I examines the Supreme Court's 8-1 ruling and focuses on the attorneys' oral argument with Justices who admitted their lack of familiarity with state court practices and demonstrated a sympathetic view toward unrepresented detainees. While suggesting that *Rothgery* moved in the right direction by reaffirming that the right to counsel attaches at the initial appearance, Part I concludes that states and localities will continue to refrain from providing legal representation until the Justices explicitly declare that *Gideon's* principles apply to initial bail proceedings.

Part II presents the results of a national survey that reveals assigned counsel's widespread absence at the bail stage and frequent delay before representing an accused in court. Contrary to the popular belief that indigent defendants are constitutionally entitled to a lawyer when their liberty is at stake, only ten states guarantee representation at the initial assessment of bail at an initial appearance. In comparison, an equal number of states deny counsel at initial bail proceedings uniformly throughout the state, while the remaining thirty states assign appointed counsel in select counties only. While these results show a clear deficiency in failing to guarantee an accused's early access to counsel, Part II highlights a gradual trend toward more states extending counsel's advocacy to the initial bail hearing.[55]

Part III examines *Rothgery's* civil rights remedy for extending a municipality's responsibility to guarantee counsel's assignment after a criminal prosecution commences.

Part IV discusses the mission that the bar, the criminal justice system, and the human rights communities must undertake: educating courts about right to counsel practices at the bail stage of a criminal prosecution. *Amicus* intervention by interested national and local organizations, as well as by influential parties such as the Solicitor General of the United States, will play an important role in the Court's deliberation and ruling in the next key case.

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55. *See also* app. tbls.I-IV.

I. THE WRONGFUL PROSECUTION OF WALTER ALLEN ROTHGERY

A. *Background*

Arrested for illegal possession of a handgun,[56] Walter Rothgery suffered the ultimate frustration of knowing he was innocent, but could not establish his non-culpability without counsel. Unfortunately for Rothgery, Gillespie County, Texas, did not provide an accused indigent with legal representation at his first appearance, a "magistration"[57] proceeding. Had one been assigned, his lawyer's phone calls to California authorities would have produced the documentation to save Gillespie County from prosecuting an innocent man based on an unfounded accusation and incurring the cost of defending his subsequent civil rights lawsuit. Counsel's advocacy would have exonerated Rothgery and spared him the adverse consequences that accompanied his prosecution.

In the absence of an assigned lawyer, Gillespie County's wheels of justice moved at a deliberate pace. Six months after arrest, a prosecutor presented Rothgery's gun possession case to a grand jury.[58] The jurors knew nothing about the computer glitch that made it appear that he had a prior felony conviction, and they indicted him.

Only after Rothgery was rearrested and arraigned on the indictment did the County authorize assignment of counsel.[59] Even then, Rothgery encountered a series of foul-ups that delayed meeting his appointed lawyer until after he had remained in jail for three more weeks because he could not afford bail.[60] Justice Scalia aptly captured Rothgery's nightmarish ordeal two decades ago. Rothgery was the "law-abiding citizen wrongfully arrested" on a

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56. Rothgery v. Gillespie Cnty., 554 U.S. 191, 195 (2008).

57. *Id.*; *see also* Kirk v. State, 199 S.W.3d 467, 476 (Tex. Ct. App. 2006) (explaining that Texas procedure refers to the defendant's initial appearance as an article 15.17 hearing, where a magistrate determines the issues of probable cause and bail, and informs the accused of the charge). Practicing lawyers refer to the initial appearance as a "magistration." Maguire Interview, *supra* note 33.

58. *Rothgery*, 554 U.S. at 196.

59. *Id.* at 196-97.

60. *Id.* at 196.

serious felony charge, who unjustly lost his freedom while being "compelled to await the grace of a Dickensian bureaucratic machine" moving excruciatingly slowly before it produced an assigned lawyer.[61]

Rothgery's situation may seem unusual, but the experience of being arrested, charged, and brought before a judicial officer for the determination of bail without counsel is a regular feature of most states' pretrial justice systems. Indeed, local courts' judicial proceedings often proceed without providing a defense lawyer at the first bail hearing.[62] These localities and states take the position that money spent for assigned counsel at the initial bail hearing is a "luxury" and not essential to legitimize a prosecution.[63] They reject *Gideon's* view that attorneys are "necessities"[64] at the first bail hearing for ensuring equal justice to the accused poor person facing a loss of freedom.

In keeping the pre-*Gideon* practices alive, where an assigned lawyer for the indigent is nowhere to be found, many prosecutors and judges take unfair advantage of the unrepresented defendant. Defendants without a lawyer are more likely to face bails they cannot afford and as a result, lose their liberty without having been found guilty.[65] Some who maintain their innocence ultimately plead guilty to avoid further incarceration until trial.[66]

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61. Riverside v. McLaughlin, 500 U.S. 44, 70-71 (1991) (Scalia, J., dissenting) (following arrest, a defendant must "promptly" appear within forty-eight hours before a judicial officer).

62. *See infra* Part II.A.2 (only ten states guarantee counsel at the initial appearance in court proceedings).

63. *See* Gideon v. Wainwright, 372 U.S. 335, 344 (1963); Douglas L. Colbert, *Section Endorses Appointed Counsel at Bail Hearing*, 13 CRIM. JUST. 17, 17 (1998) ("Most state courts, however, have chosen not to devote the resources necessary to provide defense lawyers when people first enter the criminal justice system.").

64. *Gideon*, 372 U.S. at 344 ("That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries.").

65. Douglas L. Colbert et al., *Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail*, 23 CARDOZO L. REV. 1719, 1752-56 (2002) [hereinafter Colbert et al., *Counsel at Bail*].

66. Kevin C. McMunigal, *Disclosure and Accuracy in the Guilty Plea Process*, 40 HASTINGS L.J. 957, 987 (1989) (describing the incentives for certain criminal

Rothgery's civil rights action represents the rare challenge to a local government's charging practice of commencing prosecution without guaranteeing representation at the outset of a criminal proceeding. As described in Part III, Rothgery's pro-active civil rights claim holds promise for encouraging states to conduct bail proceedings with an assigned defense lawyer in the future.

B. *The Saga Begins: Meet Walter Rothgery*

Before arriving in Gillespie County, Texas, in the spring of 2002, fifty-two-year-old Walter Rothgery lived in Arizona where he was the manager of a storage company.[67] The job exposed him to personal danger, so he took advantage of an Arizona law that permitted him to carry a loaded gun while working.[68] When Rothgery's employer transferred him to Fredericksburg, Texas, to manage a different property, Rothgery was unaware that Texas law required a gun permit and registration.[69] Shortly after beginning his new job, the former manager of the property threatened Rothgery at gunpoint.[70] Rothgery then decided to wear his security gun belt and firearm at work, and continued to do so even after he lost his job.[71] "I thought it was legal,"[72] he

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defendants to plead guilty to charges, rather than face extended pre-trial incarceration and a lengthier sentence after trial).

67. Civil Rights Complaint, *supra* note 42, ¶ 5.

68. *Id.* ¶¶ 6-7.

69. McGuire Interview, *supra* note 33; *see also* Civil Rights Complaint, *supra* note 42, ¶ 5.

70. Civil Rights Complaint, *supra* note 42, ¶ 6 ("At one point during the management transition, Mr. Rothgery went to the home of one of the outgoing managers, Ray Barreto. When Mr. Barreto opened the door he had a gun in his hand and was combative. Mr. Barreto lived near Mr. Rothgery's home, and he told Mr. Rothgery that he had a clear shot into Mr. Rothgery's home from his doorway.").

71. *Id.* ¶¶ 7-9 ("After this confrontation during which Mr. Barreto threatened Mr. Rothgery with a gun, Mr. Rothgery routinely wore a security guard belt when he was in the Oakwood RV Park, where Mr. Barreto lived."). Rothgery contended that he lost his job due to "the outgoing management team's failure to cooperate with and adequately train" him. *Id.* ¶ 8. The police arrested him in response to a resident's call. *Id.* ¶¶ 9-10.

72. Maguire Interview, *supra* note 33.

later explained to his assigned Texas lawyer, M. Patrick Maguire.

Married for twenty-one years, Rothgery maintained a steady employment record that supported him and his wife, Patty.[73] As a young man, he attended the United States Military Academy at West Point until he was injured and became disabled.[74] After receiving an honorable discharge, Rothgery attended Cleveland State College; he then worked as a computer engineer before becoming a partner in a jointly owned business.[75] A co-partner's embezzlement of company funds, however, destroyed the enterprise and resulted in Rothgery losing most of his assets.[76] Despite this setback, he soon found new employment and maintained a law-abiding life. Indeed, before facing Gillespie County's firearm charge, Rothgery had never been convicted of a crime.[77] Attorney Maguire remembered their first meeting at his law office and seeing a "well-groomed, no tattoo kind of guy, probably in his late forties or early fifties. Walter was a regular looking white guy," Maguire recalled, "but very indignant, a real firecracker. He kept saying, 'I want to sue the County.' I had to talk him down before we could have a conversation about his criminal charge."[78]

Maguire soon understood why Rothgery had reason to be upset. He had been wrongfully arrested and spent weeks in jail after being indicted for a felony crime, unlawful carrying of a firearm by a felon that carried a maximum of ten-years and mandatory two-year prison sentence.[79] "I have never been a convicted felon," Rothgery maintained.[80] Aware that this was the only time Rothgery had spoken to a lawyer since his arrest nearly seven months earlier, Maguire

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73. *Id.*

74. *Llano Man Wins Supreme Court Decision*, LLANO NEWS (Tex.) (July 2, 2008), http://www.llanonews.com/news/article/4524.

75. *Id.*

76. Marsh Interview, *supra* note 40.

77. *Id.*; *see also* Rothgery v. Gillespie Cnty., 554 U.S. 191, 195 (2008); Maguire Interview, *supra* note 33.

78. Maguire Interview, *supra* note 33.

79. TEX. PENAL CODE ANN. § 46.04 (West 2004).

80. Maguire Interview, *supra* note 33; *see also* Civil Rights Complaint, *supra* note 42, ¶ 11.

listened as his client explained the many futile written requests for counsel and lost application forms he had submitted. As they continued speaking, Maguire considered how any person would react if prosecuted and jailed for a felony crime he was certain he did not commit and then was refused counsel.[81]

Attorney Maguire recalled that he had been on trial when he received the court's assignment and had been unable to see Rothgery while he was in jail. "Rothgery had been transferred to the county jail, a three-and-one-half hour drive, and I could not manage to take a full day to get there," Maguire explained.[82] He remembered speaking to Rothgery's wife, who emphasized that his weapon always remained holstered. "Once I heard that information, I called the Assistant District Attorney who reviewed the police report. After that, she had no difficulty consenting to a bail reduction to the prior amount."[83]

Rothgery told Maguire everything that happened following his arrest and release from jail. He explained his unsuccessful search for new employment.[84] Rothgery found the pending felony blocked any job possibilities. "No one wanted to hire someone they thought was a prior felon who now faced a new felony of carrying a loaded gun and allegedly making threats," his lawyer explained.[85] Without a regular income, Rothgery and his wife lost their rental home. Then when Rothgery found a landlord willing to accept his labor in exchange for paying the monthly rent, he faced the most serious disruption—his loss of freedom. "Walter had been free on bail for six months when an officer suddenly appeared and rearrested him for his original gun charge. Only then was he told about the indictment and the tripling of his bail," Maguire recounted.[86] Three days later, he received more bad news: correctional officials transferred

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81. Maguire Interview, *supra* note 33.

82. *Id.*

83. *Id.*

84. *Id.*; Civil Rights Complaint, *supra* note 42, ¶ 14 ("[A]ll of the potential employers he contacted knew or learned of the criminal charge pending against him in Gillespie County, and Mr. Rothgery was unable to find any employment for wages.").

85. Maguire Interview, *supra* note 33.

86. *Id.*

him to the county prison, which meant he could no longer receive regular visits from his wife.[87] Adding to Rothgery's woes, he told his lawyer about the "half-dozen times [he] asked for a court-appointed counsel"[88] without any success.

Upon learning that Rothgery lost his home, three weeks of freedom, had no job, was separated from his wife, and had no legal representation, Maguire understood why Rothgery had reason for "raising hell when we first spoke."[89] But, it was when Maguire began his factual investigation and looked into Rothgery's claim of innocence that the injustice became apparent. "He kept saying he had never been convicted of a felony crime. I have heard many clients deny the charge, but the more I looked into it, the more I began to truly understand. Walter Rothgery was absolutely right. He had been wrongfully charged with a felony crime."[90]

Maguire recalled the moment of his investigation. "I still remember the day I called Orange County. I started with the Internet and made a dozen calls to clerks and law officials. I finally reached a probation officer who told me Rothgery had received a deferred adjudication and that his felony arrest had been dismissed. Rothgery had been right

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87. *Id.*

88. *Id.* On January 19, 2003, Rothgery was rearrested on the indictment. The following day he appeared before the magistrate and asked about his pending request for counsel that he had filed shortly after his first appearance. The magistrate provided a new request form, which Rothgery completed and gave to county employees responsible for filing it with the court. After he was transferred to the Comanche County jail, Rothgery asked about the pending request and was told no one had any information. He then re-filed his request. On January 23, 2003, Judge Ables approved the request and appointed M. Patrick Maguire. *Id.*; *see also* Civil Rights Complaint, *supra* note 42, ¶¶ 16-17. Mr. Maguire contacted his client, "probably by phone" on January 31, 2003, and informed Rothgery he was on trial. Maguire Interview, *supra* note 33; *see also* Civil Rights Complaint, *supra* note 42, ¶ 18. Maguire explained that the County allowed lawyers to reach clients held at Comanche by phone. Maguire Interview, *supra* note 33. Having spoken to the prosecutor and arranged for a bail reduction to the former amount, Attorney Maguire wrote Rothgery on February 5, 2003 and told him he would soon be released. *Id*. On February 8, 2003, twenty-one days after his arrest, Rothgery regained his freedom. Civil Rights Complaint, *supra* note 42, ¶ 19.

89. Maguire Interview, *supra* note 33.

90. *Id.*

all along."[91] Maguire immediately called the Gillespie County prosecutor and gained her consent for a bail reduction that freed Rothgery. Maguire obtained the California records and forwarded the documentation to the Gillespie County prosecutor.[92] Nine-and-one-half months after his arrest, a judge dismissed the felony weapons charge against Rothgery.[93]

Few of these facts are included in the federal court opinions that summarily rejected Rothgery's civil rights action against Gillespie County. As is frequently true, a court's published decision rarely tells the story of a litigant's experience with a state's legal system. When the United States Supreme Court reviewed the lower court rulings, it too presented a condensed version of the facts. Analyzing what was said at oral argument, however, gives more flavor to Rothgery's ordeal. Further, the Justices' comments shed light on the Supreme Court's limited knowledge of counsel's unavailability in state courts and surprise at learning that jailed defendants may be without counsel.[94]

Rothgery represented an important affirmation of prior right to counsel decisions that the lower federal courts had circumvented in Rothgery's particular case. The next Section examines the District and Circuit Court dismissals of Rothgery's civil rights claim and sets the scene for the Supreme Court's consideration of his suit against Gillespie County.

C. *Rothgery's Civil Rights Claim Against Gillespie County, Texas*

Rothgery's civil rights suit against Gillespie County was straightforward. Since 1978, the Supreme Court has recognized that 42 U.S.C. § 1983 provides a federal remedy against a municipality's policy, practice, and custom that deprived a person of a protected constitutional right.[95]

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91. *Id.*

92. *Id.*

93. Civil Rights Complaint, *supra* note 42, ¶ 21.

94. *See infra* Part II.E.

95. Monell v. Dep't of Soc. Servs., 436 U.S. 658, 658-59 (1978) (overruling Monroe v. Pape, 365 U.S. 167 (1961), which had held that local governments are immune from suit under § 1983).

Rothgery's attorneys contended that Gillespie County's practice of not assigning counsel at his initial bail hearing and during the six months he remained free pending trial until his indictment had deprived him of his Sixth[96] and Fourteenth[97] Amendment right to counsel.[98] The lawyers maintained that Gillespie County engaged in an unwritten policy, practice, and custom of systematically refusing to appoint counsel to all alleged felons who posted bond and gained release prior to indictment, regardless of their dire financial circumstances.[99]

Rothgery's civil rights lawyers relied on a series of post-*Gideon,* Supreme Court rulings beginning in 1972. That year, *Kirby v. Illinois* established that a poor person's right to counsel "attached" once a criminal prosecution commenced and a defendant appeared at an adversarial judicial proceeding.[100] The *Kirby* Court never explained whether attachment entitled an accused to counsel or to the appointment of a lawyer at the accused's first appearance. However, it illustrated the type of criminal proceedings that triggered a Sixth Amendment right. As in *Kirby*, a defendant might face a criminal charge contained in a grand jury indictment or appear at the arraignment

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96. The Sixth Amendment guarantees that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. CONST. amend. VI.

97. Rothgery asserted that the County deprived him of access to counsel for six months in violation of his Fourteenth Amendment right to due process. *Id.* amend. XIV; *see also* Powell v. Alabama, 287 U.S. 45, 68-69 (1932) ("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.").

98. Civil Rights Complaint, *supra* note 42, ¶¶ 23-24, 26-27, 29-30. When brought before the judge, Rothgery indicated he had made a written request for counsel. According to Rothgery, the presiding judge declared that, "he would have to wait in jail until an appointment was made." Rothgery v. Gillespie Cnty., 413 F. Supp. 2d 806, 808 n.3 (W.D. Tex. 2006). Rothgery then waived his right to counsel for purposes of the bail determination. *Id.*

99. *Id.* at 810. Rothgery's § 1983 civil rights claim also alleged the County engaged in a custom and practice of inadequately training its employees who were responsible for processing indigent defendants' requests for assigned counsel and of not adequately monitoring assigned counsel's prompt contacts with their indigent clients. *Id.*

100. 406 U.S. 682, 689-90 (1972).

proceeding.[101] Alternatively, a prosecutor could file charges in a criminal information or present evidence of a felony crime at a preliminary hearing.[102] Each event, said the *Kirby* Court, evidenced the State's initiative of commencing an "adversarial" proceeding.[103] Additionally, each event showed that "the government has committed itself to prosecute" by placing the defendant in a situation where he "finds himself faced with the prosecutorial forces of organized society"[104] and in immediate need of "rely[ing] on counsel as a 'medium' between him and the State."[105]

While these examples were useful, *Kirby* left other questions unanswered. Rothgery, for instance, had been arrested on a weapons charge; he was not facing a prosecutor-initiated indictment, information, or a preliminary hearing when he first appeared before a magistrate in the lower criminal court. Would *Kirby's* "attached" right to counsel entitle him to counsel's in-court representation? Or did it merely protect against a custodial police interrogation without prior communication with a lawyer? In other words, was the arresting officer's warrantless, on-the-scene arrest and filing of an affidavit complaint enough to establish that the government was sufficiently serious and committed to prosecution? Or was something more "formal" needed to show that Rothgery had become vulnerable to "prosecutorial forces of organized society"? And, in deciding whether Rothgery's initial appearance was "adversarial," must a prosecutor be present or, at least, involved when the arresting officer filed charges, as the County argued?[106]

These and other issues caused lawyers and scholars to exercise caution when construing indigent defendants' right to counsel at the initial appearance.[107] It also explained

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101. The right to counsel "attaches only at or after the time that adversary judicial proceedings have been initiated . . . whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Id.* at 688-89.

102. *Id.* (citing Coleman v. Alabama, 399 U.S. 1 (1970)).

103. *Id.* at 688.

104. *Id.* at 68

105. Maine v. Moulton, 474 U.S. 159, 176 (1985).

106. *See infra* notes 146-50 and accompanying text.

107. *See, e.g.*, Alan Austin, Note, *The Pretrial Right to Counsel*, 26 STAN. L. REV. 399, 412 (1974) ("Although the holding in *Kirby* is arguably not

Rothgery's legal strategy of advocating that his right to an assigned counsel had "attached" when he first appeared before the Texas magistrate, rather than asserting that he was entitled to counsel's actual representation. The strategy seemed sensible for pursuing his § 1983 civil rights remedy. It also would provide the civil rights bar with clarification of *Kirby* and other post-*Gideon* rulings regarding the meaning of an attached right to counsel at the initial bail hearing.[108] For while the Supreme Court had made clear that an arrest did not commence a prosecution,[109] scholars were uncertain as to whether the Court construed *Kirby* strictly to limit an accused's right to counsel to the specific examples mentioned or whether the Court intended to offer a less formalistic interpretation.[110] As the following Sections detail, even Rothgery's limited right to counsel claim proved unsuccessful before the lower federal courts.

1. Rothgery v. Gillespie County *in the Federal Courts*

Despite his arrest and incarceration, the United States District Court for the Western District of Texas and a three-judge panel of the Fifth Circuit Court of Appeals did not view Rothgery's civil rights claim as a slam-dunk for bringing his civil rights case before a trial jury. In fact, the three-judge appellate panel described its struggle to discern "the sometimes elusive degree to which the prosecutorial forces of the [S]tate have focused on an individual"[111] that would trigger an indigent defendant's attached right to counsel. Both courts considered *Kirby's* language controlling; adversarial judicial proceedings commenced when "the government has committed itself to prosecute."[112]

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inconsistent with prior precedent in a technical sense, the opinion is clearly inconsistent with the functional rationale of the cases which it purports to follow.").

108. *See* Brief for Twenty-Four Professors of Law as Amici Curiae in Support of Petitioner, Rothgery v. Gillespie Cnty., 554 U.S. 191 (2008) (No. 07-440) [hereinafter Twenty-Four Professors Brief].

109. United States v. Gouveia, 467 U.S. 180, 190 (1984) ("[W]e have never held that the right to counsel attaches at the time of arrest.").

110. *See supra* note 107.

111. Rothgery v. Gillespie Cnty., 491 F.3d 293, 297 (5th Cir. 2007) (quoting Lomax v. Alabama, 629 F.2d 413, 415 (5th Cir. 1980)).

112. Kirby v. Illinois, 406 U.S. 682, 689 (1972).

Yet, they searched for clear signs of when the prosecution had charged a person with a crime and commenced an adversarial proceeding.

As explained below, neither federal court was convinced that the arresting officer's affidavit and criminal complaint against Rothgery demonstrated the necessary commitment to prosecute without a prosecutor's participation at the defendant's initial appearance. Nor were they persuaded that prior Supreme Court rulings supported Rothgery's claim, despite consistent language that an accused's right to counsel attached when he first appeared at a bail hearing before a judicial officer.[113] Indeed, in affirming the District Court ruling, the Fifth Circuit appellate panel appeared unimpressed with the court's trilogy of *Brewer v. Williams*,[114] *Michigan v. Jackson*,[115] and *McNeil v. Wisconsin*,[116] which it characterized as "[a]t most . . . neutral on the point . . . [and] simply not enough for us to ignore our binding authority."[117] The Fifth Circuit's reliance on its "prosecutorial involvement" theory and its misinterpretation of Supreme Court precedent virtually assured that the Justices would grant certiorari.[118]

2. *U.S. District Court for the Western District of Texas*

United States District Court Judge Yeakel found little merit to Rothgery's civil rights cause of action. After reviewing the arresting officer's "Affidavit of Probable Cause"[119] in support of his weapons charge against Rothgery, and relevant case law, Judge Yeakel was persuaded that the magistrate judge had no constitutional

113. *See infra* notes 193-204 and accompanying text.

114. 430 U.S. 387 (1977).

115. 475 U.S. 625, 629 n.3 (1986).

116. 501 U.S. 171 (1991).

117. Rothgery v. Gillespie Cnty., 491 F.3d 293, 298 (5th Cir. 2007).

118. *See id*. at 297-98.

119. "This affidavit purports to set forth facts personally observed by the arresting officer regarding Rothgery's actions on July 15, 2002, and charges Rothgery committed the offense of unlawful possession of a firearm by a felon, a third degree felony." Rothgery v. Gillespie Cnty., 413 F. Supp. 2d 806, 808 (W.D. Tex. 2006).

duty to appoint counsel.[120] He, therefore, granted the County's motion for summary judgment.[121]

From the outset of his written opinion, it was apparent that the judge had determined that "no formal charges" had been filed nor adversarial criminal proceedings initiated when the arresting officer presented his affidavit to the Texas magistrate.[122] The judge did acknowledge, however, that the Supreme Court had previously recognized a defendant's Sixth Amendment right to counsel at certain "critical stages" of criminal proceedings.[123] Yet, Judge Yeakel declared that Texas law "has not set forth a [similar] 'bright-line rule'" for determining when criminal proceedings commence or what constitutes a "critical stage."[124]

Indeed, reviewing Texas state court interpretations of Texas law, the federal judge concluded that an officer's probable cause affidavit could not be deemed a formal adversarial charge.[125] To the contrary, he found that Texas courts only accepted such affidavits to commence an arrest warrant prosecution, but had never "expressly" applied the same type of reasoning to Rothgery's warrantless arrest.[126] Finding "no case holding, or even discussing the possibility" that the officer's affidavit and complaint constituted a formal charge in such situations, the court accepted Texas's argument.[127] Rothgery had failed to establish that the arresting officer's affidavit formally charged him with a crime that would trigger his Sixth Amendment right to assigned counsel. In a warrantless arrest situation, the officer's affidavit was limited to the magistrate's determination of probable cause.[128]

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120. *Id.* at 816-17.

121. *Id.* at 817.

122. *Id*. at 814.

123. *Id*. at 815.

124. *Id*. at 812.

125. *Id.* at 814.

126. *See id.* at 813, 817.

127. *Id.* at 813.

128. Texas procedure defines an "affidavit made before the magistrate . . . a 'complaint' if it charges the commission of an offense." TEX. CODE CRIM. PROC. ANN. art. 15.04 (West 2010). The district judge distinguished this type of

The semantic difference had significant constitutional consequences. Finding that sworn allegations were inadequate to formally charge a felony crime meant that Rothgery's right to counsel never "attached" and relieved Texas of its constitutional obligation to assign counsel "before, at or after" his initial appearance.[129]

Even if the affidavit had been sufficient to commence a criminal prosecution, said Judge Yeakel, it would not suffice to constitute an adversarial proceeding and to attach Rothgery's right to counsel.[130] The court reasoned that Rothgery had never been confronted "by the procedural system, or by his expert adversary, or by both" at his initial bail hearing.[131] "[T]he summary-judgment record does not reflect any involvement of the Gillespie County District Attorney's Office[,]" declared the court, adding that only a prosecutor had the power to initiate a criminal prosecution.[132] Since none appeared or participated in the filing of a criminal charge, Rothgery had never been an accused "confronted with prosecutorial forces."[133] A contrary ruling, Judge Yeakel suggested, "would violate Supreme Court precedent equating adversarial judicial proceedings with criminal prosecutions, which necessarily implies involvement or, at a minimum, awareness of the prosecutor."[134] From the court's perspective, the arresting officer's affidavit and filing of a weapons charge never

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complaint as limited to arrest warrants and not to Rothgery's warrantless arrest, but acknowledged that "there is little case law on the issue." *Rothgery*, 413 F. Supp. 2d at 812-13.

129. *See* NACDL Brief, *supra* note 46, at 13 ("[Forty-three] states, the District of Columbia, and the federal government supply counsel to indigent defendants either before, at, or directly after an initial appearance."); *see also* Brewer v. Williams, 430 U.S. 387, 398 (1977) ("Whatever else it may mean, the right to counsel . . . 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.").

130. *Rothgery*, 413 F. Supp. 2d at 814-16.

131. *Id.* at 815 (quoting United States v. Ash, 413 U.S. 300, 310 (1973)).

132. *Id.* at 816.

133. *Id.* at 815.

134. *Id.* at 816. The district court judge positioned his ruling as "consistent with Supreme Court and with Fifth Circuit precedent . . . [that] has repeatedly stated that 'the initiation of judicial criminal proceedings is far from a mere formalism.'" *Id.* at 815 (quoting Kirby v. Illinois, 406 U.S. 682, 689 (1972)); *see also infra* text accompanying notes 167-73.

initiated a criminal prosecution, and thus Rothgery was precluded from invoking a Sixth Amendment right to counsel.[135]

Such words have particular irony for defendants like Rothgery, who had already been charged, detained, denied counsel, brought to court, and ordered jailed by a judicial magistrate. They would stare in disbelief if told that no prosecution had commenced because a prosecutor chose to remain on the sidelines while a police officer filed the criminal charge. Such defiance of common sense illustrates the rationale that has blocked *Gideon* from having real meaning as to the right to counsel after a person has been charged with committing a crime. The district court opinion shows no insight as to the plight of the presumptively innocent and falsely accused person repeatedly thwarted in efforts to obtain assigned counsel. Surely, Rothgery felt like "an accused confronted with prosecutorial forces" when taken into custody and brought before a magistrate judge.

3. *The Fifth Circuit Court of Appeals Affirms*

When Rothgery appealed the district court's decision to a three-judge panel of the Fifth Circuit Court of Appeals, Gillespie County maintained that the prosecution had never committed itself to prosecute when Rothgery first appeared before the magistrate.[136] Only a prosecutor, not a police officer, the County argued, may commit the prosecutorial resources necessary to initiate a weapons prosecution.[137] The prosecutor here had been a passive bystander.[138] Since Rothgery had not been formally charged—Texas did not consider the magistration bail proceeding comparable to an arraignment within the meaning of *Kirby*—the County argued that it had no constitutional obligation to assign counsel.[139] Under this view, Texas argued it could legitimately refuse to assign a lawyer to Rothgery and other released defendants facing felony charges until indictment

135. *Id.* at 814, 816.

136. Rothgery v. Gillespie Cnty., 491 F.3d 293, 297 (5th Cir. 2007).

137. *Id.* at 297; *see also* Respondent's Brief in Opposition to Petition for Writ of Certiorari at 10, Rothgery v. Gillespie Cnty, 554 U.S. 191 (2008) (No. 07-440).

138. *Rothgery*, 491 F.3d at 297.

139. *Id.* at 296.

or a recognized "critical" stage occurred.[140] The County's position justified denying counsel to indigent defendants for an indeterminate period after arrest, while they awaited a prosecutor's determination of whether or not to prosecute.

The Fifth Circuit three-judge panel provided an excellent preview of the legal hurdles that Rothgery would confront in the Supreme Court. The appellate panel declared it would reject "rely[ing] formalistically" on a *Kirby* "label given to a particular pretrial event" in deciding whether Rothgery's right to counsel attached at the initial bail proceeding.[141] The appellate judges promised to scrutinize the point where the defendant faced the "prosecutorial forces of organized society."[142] Yet when applying the analysis, the panel examined only the conduct and activities of the prosecution. It gave scant attention to Rothgery's experience as the subject of arrest and to charging procedures central to a government's prosecution.[143]

The appellate court concluded that for adversary proceedings to commence and for counsel to attach, the prosecution must take affirmative action and show "some . . . awareness or involvement" related to the defendant's arrest, charges, or appearance at a magistration bail hearing.[144] The court's meaning was clear: the prosecution was the controlling force in determining the accused's right to counsel. The appellate panel highlighted the prosecutor's invisibility when the arresting officer charged Rothgery and presented his affidavit to the magistrate judge.[145]

Relying on a previous Fifth Circuit ruling, the panel found that the officer's affidavit-complaint fell short of what State law required to initiate an adversarial judicial

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140. *See id.* at 296. By illustration, the State cited an accused's right to counsel at a felony preliminary hearing, see Coleman v. Alabama, 399 U.S. 1, 9-10 (1970), while conceding that such hearings are rarely conducted. *See* Transcript of Oral Argument, *supra* note 1, at 39-40.

141. *Rothgery*, 491 F.3d at 296.

142. *Id.* at 296-97 (quoting Caver v. Alabama, 577 F.2d 1188, 1195 (5th Cir. 1978)).

143. *See id.* at 297-300.

144. *Id.* at 297 n.7.

145. *Id.* at 297.

proceeding.[146] The prosecutor's non-participation in Rothgery's arrest or the filing of charges showed the County had not yet committed to prosecution, but would make that decision at a later time. Rothgery gave "no reason" to impute the arresting officer's actions to the prosecutor.[147] The filing of charges, said the appellate court, did not "signal that Rothgery was opposed by the prosecutorial forces of the state."[148] That conclusion must have surprised police and prosecuting officials who work closely together to prosecute crime and convict offenders. Prosecutorial commitment, declared the court, requires a prosecutor to take "some" step forward before imposing a duty on a magistrate to assign counsel.[149] Since the prosecution had not done so, no adversarial criminal proceeding commenced. Rothgery's right to counsel never attached.[150]

The Fifth Circuit panel went on to discuss other legal obstacles that would be the subject of Supreme Court review. First, the panel distinguished two prior Supreme Court rulings, *Brewer v. Williams* and *Michigan v. Jackson*, where the Court held that adversarial proceedings begin, and thus counsel attaches, at a defendant's initial appearance before a judicial officer.[151] The panel asserted that in these cases, the Court failed to "address[ ] the issue of prosecutorial involvement, much less the relevance of prosecutorial involvement under Texas law."[152] The Fifth Circuit suggested that in *Jackson*, a prosecutor had been involved, and contrasted Rothgery's appearance at a magistration hearing with Jackson's "arraignment" where counsel had attached.[153] Though the panel had said that it would look past formal labels, it did not. Instead, the court

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146. *See id.* at 294 (citing McGee v. Estelle, 625 F.2d 1206, 1208-09 (5th Cir. 1980) ("[A] warrantless arrestee's Sixth and Fourteenth Amendment right to counsel does not attach in Texas when [a defendant] appears before a magistrate for statutory warnings if prosecutors are unaware of and uninvolved in the arrest and appearance [of the defendant].")).

147. *Id.* at 297, 301.

148. *Id.* at 297.

149. *Id.* at 297 n.7.

150. *Id.* at 300-01.

151. *Id.* at 297-98.

152. *Id.* at 298.

153. *See id.*

refused to consider the magistration proceeding as the equivalent of an arraignment.

The appellate panel also agreed with distinctions as to arrests pursuant to a warrant and warrantless arrests.[154] The panel's legal authority was unconvincing when asserting that "the relationship between a complaint and the commencement of a prosecution in Texas is less clear than Rothgery claims."[155] Its' ruling rested on a decision where the State's highest court "chose *not* to decide whether the [warrantless] complaint initiated adversary judicial proceedings."[156]

The Fifth Circuit concluded that a criminal prosecution and adversary proceeding had not commenced against Rothgery, despite the arresting officer's affidavit of probable cause, in which he stated, "I charge . . . [the] Defendant, Walter A. Rothgery, did . . . commit the offense of unlawful possession of a firearm by a felon . . . ."[157] Construing the purpose of the affidavit literally, the appellate court concluded it was intended only for a probable cause determination, not to support a formal charge against Rothgery.[158] The Fifth Circuit panel stated: "[W]e simply cannot assume that the affidavit filed in this case was the same type of complaint addressed in the cases cited by Rothgery or that it served the same function as those complaints."[159] The court decided that the officer's complaint was "part of the investigatory process, serving solely to validate the arrest without committing the state to prosecute."[160]

There was little concern for Rothgery and other indigent defendants in similar predicaments seeking a lawyer's assistance to regain their liberty. Most telling, the court rationalized that the prosecutor's six-month delay in

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154. *See id.* at 299.

155. *Id*. The appellate panel concluded that, "the filing of the affidavit was part of the investigatory process, serving solely to validate the arrest without committing the state to prosecute." *Id.* at 301.

156. *Id.* at 299 (emphasis added).

157. *Id*. at 295.

158. *Id.* at 300-01.

159. *Id*. at 300.

160. *Id*. at 301.

obtaining an indictment was necessary to determine the government's intention to prosecute.[161] The Fifth Circuit never considered the impact on the presumptively innocent defendant of waiting for a lawyer to appear to commence preparing a defense against a false accusation.

The Fifth Circuit reasoning demonstrated the barriers to Rothgery's claim that Gillespie County had raised by continuing to prosecute poor people without guaranteeing a defense lawyer. Both federal courts were reluctant to interfere with Texas' practice and refused to order the State to assign counsel when indigent defendants first appeared for a bail hearing before a judicial officer. Rothgery's lawyers knew they had only one remaining hope: certiorari review. Focusing on the Fifth Circuit's dismissive attitude toward Supreme Court precedent,[162] and on discrediting the appellate panel's "prosecutorial involvement" standard, Rothgery's petition convinced the Supreme Court to decide whether the assigned right to counsel requires a prosecutor's participation in initiating a criminal charge.[163]

D. *The Supreme Court Rules: Counsel Attaches at the Initial Appearance*

Gillespie County's brief presented the Supreme Court with the same seductive argument it had delivered to the Fifth Circuit: "adversarial" criminal proceedings cannot begin without an adversary.[164] Since the prosecutor had neither been present at the initial appearance, nor involved

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161. *See id.*

162. The Fifth Circuit distinguished Rothgery's warrantless arrest from the situation the Supreme Court addressed in *Michigan v. Jackson*, 475 U.S. 625 (1986) and *Brewer v. Williams*, 430 U.S. 387 (1977), where the defendants had been arraigned on an arrest warrant. *Rothgery*, 491 F.3d at 298. The Fifth Circuit panel identified Brewer's and Jackson's arraignment as a specific *Kirby* example of a pretrial event that initiated an adversary judicial proceeding and required counsel attaching. *See id.*

163. The Supreme Court went on to reject Gillespie County's opposing argument that Rothgery's felony was not yet a "formal charge," that his right to counsel had not attached, and that the Fifth Circuit had correctly construed Supreme Court precedent to deny assigning counsel at his initial magistration hearing. *See* Rothgery v. Gillespie Cnty., 554 U.S. 191, 210-12 (2008).

164. Brief for Respondent at 10, Rothgery v. Gillespie Cnty., 554 U.S. 191 (2008) (No. 07-440).

in the charging decision, the prerequisite for commencing an adversary proceeding and for counsel attaching was missing. Omit the prosecutor, Gillespie County seemed to be saying, and no court could conclude the State was committed to prosecute.

Such logic had appealed to both lower federal courts. The Fifth Circuit's line marking when Rothgery's right to counsel "attached" required a prosecutor's visibility at the charging and initial appearance stages.[165] The panel viewed Rothgery's claim to counsel as an opportunity to extend the Fifth Circuit's "involvement and awareness" standard to warrantless arrests.[166] Neither federal court considered the consequence of the prosecutor's boundary line: indigent defendants' access to counsel would be delayed as long as a prosecutor remained out of sight following arrest, allowing the arresting officer to assume the charging role. This tactic ensured that accused indigents would remain without a lawyer, and frequently in custody, until a prosecutor surfaced and declared: "I am ready to prosecute" or "Not interested. Move to dismiss."

1. *The Decision*

The Supreme Court Justices wasted no time rejecting the lower court rulings. After describing the facts and reviewing the lower court proceedings, Justice Souter, who authored the 8-1 decision, made clear that the Fifth Circuit had been in "error" when it rejected Rothgery's plea for counsel because no prosecutor had participated in initiating his prosecution.[167] That court had had been wrong, Justice

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165. *Rothgery*, 491 F.3d at 297; *see also supra* notes 144-50 and accompanying text.

166. *See Rothgery*, 491 F.3d at 297.

167. *Rothgery*, 554 U.S. at 193, 198-99. While eight Justices agreed that counsel's attachment did not depend upon a prosecutor's involvement or presence at the initial appearance, two concurring opinions accompanied the Court's majority decision. Chief Justice Roberts and Justice Scalia wrote briefly to indicate they believed *Brewer* and *Jackson* were controlling. *Id.* at 213. Justice Alito, joined by the Chief Justice and Justice Scalia, emphasized that the Court decided only "when" counsel attached and not whether "the [C]ounty had an obligation to appoint an attorney to represent petitioner . . . after his magistration . . . . That question lies beyond our reach." *Id.* at 216 (Alito, J., concurring). Justice Alito went on to emphasize that "[t]he Court expresses no opinion on whether Gillespie County satisfied that obligation in this case." *Id.* at

Souter explained, because it "effectively focused not on the start of adversarial judicial proceedings, but on the activities and knowledge of a particular state official who was presumably otherwise occupied."[168] The eight-Justice consensus recognized the enhanced prosecutorial power that the "involvement" standard gave prosecutors. By remaining absent during the days or weeks following arrest, they could suspend an accused's right to counsel and control when an assigned attorney entered a felony case.

The Supreme Court's majority opinion expressed concern that the Fifth Circuit had invoked a constitutional standard that the high court had never "said a word about" in prior decisions.[169] The Justices rejected the Fifth Circuit's "attachment rule that turned on . . . [the] prosecutor's first involvement[,]" and characterized it as "'wholly unworkable and impossible to administer.'"[170] Rothgery, said the Justices, had been accused of a crime and deprived of his liberty when he appeared at his initial judicial proceeding. "[W]hat counts . . . is an issue of federal law unaffected by allocations of power among state officials under a State's law."[171] It did not matter whether "the machinery of prosecution was turned on by the local police or the state attorney general."[172] In either situation, Rothgery was "*subject to accusation . . . headed for trial . . . [and needed] to get a lawyer working, whether to attempt to avoid that trial or to be ready with a defense when the trial date arrive[d].*"[173] The Justices recognized the importance of an assigned lawyer "working" promptly. "[C]ounsel must be appointed

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218. Justice Alito's concurring opinion added that "I interpret the Sixth Amendment to require the appointment of counsel only after the defendant's prosecution has begun, and then only as necessary to guarantee the defendant effective assistance at trial." *Id.* at 217. *But see infra* text accompanying notes 235-38, 240 (referring to Justice Alito's, Kennedy's and Scalia's comments during oral argument suggesting an incarcerated pretrial defendant has a strong argument for prompt assignment of counsel).

168. *Rothgery*, 554 U.S at 198-99.

169. *Id*. at 206.

170. *Id.* at 206 (quoting Escobedo v. Illinois, 378 U.S. 478, 496 (1964) (White, J., dissenting)).

171. *Id.* at 207.

172. *Id*. at 208.

173. *Id*. at 210 (emphasis added).

within a reasonable time after attachment to allow for adequate representation at any critical stage before trial, as well as at trial itself."[174]

The near-unanimous ruling reflected a fundamental difference with the State's position during oral argument which disregarded *Gideon's* guarantee of a balance between the government's power to prosecute and the necessity of a lawyer to defend an individual's liberty when incarcerated.[175] Indeed, several Justices voiced concern with Texas's charging procedures and denial of counsel practices following arrest.[176] Others sounded perplexed, and even annoyed, at the State's position that a police officer's filing of a criminal charge neither commenced prosecution nor

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174. *Id.* at 212.

175. *See* Gideon v. Wainwright, 372 U.S. 335, 344 (1963); *see also* Colbert, *Illusory Right to Counsel*, *supra* note 15, at 52 ("Supreme Court decisions in *Gideon* and *Argersinger* emphasized that the guarantee of counsel is fundamental to the fairness of our justice system.").

176. *See* Transcript of Oral Argument, *supra* note 1, at 14 (Alito, J.); *id*. at 41 (Breyer, J.); *id.* at 28 (Kennedy, J.); *id.* at 12, 28, 30 (Scalia, J.); *id.* at 29-30, 53-55 (Souter, J.); *id*. at 34-36, 46-48 (Stevens, J.). Justices Souter, Ginsburg, and Scalia engaged in the following dialogue with Texas Solicitor General Gregory Coleman:

Justice Souter asked: "You mean no complaint needs to be filed by the police? . . . [D]on't the police normally have a complaint . . . ?" Mr. Coleman said: "No, Justice Souter." Justice Ginsburg appeared flummoxed: "You can't just say the police brought someone in and they get locked up in jail. The police had to present something." *Id.* at 37.

Eventually, Mr. Coleman acknowledged the officer's affidavit of probable cause and said to Justice Ginsburg: "I think if he [Rothgery] had insisted on counsel being present for the bail portion of the 1517 magistration, I believe that they would have gotten somebody to come." Justice Souter inquired further: "Would they have been obligated to get somebody to come?" Mr. Coleman replied: "Under Texas statute they would." Justice Souter again asked whether Texas recognized a constitutional right "[u]nder the Sixth Amendment?" "No," repeated Mr. Coleman. *Id.* at 38-39.

Justice Scalia also appeared offended at Texas' charging procedures even when a lawyer did appear. "[E]ven if you appoint counsel," he told the State's attorney, Texas has "a problem. . . . You say you can keep people without charging them so long as you give them counsel?" Mr. Coleman provided the Court with a dose of Texas reality: "It happens all the time, Justice Scalia, where people are appointed counsel but, for whatever reason, do not make bail." *Id.* at 30.

required a lawyer's assignment for an indigent defendant.[177] Justice Souter wondered "if the [private] lawyer comes in and says, you know, my client is sitting in jail, you've had him there for three days now, and no complaint has been filed . . . [is it a] constitutional answer to say, well, you know, that's for us to know and you to find out?"[178] Texas Solicitor General Gregory Coleman maintained that, while Texas would not prevent the private lawyer from representing a client, it did not recognize a Sixth Amendment constitutional obligation to provide counsel.[179]

Justices expressed alarm when Coleman asserted that Texas had no constitutional obligation to assign counsel, since it had not considered Rothgery formally charged until

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177. Justice Souter's effort to understand the State's reasoning appeared to borrow a page from Abbott & Costello's memorable "Who's On First" performance:

JUSTICE SOUTER: . . . At the examining trial [first appearance, probable cause hearing], is there a charge filed?

MR. COLEMAN: No. . . .

JUSTICE SOUTER: What are they finding probable cause for if they don't know what the charge is? . . .

MR. COLEMAN: An examining trial is an extended version of a probable-cause determination. It is not holding on a charge[.]

JUSTICE SOUTER: That is right. It is a probable-cause determination, and you've got to have an answer: Probable cause for what?

MR. COLEMAN: Probable cause . . . that a crime has been committed.

JUSTICE SOUTER: So . . . in other words, you determine whether a crime has been committed without charging the individual with the crime.

MR. COLEMAN: If . . . that were the law, *Gerstein* would have to be reversed.

JUSTICE SOUTER: Well, I'm just asking what you do . . . . Then, at the end of the probable cause hearing . . . the judge says: Well, you've got probable cause to hold this person for possessing a gun after having been convicted of a felony, but there doesn't happen to be any charge to that effect here. Is that the state of the law, in fact?

MR. COLEMAN: That is what preliminary hearings and examining trials have always been about. Yes, Your Honor.

Id. at 53-55.

178. *Id.* at 31.

179. *See id.* at 29-30.

he was indicted six months later.[180] Justice Kennedy asked the State's attorney "how could they hold [him] in jail" without charging a crime and without providing or assigning counsel?[181] "Suppose he had been held for three months and . . . couldn't make bail, we don't need counsel? . . . [W]ould counsel be required to be appointed?"[182] Justice Kennedy demanded to know. When Coleman replied, "No, Your Honor,"[183] Justice Scalia expressed his doubt. "What authority do you have to hold somebody who's not been charged? I mean I don't understand that. You say he hasn't been charged, but we're going to hold you in jail. That's very strange."[184] Coleman indicated that "[i]t is not uncommon—in fact, it's universal practice" for Texas police to arrest and to bring a defendant before a magistrate.[185] Coleman then maintained that the right to counsel did not apply here. The Fourth Amendment prohibition against unreasonable

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180. Justice Stevens sounded frustrated when he sought clarification about the State's policy of denying Rothgery an assigned lawyer to dismiss his criminal charge at the beginning of a criminal prosecution.

JUSTICE STEVENS: Let me ask on Texas procedure. Supposing after the magistration he wanted to have the charges dismissed. Could he have hired a lawyer to come in and ask the judge to dismiss the charges?

MR. COLEMAN: Absolutely not, Justice Stevens. There were no charges pending. . . .

JUSTICE STEVENS: Let's say he wanted to get a release from bond and said he wanted to terminate his custody. . . . [C]ould he have a lawyer appear before the Court to ask for that? . . .

MR. COLEMAN: . . . I don't think the Sixth Amendment would necessarily have required it. . . .

JUSTICE STEVENS: He would not have had a right under the Constitution to have a lawyer come in and say: I want to get released from this bond[?] I find that hard to believe. . . .

MR. COLEMAN: It would not be a Sixth Amendment right to counsel. . . . [I]t would not be an "attachment," an "appointment" issue, where you are entitled to appointment of counsel . . . .

Id. at 46-48 (emphasis added).

181. *Id.* at 27.

182. *Id.* at 28.

183. *Id.*

184. *Id.*

185. *Id.* at 27-28.

seizures and probable cause determination, he said, would protect a defendant's liberty.[186]

Justice Souter wanted to be certain he understood Texas's position. "What you're saying, in answer to Justice Kennedy's question, that an individual can be brought into court, held in jail for three weeks without charge, and no right to counsel applies? I think that's your answer, but I want to make sure. I'll be candid to say I'm surprised."[187] The Texas prosecutor turned again to the Fourth Amendment, "*Gerstein* says that there must be . . . ."[188] Justice Souter interrupted:

> I want to know what your answer is here. Get to authority later, but I want to know whether your position is that an individual may be brought by a police officer before a magistrate, charged with no crime, required to post bail, and if he doesn't post bail, held for three weeks without charge. . . . I'm asking whether it would be constitutional without appointing counsel.[189]

The Texas prosecutor maintained that "[i]t would . . . not be a violation of the Sixth Amendment right to counsel."[190] Listening to the exchange, Justice Scalia registered disbelief: "No counsel right would attach?"[191] Holding tightly to his position, the prosecutor answered, "That's correct."[192]

The Supreme Court ruling reflected the Justices' frustration with Texas's position and with the Fifth Circuit's decision to uphold the State's practice, contrary to Supreme Court decisions that had "twice held" poor people's right to counsel attached at the initial appearance where a judicial officer decided bail.[193] The Justices carefully

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186. *Id.* at 28.

187. *Id.* at 29.

188. *Id.*

189. *Id.* at 29-30.

190. *Id.* at 30.

191. *Id.*

192. *Id.*

193. Rothgery v. Gillespie Cnty, 554 U.S. 191, 199 (2008) (citing Michigan v. Jackson, 475 U.S. 625, 629 n.3 (1986); Brewer v. Williams, 430 U.S. 387, 399 (1977)). At times during oral argument, Coleman appeared to move away from embracing the Fifth Circuit's "prosecutor involvement" theory. *See* Transcript of Oral Argument, *supra* note 1, at 39-40, 49-50 (responding to Justice Alito's questions). In reply to Justice Stevens's "simple question" of whether a

reviewed the existing case law, beginning three decades earlier, and declared, "there can be no doubt . . . that judicial proceedings had been initiated."[194] In *Brewer v. Williams*, the right to counsel attached when a represented defendant first appeared before a judge to answer an out-of-state warrant.[195] Like Rothgery's initial "article 15.17 hearing," said the Court, "the judge at defendant Brewer's [first appearance] arraignment explained the charge, advised him of his rights, ordered bail and committed him to jail.[196] No one doubted Brewer faced a criminal prosecution for which his right to counsel attached.

The Supreme Court rehashed the same conclusion it had reached nine years later in *Michigan v. Jackson*.[197] "[W]e had no more trouble answering it the second time around," Justice Souter stated.[198] "[T]his attempt to explain *Jackson* as a narrow holding is impossible to square with *Jackson's* sweeping rejection of the State's claims."[199] The Justices showed little patience with the Texas attorney's

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prosecutor's participation at the initial magistration hearing would have been "relevant" in commencing a prosecution, Mr. Coleman maintained Rothgery was not entitled to an assigned lawyer because "[t]here is no role for a prosecutor at a magistration." *Id.* at 34. Justice Stevens then asked if a prosecutor had been present at Rothgery's magistration and "the prosecutor said: This is a case we intend to pursue more seriously. That's all he says to the judge. Would have that [sic] been sufficient?" *Id.* at 35. Mr. Coleman still held onto his belief that such a statement would not commence "formal adversary judicial proceedings." *Id.* at 36.

194. *See Rothgery*, 554 U.S. at 200 (quoting *Brewer*, 430 U.S. at 399).

195. *Brewer*, 430 U.S. at 390, 397-99. In *Brewer*, the defendant voluntarily surrendered to the Davenport, Iowa police on a warrant issued in Des Moines, Iowa, for the alleged abduction of a ten-year-old girl. *Id.* at 390. After counsel represented the defendant at the initial appearance, the Davenport police drove and interrogated the defendant during a 160 mile car ride. *Id.* at 390-93. A court suppressed the evidence after finding that the Davenport police had initiated criminal proceedings and had not notified Brewer's attorney. *Id.* at 397-99, 406.

196. *Rothgery*, 554 U.S. at 199-200; *see also* Kirk v. State, 199 S.W.3d 467, 476-77 (Tex. Ct. App. 2006) (explaining that Texas procedure refers to the defendant's initial appearance as an article 15.17 hearing wherein a magistrate determines the issues of probable cause and bail and informs the accused of the charge).

197. 475 U.S. 625 (1986).

198. *Rothgery*, 554 U.S. at 201.

199. *Id.* at 202-03 n.13.

attempt to distinguish Michigan's two-stage arraignment system by arguing that only the second proceeding mandated counsel in cases where the defendant entered a formal plea.[200] "We flatly rejected the distinction between initial arraignment and arraignment on the indictment, the State's argument being 'untenable' in light of the 'clear language in our decisions about the significance of arraignment.'"[201]

The *Rothgery* Court concluded its rebuke of the State's argument and the Fifth Circuit's reasoning by referring to its third decision affirming attachment within a fifteen year period, *McNeil v. Wisconsin*.[202] In *McNeil*, the Supreme Court once again reaffirmed that "[t]he Sixth Amendment right to counsel attaches at the first formal proceeding against an accused," namely, when the defendant initially appeared before the judicial officer who set bail.[203] The *McNeil* Court connected counsel's "attachment" to the assigned lawyer's representation at the initial bail hearing by asserting that "in most States, at least with respect to serious offenses, free counsel is made available at that time . . . ."[204]

Rothgery's majority indicated it did not matter that Texas called the defendant's initial appearance by a different name than the "arraignment" stage referred to in *Kirby*.[205] A rose by any other name is still a rose.[206] The Supreme Court explained that, from a constitutional perspective, the Texas "article 15.17 hearing is an initial appearance."[207] It serves the same purpose as the arraignment in *Brewer* or *Jackson* or *McNeil*, where the

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200. *See id.* at 201-02.

201. *Id.* at 202 (quoting Michigan v. Jackson, 475 U.S. 625, 629 n.3 (1986)).

202. 501 U.S. 171 (1991).

203. *Id.* at 180-81.

204. *Id.* at 181.

205. *Id.* at 198-99.

206. *See* WILLIAM SHAKESPEARE, ROMEO AND JULIET, act 2, sc. 2. ("What's in a name? That which we call a rose by any other name would smell as sweet.").

207. Rothgery v. Gillespie Cnty., 554 U.S. 191, 199 (2008); *see also* Kirk v. State, 199 S.W.3d 467, 476-77 (Tex. Ct. App. 2006) (explaining an article 15.17 hearing).

Court confirmed that a criminal prosecution commenced and an accused's right to counsel attached.

The Justices put to rest other technical distinctions Texas used to deny Rothgery assigned counsel. The Justices rejected Texas's explanation for accepting a police affidavit as a "formal complaint" for initiating an arrest warrant prosecution and treating warrantless arrests differently.[208] Such an artificial distinction, said the Justices, would allow "the constitutional significance of judicial proceedings . . . to founder on the vagaries of state criminal law," and render "the attachment rule . . . utterly 'vague and unpredictable.'"[209] The Court ruling made explicit that *Kirby's* enumerated examples were only illustrative and were not intended to allow states to delay assigning counsel indefinitely.[210]

Rothgery's unequivocal message was that indigent defendants' right to counsel attached at the initial appearance, and states must not "unreasonably" delay the assigning of counsel.[211] Following arrest and the filing of charges, a defendant's appearance before a judicial officer commenced an adversary criminal prosecution. "By that point," the Justices agreed, "it is too late to wonder whether [the defendant] is 'accused' within the meaning of the Sixth Amendment, and it makes no practical sense to deny it."[212] The Court left no doubt that when Rothgery appeared before the County magistrate, his relationship to the State had become adversarial. He was the criminal defendant facing "formal charges," and had been confronted with the "prosecutorial forces of organized society and . . . the intricacies of substantive and procedural criminal law."[213] The initial appearance "mark[ed] that point" where the County was committed to prosecute Rothgery; he was now

208. *See Rothgery*, 554 U.S. at 199 n.9. ("[W]e are reluctant to rely on the formalistic question of whether the affidavit here would be considered a 'complaint' or its functional equivalent under Texas case law . . . a question to which the answer itself is uncertain." (quoting Rothgery v. Gillespie Cnty. 491 F.3d 293, 300 (5th Cir. 2007))).

209. *Id*. (quoting Virginia v. Moore, 553 U.S. 164, 175 (2008)).

210. *Id.* at 198, 207.

211. *Id*. at 213.

212. *Id*. at 207.

213. *Id.* (quoting Kirby v. Illinois, 406 U.S. 682, 689 (1972)).

the defendant "headed for trial" and the County had the "consequent state obligation to appoint counsel within a reasonable time once a request for assistance [was] made."[214]

While *Rothgery* clarified that the right to counsel attached at the initial judicial appearance and that counsel must be appointed "within a reasonable time" thereafter, the majority concluded by declaring that the Court's present "holding is narrow."[215] For the time being, the Justices opted to leave undeclared the most important issue for accused poor persons: When are they entitled to their assigned lawyer's representation in court and for counsel to begin "working" on their behalf? As the following Section indicates, during oral argument many Justices wanted to answer this question and appeared sympathetic to the detained unrepresented defendant. The colloquy between the Justices and attorneys provides insight regarding how the Court will likely decide the issue in the future.

E. *Oral Argument: Previewing the Future*

1. *Rothgery's Counsel*

When Rothgery's attorney, Danielle Spinelli, began oral argument, it was clear that most Justices expected her to contend that her client had a constitutional right to counsel when first appearing before the Texas magistrate. The comments of Justices Alito, Breyer, Ginsburg, Kennedy, Scalia, Souter, and Stevens suggested they were prepared to consider whether a constitutional rule mandated states to assign counsel and to regulate when advocacy commenced.[216]

Rothgery's legal strategy, though, was much narrower than the Justices anticipated. By defending her client's civil rights claim that Gillespie County had deprived him of an assigned counsel, Ms. Spinelli avoided doing battle over

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214. *Id*. at 198, 210.

215. *Id.* at 213 ("We do not decide whether the 6-month delay in appointment of counsel resulted in prejudice to Rothgery's Sixth Amendment rights, and have no occasion to consider what standards should apply in deciding this. We merely reaffirm . . . a criminal defendant's initial appearance before a judicial officer . . . marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel.").

216. *See, e.g.*, Transcript of Oral Argument, *supra* note 1, at 5-7, 12-15.

whether Rothgery was entitled to his lawyer's presence at the initial bail hearing. She maintained that the assigned right to counsel "attached" when judicial proceedings commenced and required the magistrate to grant Rothgery's request.[217] At no point did Spinelli insist that Texas had an obligation to produce a lawyer at the hearing.[218] Her strategy succeeded in gaining the support of all but one Justice, but left unrepresented defendants in limbo.

Attorney Spinelli knew she must dispel the lower courts' belief that a prosecutor's involvement was a prerequisite for commencing an adversarial proceeding and triggering the attachment of counsel. She seized the opportunity after Chief Justice Roberts challenged her assertion that an adversary proceeding had begun when Rothgery was brought before a magistrate. "[H]ow can this be part of an adversary proceeding when there's no other adversary on the field?" asked the Chief Justice.[219] "The prosecution's not present. They don't even know anything about this."[220]

Ms. Spinelli's response startled the Justices. "[W]e don't contend that it is adversarial[,]" she said, adding that the prosecutor's presence was irrelevant "because the consequences of the initial appearance for the defendant are precisely the same whether or not a prosecutor is involved."[221] Justice Ginsberg sought clarification. "Ms. Spinelli, there's something confusing about your presentation of this, because . . . you are not contending that there was a right to counsel at that very proceeding."[222] Rothgery's lawyer agreed and reminded the Court it had granted certiorari only to "resolve the threshold question . . . did a criminal prosecution commence at Rothgery's magistration?"[223] If it did, Ms. Spinelli contended, then the right attached and Gillespie County was required to assign counsel.

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217. *Id.* at 8.

218. *See id.* at 13 ("We're not contending that an attorney was required.").

219. *Id.* at 4.

220. *Id.*

221. *Id.* at 5-6.

222. *Id.* at 7.

223. *Id.* at 10.

Justice Kennedy then indicated that the Court's interest, when granting certiorari, lay in considering the broad right to counsel issue. "But what we're looking for here, at least one of the things we might look for in this case, is a specific rule to give to the States so the State knows when counsel has to be appointed."[224] Justice Kennedy then asked, for example, if the state must appoint a lawyer for someone released on personal recognizance who had never appeared before a judicial officer.[225] Rothgery's lawyer indicated that "would seem less likely."[226] Justice Ginsberg interceded: "So when, at what point in time, did this right to counsel attach?"[227] Ms. Spinelli responded, "at the time a criminal prosecution commences."[228]

Other Justices wanted to know as well whether attachment translated to requiring a lawyer's appearance as an advocate. Justice Alito must have had this thought in mind when he asked the $64,000 threshold question: "What does 'attachment' mean?"[229] Receiving a textbook response,[230] Justice Alito sought to pinpoint the specific moment when Rothgery's right attached at the "magistration" hearing. Did this take place "[a]t the beginning [or] at the end" of a defendant's initial appearance?[231] Justice Alito also wondered—if Spinelli believed the defendant could insist that the magistrate assign counsel, might the defendant demand a lawyer's immediate representation?[232] Spinelli responded that Rothgery's right to counsel attached "at the time that the magistrate informed [him] of the accusation against him [and] he became a defendant in a criminal case."[233] His in-custody status, she added, made the need for

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224. *Id.* at 6.

225. *Id.* at 6-7.

226. *Id.* at 7.

227. *Id.*

228. *Id.* at 8.

229. *Id.*

230. Once the right attached, Ms. Spinelli told the Justices, "the State cannot interfere after that point with the attorney-client relationship . . . the defendant has the right to counsel to serve as an intermediary." *Id.*

231. *Id.* at 9.

232. *Id.*

233. *Id.* at 9-10.

counsel substantially greater than someone who receives a traffic citation and goes home. "Here, we have an arrest. We have a person who has been held for a period of time."[234]

Justice Scalia suggested that Rothgery's pretrial incarceration—"a very strong point in your favor"—might satisfy his colleagues' quest for a constitutional standard that would tell Texas and other states when it must assign an attorney.[235] Justice Kennedy posed the question directly. Was she advocating, he asked, "that an attorney is required whenever bail is set?"[236] Ms. Spinelli returned to the safety of her main position: "We're not contending that an attorney was required."[237] Justice Kennedy persisted, "[W]hat do we tell Texas it has to do in all these cases? . . . Does it make a difference that you're held in custody or not held in custody? I don't understand the rule you want us to adopt."[238]

As the Court moved toward considering such a broad right to counsel rule, Ms. Spinelli did her best to deflect the inquiry. Her client, she asserted, was "not asking the Court to adopt any new rule today, but simply to reaffirm the rule it has already announced in *Brewer* and *Jackson*," namely that the right to counsel attached at the initial proceeding—the magistration hearing in Rothgery's case.[239] Ultimately, the Court agreed. It declined establishing an explicit constitutional mandate that would guarantee detainees the immediate assignment and assistance of an appointed attorney.

Some Justices, though, pondered how an attached right to counsel connected to the assigned lawyer's appointment and courtroom appearance. Take the defendant who remains in jail, Justice Alito hypothesized—how long could the State persist in delaying his counsel's appointment? "[W]hen do you say[,]" he asked Spinelli, that "counsel has to be appointed? . . . [T]en days after the magistration?"[240] Deciding the legal argument did not require that she

234. *Id.* at 11.

235. *Id.* at 12.

236. *Id.* at 13.

237. *Id.*

238. *Id.*

239. *Id.* at 14.

240. *Id.*

endorse an exact time frame, Ms. Spinelli indicated that a ten-day delay would be impermissible.[241] The County, she replied, should have made the assignment "*promptly* after Rothgery renewed his request for an attorney following the magistration."[242]

Justice Souter identified the moment when a defendant requested counsel as the constitutional "point at which a reasonable time starts running within which Texas must afford—appoint counsel."[243] Justice Souter clarified Rothgery's position: "So there's no claim that there was anything invalid about the magistration proceeding . . . itself because there was no counsel there."[244] Ms. Spinelli answered: "Not at all."[245] She agreed that counsel must be appointed within a "reasonable" time after the defendant's initial appearance.[246]

How would the Supreme Court ultimately have decided whether assigned counsel was required at an accused's initial bail hearing? Would a detainee's jail status be determinative of the State's constitutional obligation to appoint counsel? For bonded defendants, how long must a released defendant wait for an assigned lawyer?

The Justices tested numerous theories beyond the idea that bail or jail time requires counsel's immediate appointment for an in-custody defendant. Justice Scalia said he would be "quite more sympathetic" if Rothgery's argument did not require appointment until a "critical stage" occurred.[247] Ms. Spinelli rejected a critical stage rule because of her concern that the defendant's recognized right

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241. *Id.*

242. *Id.* (emphasis added).

243. *Id.* at 14-15.

244. *Id.* at 15.

245. *Id.*

246. *Id.* Justice Thomas took issue with this conclusion and thus was the lone dissenter in this case. Rothgery v. Gillespie Cnty., 554 U.S. 191, 218 (2008) (Thomas, J., dissenting) (arguing that the Sixth Amendment right to counsel only attaches at the beginning of a criminal prosecution, and that the article 15.17 hearing—nor any type of initial appearance—are not the beginning of a criminal prosecution).

247. *See* Transcript of Oral Argument, *supra* note 1, at 20. "[O]nly when there is some later proceeding [after the initial appearance], which is an essential part of the prosecution, must you have counsel." *Id.* at 19.

to counsel at a preliminary hearing might be illusory and that many defendants would remain without representation for much longer periods before indictment.[248] She reminded the Court that her client had needed a lawyer at his initial appearance when deciding whether or not to request a preliminary hearing.[249]

Drawing a broader perspective, Rothgery's attorney asserted that a lawyer is necessary "to ensure that the defendant understands and is able to invoke all of his rights [,] . . . [including] demonstrat[ing] his innocence prior to being indicted, rearrested, and incarcerated."[250] Ms. Spinelli argued that a lawyer's counsel was required "not only to conduct and prepare for critical stages, but also to assist a defendant in deciding whether to undergo them."[251] When Justice Scalia pressed her to identify whether Texas must "promptly" assign counsel "as soon as the magistration was completed," Ms. Spinelli replied: "Not necessarily immediately, but within some reasonable time after his request."[252]

Spinelli had accomplished her primary objective—sustaining Rothgery's civil rights claim against the County for failing to assign him a lawyer after the County commenced prosecution. By avoiding the controversial "when is counsel required?" question, she persuaded eight Justices that Rothgery's right to counsel attached at his initial bail hearing. Though her legal strategy failed to tell Texas and other states when they were required to assign counsel and ensure counsel's appearance, the Justices' commentary revealed many factors they would consider in arriving at a constitutional standard, such as a defendant's jail status, the delay in assigning counsel, the lawyer's

248. *See id.* at 19-22. While a preliminary hearing is a critical stage that requires an assigned counsel's presence, it remains within a prosecutor's discretion whether to conduct the courtroom hearing or present evidence to a closed and non-adversarial grand jury proceeding. Texas's state attorney acknowledged that preliminary hearings are "rare" in Texas. *Id.* at 40. Typically, they are scheduled within thirty days following the initial appearance, at which time a prosecutor selects the course of action. *See* app. tbl.II (Tex.).

249. Transcript of Oral Argument, *supra* note 1, at 25.

250. *Id.*

251. *Id.*

252. *Id.* at 22.

eventual appearance, and the defendant's explicit request and necessity for counsel's assistance.[253] Justices Alito, Kennedy and Scalia indicated that an incarcerated pretrial defendant had the strongest argument for counsel at the initial appearance.[254]

Analyzing the Justices' response to the Texas Solicitor General's argument provides added insight into the Court's interest in wanting to learn more about the reality and deficiencies of states' assignment-of-counsel practices.

2. *Gillespie County's Argument*

Solicitor General Gregory Coleman passionately defended Gillespie County's six-month delay in appointing counsel to Walter Rothgery and indigent defendants in general. In turn, the Supreme Court Justices strongly responded to a state criminal prosecution that proceeded without assigning counsel to indigent defendants. Several Justices admitted unfamiliarity with state court right to counsel practices—not surprising, considering that the Justices' experience had been limited to federal courts.[255]

The Justices expressed collective surprise with the State's criminal procedure that regarded in-custody defendants like Rothgery as still being under investigation, despite having been arrested and charged with a felony crime as described in an officer's sworn and filed complaint.[256] For most Justices, the assignment-of-counsel clock began ticking at the bail hearing.

The Justices rejected the State's interpretation of *Kirby* that justified undue delay in assigning counsel and ensuring counsel's assistance to accused poor people in-custody.[257] Several Justices expressed alarm that Rothgery

253. *See id.* at 5-7, 11-14, 24-25.

254. *See id.* at 6-7, 11-14.

255. *See, e.g.*, *id.* at 27-33; *see also* Ifill, *supra* note 50.

256. *See* Transcript of Oral Argument, *supra* note 1, at 54 (Souter, J.) ("Well, I'm just asking what you do . . . . Then at the end of the probable cause hearing . . . the judge says: Well, you've got probable cause to hold this person for possessing a gun after having been convicted of a felony, but there doesn't happen to be any charge to that effect here. Is that the state of the law, in fact?").

257. *Id.* at 40.

had remained in jail for three weeks *after* Texas assigned a lawyer.[258] Others appeared bewildered when Texas maintained it could hold a defendant in jail without assigning counsel for three to ten days.[259]

Lastly, many Justices revealed an interest in learning about states' and localities' right to counsel assignment practices. The more the Justices became aware about Texas's delay in assigning counsel practices and an accused's lengthy wait before counsel appeared, the more they gravitated toward federal constitutional right to counsel protection.

Justice Scalia was the first to ask how much Texas's pretrial procedure and assignment of counsel practices had in common with other states' early judicial proceedings. "Mr. Coleman, what happens in other jurisdictions? I probably ought to know this, but I don't."[260] Hearing no response, Justice Scalia asked the Texas prosecutor what happened when "someone is taken before a magistrate and with the prosecutor present, is the indictment at that point drawn up[?] . . . [D]oesn't the prosecutor have some time to decide what the indictment ought to contain?"[261] Mr. Coleman told the Justice that a felony indictment involved a grand jury presentment and did "take a little bit more time."[262] In Rothgery's situation, the government had waited six months to indict after he posted bail and was released from jail. Justice Scalia asked what would have happened to a person who remained in jail during this period. "[I]s he just held because he is going to be charged, which is what's going on here[?]"[263] Mr. Coleman indicated the defendant "is not charged during that interim."[264] He remained silent about the substantial time Texas defendants remained in

258. *See id.* at 11-14 (comments of Justices Kennedy, Scalia, and Alito).

259. *Id.* at 29-31.

260. *Id.* at 36.

261. *Id.*

262. *Id.*

263. *Id.* at 36-37.

264. *Id.* at 37.

jail without counsel's in-court representation while waiting for the prosecutor's decision.[265]

Justice Kennedy also inquired into what happened to indigent defendants after they appeared without counsel at the first bail hearing. "[H]ow many people[,]" he asked Mr. Coleman, "are being held in custody after a probable-cause determination and do not have counsel appointed for them . . . until some other critical phase takes place?"[266] Mr. Coleman replied that in Texas, every detainee is appointed counsel "within one business day in the large counties and . . . within three business days in the smaller counties."[267] Justice Kennedy then asked Mr. Coleman why Rothgery remained in custody for three weeks after indictment before seeing his assigned lawyer. Was there a mistake? "No[,]" said Mr. Coleman, "he was appointed counsel immediately upon indictment."[268] Mr. Coleman did not explain that appointing counsel does not translate to the lawyer's appearance.

Justice Alito moved the discussion from the murky waters of the attached right to counsel and searched for a clear constitutional rule that would value counsel's timely assignment. He asked Mr. Coleman whether Rothgery was entitled to counsel's appointment to prepare for the critical stage of a preliminary felony hearing, assuming the defendant requested one.[269] When Coleman agreed, Justice Alito queried "[w]hy would the situation be different simply because Texas law doesn't require [counsel at] the examining [probable cause] trial, but gives the defendant the option of demanding one?"[270] Mr. Coleman explained the reality of the vanishing preliminary hearing: "[I]n Texas [and elsewhere] they are very rare because in the very unusual circumstances where somebody asks for one, more

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265. *See infra* text accompanying note 267 (noting where Solicitor General Coleman instead referred to Texas providing assigned counsel for a detainee within one to three days of the defendant's request).

266. Transcript of Oral Argument, *supra* note 1, at 51.

267. *Id.*

268. *Id.* at 51-52.

269. *Id.* at 39.

270. *Id.* at 39-40.

often than not the prosecutor will simply hurry up and do an indictment."[271]

Justice Alito wondered:

> Why is the question of whether the right attaches . . . a separate question from what I would think would be the question here: Whether [Rothgery] had the right to have counsel appointed for him[?] Why isn't that the question, and 'attachment' is simply a label that is used to express one of the conditions for having the right to appoint a counsel?[272]

The Texas Solicitor General agreed "that the analysis is essentially the same . . . there is a right to have the assistance of counsel without having a critical stage."[273]

Justice Kennedy then explored whether a constitutional rule could address when an incarcerated accused should expect to see a lawyer. "If we said that when a defendant is ordered held in custody, that there is then a right of counsel, would we be contradicting any of our precedents as opposed, say, to extending them?"[274] Mr. Coleman indicated he was "not clear" whether the fact of an accused's pretrial incarceration "makes a constitutional difference."[275] He did not respond when Justice Breyer asked "[w]hat harm[,] . . . [w]hat inconvenience[,] . . . what difficulties" would result if the Sixth Amendment right to counsel attached for pretrial detainees awaiting trial.[276]

As oral argument came to a close, it became clear why the Court postponed a ruling that would guide Texas and other states on when counsel must be assigned and be present. Delay would allow states to consider proactive measures to change their assignment of counsel practices. The Court had not faced a similar issue in almost two decades, and both Rothgery's and Texas's lawyers had focused on the considerably narrower certiorari issue here. The Justices knew little about state court practices and welcomed additional data about national practices, after

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271. *Id.* at 40.

272. *Id.* at 49.

273. *Id.* at 50.

274. *Id.* at 40.

275. *Id.* at 41.

276. *Id.*

seeing it might not be true that counsel is available in most states for felonies.[277] By the conclusion of oral argument, the Justices appeared to be moving closer to an agreement that a jailed defendant was entitled to a lawyer's assignment and representation within the forty-eight hour constitutional rule requiring a defendant to first appear before a judicial officer.

The results of a national survey inform when an accused should expect to obtain counsel's assistance after entering the criminal justice system in each of the fifty states and appearing before a judicial officer in select jurisdictions.

II. STATES' PRACTICES IN APPOINTING COUNSEL AT THE INITIAL APPEARANCE

In *Rothgery v. Gillespie County*, the Supreme Court remanded the case and asked the trial court to determine whether Gillespie County had delayed assigning a lawyer to Walter Rothgery for an unreasonable period, after commencing prosecution against him.[278] The Justices' ruling reinstated Rothgery's § 1983 claim based on the County's tardiness in assigning counsel more than six months after the right had attached at Rothgery's initial hearing.[279] The *Rothgery* Court ruling invites further inquiry concerning the timeliness of counsel's actual appearance in local criminal courts across the country. The Justices appear prepared to consider the broader issue of when states must assign counsel. When that day arrives, the Justices will want to take a close look at states' assignment and guarantee of counsel.

Specifically, the Justices will want to know whether indigent defendants are represented at the initial appearance and, if not, the extent of delay before counsel is appointed and begins representing an assigned client. In localities that do not provide counsel, the Justices will be interested in learning how long an incarcerated defendant waits for counsel's in-court representation. When the Court reviews that information, it will discover that many states'

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277. *See supra* pp. 366-69, 379-82.

278. Rothgery v. Gillespie Cnty., 554 U.S. 191, 213 (2008).

279. *See id.*

jurisdictions delay counsel's courtroom advocacy for five, ten, twenty, or thirty or more days beyond an accused's first appearance before a judicial officer.

The following Section presents a composite picture within the different states and representative counties of the limited extent to which they protect indigent defendants' right to counsel during the initial stage of prosecution. The results obtained from more than four hundred public defenders and appointed counsel measure the impact of *Gideon* and of states' flawed "experimentation" of denying counsel at the preliminary stages of a criminal prosecution.[280] The survey's findings reveal which states and localities regard indigents' right to assigned counsel as fundamental and which place less value on counsel's early assistance.

A. *Surveying the Fifty States: Counsel at Initial Appearance*

Following the Supreme Court's ruling in *Rothgery*, student researchers mailed more than nine hundred surveys to public defenders and assigned counsel in judicial districts in each state to learn whether indigent state defendants were first represented after prosecution commenced, and, if not, when in-court representation began.[281] The 2008-2009 survey followed a previous right to

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280. *See* Gerstein v. Pugh, 420 U.S. 103, 123 (1975) (recognizing the value of "experimentation" among the states to determine whether the Fourth Amendment required the presence of counsel at pretrial hearings).

281. In an effort to obtain this information, student researchers mailed the following questionnaire to 931 public defenders and attorneys who are the contract providers in multiple localities in the fifty states. They received answers to the following questions from 308 individuals representing one third of the sample population from every state except Maryland. Additionally, we conducted telephone interviews with approximately ninety-five assigned attorneys in which the same questions were asked.

1) COUNSEL'S APPEARANCE: Following arrest, how many days typically pass before assigned counsel represents a jailed defendant before a judicial officer, i.e., magistrate, commissioner, judge?

2) INITIAL APPEARANCE:

(a) In your jurisdiction, are indigent defendants represented by a public defender or assigned counsel at the defendant's initial bail appearance before a judicial officer?

counsel study, published ten years earlier, that uncovered serious deficiencies in assigned counsel's representation at the initial bail stage in states' criminal courts.[282] At that time in 1998, responding defenders indicated that only eight states and the District of Columbia guaranteed assigned counsel's immediate in-court representation after a criminal prosecution began.[283] More than twice as many states—eighteen altogether—uniformly denied an appointed lawyer

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(b) If indigent defendants are NOT represented by a public defender or assigned counsel at the initial appearance, do judicial officers order counsel's appointment?

(c) Would the result in (b) change if the defendant specifically asked the presiding judge to appoint counsel?

3) PRETRIAL DETENTION: Defendant's Second Judicial Appearance

(a) For defendants who remain in jail because they cannot afford bail, how many days usually pass until they next appear in court?

(b) Is counsel typically present at this proceeding?

To gain a fair sampling of a state's response, researchers insisted upon receiving information from a minimum of one out of four attorneys. Researchers recommend a 25% response rate for mail-in surveys. *See* Scott Keeter et al., *Gauging the Impact of Growing Nonresponse on Estimates from a National RDD Telephone Survey*, 70 PUB. OPINION Q. (SPECIAL ISSUE) no. 5, 759, 763, 766 (2006) (showing that a 25% response rate yielded results that were statistically indistinguishable from a 50% response rate); *see also*, Penny S. Visser et al., *Mail Surveys for Election Forecasting? An Evaluation of the* Columbus Dispatch *Poll*, 60 PUB. OPINION Q. no.2, 181, 181-82 (1996) (demonstrating that surveys with low response rates are "not necessarily low in validity"). Surveys invariably included defenders who practiced in a state capital or populated city to capture the anticipated large volume of arrests. In the few instances where researchers received fewer than 25% responses, they conducted additional telephone interviews. The survey results are included in the Appendix. App. tbls.I-IV.

282. *See generally* Colbert, *Illusory Right to Counsel*, *supra* note 15 (describing the results of a national survey on legal representation of the accused and discussing deficiencies in assigned counsel's representation).

283. *Id.* at 8-9 (California, Connecticut, Delaware, Florida, Massachusetts, North Dakota, West Virgina, Wisconsin, and the District of Columbia). Mindful of the Supreme Court's ruling in *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991), where the majority held that an accused must be brought before a judicial officer within forty-eight hours of arrest, including weekends, the 2008-2009 survey provided a more generous standard: a state was in compliance with the forty-eight-hour representation standard when assigned counsel represented an indigent defendant at the first bail hearing within three days from the date of arrest, if it included one or more weekend days. Longer delays until an attorney's in-court representation were regarded as a "No" representation response for purposes of collecting data.

to lower-income people at their first appearance.[284] The survey revealed that most of the remaining twenty-four states refused to assign a lawyer with the exception of a few limited localities in their jurisdiction.[285]

The results of the current 2008-2009 survey show a marked change. Across the country, more states and local defenders are now representing indigent defendants at initial appearances held within the forty-eight hour period following arrest.[286] For instance, two additional states are guaranteeing representation,[287] and many more have modified their practice to ensure an assigned counsel's presence in at least half of their judicial districts.[288] Equally significant, only ten states presently deny a lawyer's appearance statewide—down from the eighteen states that conducted initial hearings without counsel a decade ago.[289] Many of the eighteen previous "no counsel" states now guarantee a lawyer's appearance in one or two counties that usually includes a highly populated city.[290]

Despite this national trend toward representing indigent defendants at the initial appearance, about half of the country's local jurisdictions persist in not providing counsel.[291] Even more troubling, even after the initial appearance, defendants are not likely to obtain counsel's in-court representation any time soon.

1. *Added Court Delays: The Need for Counsel*

This survey highlights the substantial delay resulting from court administrators' scheduling of the unrepresented defendants' next court appearance. In these "no-counsel"

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284. *Id.* at 10-11.

285. *See id.* at 11.

286. *See* app. tbls.I-IV.

287. *See* app. tbl.I (indicating Hawaii, Maine, and Vermont now provide statewide representation, but not West Virginia, which was cited in the 1998 Study).

288. *See infra* Part II.A.3.b.

289. *See infra* Part II.A.3.a; *see also* app. tbl.II.

290. *See infra* Part II.A.3.b.

291. *See* app. tbls.II, IV (showing ten states do not provide counsel and eighteen others do so only in select counties).

jurisdictions, an accused who cannot afford bail is accustomed to waiting in jail for seven to twenty-eight days, and frequently one month or longer, before returning to court and finding an assigned counsel present.[292] Responding lawyers provide a disturbing account of what frequently occurs when states deny counsel at the initial bail hearing: localities postpone cases for excessive periods, thereby adding further delay to assigned counsel's in-court representation well beyond the date of counsel's formal appointment.[293]

The emphasis on the delay between a defendant's initial bail hearing and an assigned lawyer's actual in-court representation takes into account the attorney's critical role at this early stage. In the usual state system, where nine out of ten people are charged with nonviolent or misdemeanor crimes, a lawyer's courtroom advocacy typically means the difference between pretrial release and unaffordable bail.[294] Absent counsel, an accused is more likely to suffer the serious consequences of pretrial incarceration beyond personal liberty, namely economic and social losses that the Supreme Court has recognized "may imperil the suspect's job, interrupt his source of income, and impair his family relationships."[295]

A defender's courtroom presence helps balance a playing field that otherwise leans heavily in favor of the unopposed government prosecutor, while also serving as a counterweight to an intimidating legal process. A lawyer's zealous bail argument, early investigation, and evaluation of the State's case allow a detainee to believe in an assigned counsel's dedication to the case and to consider a trial option. In contrast, the longer the delay before counsel

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292. *See* app. tbl.II. For example, defendants in El Paso, Texas, wait an average of seven to ten days before receiving counsel. *Id.* (Tex.). Defendants in Merrimack County, New Hampshire, wait an average of ten to thirty days before receiving counsel. *Id.* (N.H.). Defendants in Shelby County, Alabama, wait an average of twenty-one to twenty-four days before receiving counsel. *Id.* (Ala.). Defendants in Aiken County, South Carolina, wait an average of forty-five to sixty days before receiving counsel. *Id.* (S.C.).

293. *See infra* Part II.A.3.

294. *See* Colbert et al., *Counsel at Bail*, *supra* note 65, at 1721-22.

295. Gerstein v. Pugh, 420 U.S. 103, 114 (1975) (citing RONALD GOLDFARB, RANSOM: A CRITIQUE OF THE AMERICAN BAIL SYSTEM 32-91 (1965); LEWIS KATZ ET AL., JUSTICE IS THE CRIME 51-62 (1972)).

appears in court, the greater the client's reasonable anxiety about the assigned lawyer's competence and commitment to defend. Many defendants, particularly those in custody, ultimately lose the will to fight and opt to plead guilty because they lack confidence in the late arriving, appointed lawyer.[296]

Consequently, when court officials delay the scheduling of the next court appearance, assigned counsel knows it is imperative to meet and interview the new client. Visiting lawyers can accomplish a lot while fulfilling their ethical duty to communicate promptly.[297] Rothgery's counsel, for instance, though unable to interview Rothgery in person, succeeded in gaining his client's release after their phone conversation and communication with Rothgery's wife allowed him to engage the prosecuting attorney in discussion.[298] His subsequent investigation and procurement of exculpatory evidence resulted in dismissal of the weapons charge.[299]

In practice, most assigned lawyers find it difficult to arrange for jail visits. Rothgery's counsel, for instance, was on trial on an unrelated matter when he was appointed and never saw his client until after he regained liberty, weeks later.[300] Most colleagues would have chosen the convenience of waiting until the next court date, rather than arranging the time-consuming jail meeting.

When deciding whether counsel's attachment requires early representation, the Supreme Court should consider the total time period in which a state delays assigning counsel and schedules the next court appearance where counsel is expected to appear. Understanding the full extent

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296. *See* McMunigal, *supra* note 66, at 987.

297. The ABA Model Rules of Professional Conduct require that "[a] lawyer shall . . . promptly inform the client of any decision or circumstance with respect to which the client's informed consent . . . is required." MODEL RULES OF PROF'L CONDUCT R. 1.4 (2003). Rule 1.3 also requires a lawyer to "act with reasonable diligence and promptness in representing a client." MODEL RULES OF PROF'L CONDUCT R. 1.3 (2003). However, clients frequently complain about lawyers' dereliction in communication. *See* RICHARD ZITRIN ET AL., LEGAL ETHICS IN THE PRACTICE OF LAW 857 (3d ed. 2007).

298. Rothgery v. Gillespie Cnty., 554 U.S. 191, 196-97 (2008).

299. *Id.*

300. Maguire Interview, *supra* note 33.

of delay provides a crucial perspective for considering whether indigent defendants ought to receive the benefit of counsel's courtroom assistance at the first judicial bail proceeding, particularly for in-custody defendants.

The next Section presents the collective fifty states' practices. It begins by identifying the approximately one out of five states which guarantee representation at bail within forty-eight hours of arrest, and the equivalent same number that decline to do so. The following Section explains the thirty "hybrid" states where representation at the initial appearance is spotty and where counsel's ultimate presence depends upon the local jurisdiction where prosecution occurs.

2. *Ten States Guarantee Representation*

Gideon's constitutional right to counsel has not yet extended to a poor person's initial bail hearing. Indeed, the current 2008-2009 survey shows that only ten states—California, Connecticut, Delaware, Florida, Hawaii, Maine, Massachusetts, North Dakota, Vermont, Wisconsin, and the District of Columbia,[301] ensure representation within the forty-eight-hour initial bail hearing.[302] Several additional states, including Minnesota, Montana, Oregon, and Washington also guarantee counsel in about three out of every four localities where an indigent defendant first appears following arrest.[303]

During Rothgery's oral argument, several Justices reacted sharply to the Texas prosecutor's bold defense of Gillespie County's rejection of the defendant's plea for counsel.[304] At that time, the Justices did not know how few states honored counsel's presence at the initial bail hearing; they were likely more familiar with federal practice that guarantees counsel's presence and were taken aback when

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301. In the nation's capital, defenders represent indigent clients at the initial bail proceeding, which usually occurs within twenty-four hours of arrest, except when "the arrest occurs on Saturday after the cutoff time." Survey Response from Amanda Davis & Jason Downs, Pub. Defender. Wash., D.C. (Summer 2009); *see also* app. tbl.I (D.C.).

302. App. tbl.I.

303. *See* app. tbl.III.

304. *See* Transcript of Oral Argument, *supra* note 1, at 28-37.

confronted with Texas's practice of denying counsel after prosecution commenced.[305] The Justices probably expected Texas to be less dismissive of post-*Gideon* protections, and for the State prosecutor to take a less hard-line position in defending a system that denied counsel to an incarcerated, and innocent, person like Rothgery. The Court's rejection of Texas's position revealed its appreciation for a shared *Gideon* principle: access to counsel at the initial bail hearing and thereafter can no longer be ignored. More states and localities can be expected to embrace *Rothgery* and join the "YES, we guarantee representation" category after a criminal prosecution has begun.

a. Why These States?

No clear explanation appears for understanding why the current group of "YES, We Do" states provide counsel for indigent defendants when they first appear at a bail hearing before a judicial officer. Most share an important feature: they employ a statewide public defender system to meet their constitutional duty to poor people accused of crime.[306] A statewide organization charged with responsibility for indigent representation makes it easier to employ uniform right-to-counsel standards. Yet a statewide Office of the Public Defender does not always guarantee counsel's advocacy at the earliest stage.[307]

States' common location and regional culture might be thought to account for inter-regional differences. Examining the 2008-2009 survey reveals some support and evidence of a geographic pattern.[308] "YES, We Do" states are found

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305. *See supra* notes 176-92 and accompanying text.

306. A statewide office of the public defender exists in California, Connecticut, Delaware, Florida, Hawaii, Massachusetts, and Wisconsin.

307. Maryland's statewide Office of the Public Defender does not represent indigent defendants at the initial bail hearing at any of its' judicial districts. *See* app. tbl.II (Md.). Hybrid states Alaska, Colorado, New Jersey, New Mexico, and Wyoming also fund a statewide office, but are present at the initial appearance only in a minority of localities. *See* app. tbl.IV. For a general overview of indigent defense in state courts, see *Access and Fairness: Indigent Defense FAQs*, NAT'L CTR. FOR STATE COURTS, http://www.ncsconline.org/topics/access-and-fairness/indigent-defense/faq.aspx (last visited Feb. 15, 2011).

308. The United States Census Bureau places individual states in the following nine divisions: Pacific, West North and West South Central, Mountain, East North and East South Central, South Atlantic, Middle-Atlantic, and New

disproportionately in the New England coastal region (including Connecticut, Maine, Massachusetts, and Vermont—four out of its six states),[309] and in two other areas, the Pacific (including California and Hawaii—two out of its five states)[310] and in the South Atlantic region where

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England. U.S. CENSUS BUREAU, CENSUS REGIONS AND DIVISIONS OF THE UNITED STATES, http://www.census.gov/geo/www/us_regdiv.pdf (last visited Feb. 15, 2011).

309. New England Division states consist of Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont. U.S. CENSUS BUREAU, *supra* note 308. In the six-state New England Division, Connecticut, Maine, Massachusetts, and Vermont represent indigent defendants at the initial bail proceeding. App. tbl.I. New Hampshire is the lone New England state that refuses to guarantee representation at the first bail hearing, with the exception of defendants charged with felony crimes in Grafton County. *See* app. tbl.II; *see also infra* note 328.

In Rhode Island, the statewide Public Defender John Hardiman initiated a right to counsel, which allows public defenders to represent many poor people at the initial bail hearing in most counties. Public Defender Hardiman reported that Providence public defenders are present in the three largest judicial districts, but not in the two smallest counties where defendants wait three to seven days for their appointed counsel. *See* app. tbl.III (R.I.). Warwick, Kent County Public Defender Christine O'Connell indicated that, "prior to the establishment of our program, it was unusual to see counsel present at those events, except for the most affluent defendants. I am present at arraignment [bail hearing] pursuant to a program set up by my office—not by court procedure/policy." O'Connell added that early representation "saves our state about nine million dollars a year." Letter from M. Christine O'Connell, Pub. Defender, Warwick, R.I., to author (July 1, 2008) (on file with author).

310. Pacific Division states consist of Alaska, California, Hawaii, Oregon, and Washington. U.S. CENSUS BUREAU, *supra* note 308. Ten years ago, only one of four Hawaii circuits guaranteed the right to counsel at the initial bail hearing. Colbert, *Illusory Right to Counsel*, *supra* note 15, app. tbl.B at 56. Currently, Hawaii has joined California, whose defenders are also present at the first bail determination throughout the state. Public defenders from Kauai, Hawaii, say their office has the quickest public defender involvement statewide: an in-custody defendant appears with counsel at a bail hearing before a judicial officer within forty-eight hours (weekends included) of arrest. Telephone Interview with Edmund Acoba, Pub. Defender, Kauai, Haw. (Aug. 13, 2009); *see also* app. tbl.I (Cal., Haw.).

In Washington, six of the eight responding jurisdictions, including Seattle, Tacoma, and Spokane (for felonies), the state's most populated cities, guarantee representation within one business day. App. tbl.III (Wash.). Spokane County Public Defender Kathy Knox confirmed representation at the initial bail hearing for defendants charged with felonies, but not for defendants facing misdemeanors who wait six days. *Id.* In less populated communities, such as

Delaware, Florida, and the District of Columbia provide representation at the initial bail hearing. New England is the only region where a majority of states guarantee counsel at the initial bail hearing.

Of the remaining two "YES, We Do" states, North Dakota and Wisconsin are randomly located in two other regions. Delaware and Florida are the only two states in the South Atlantic region (consisting of eight states and the District of Columbia in total) to provide counsel at the initial bail proceeding.[311] North Dakota is the only state from the West North Central region to represent indigent defendants throughout its borders.[312] Wisconsin completes

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Port Townsend (population 8,300) and Port Angeles (population 18,800), Public Defenders Ben Critchlow (Jefferson County) and Harry D. Gasnick (Clallam County) report that indigent defendants wait up to ten days before obtaining legal representation. *See id.*

Responding public defenders and assigned counsel in Oregon indicated they are present at initial bail hearings in seven out of the eleven counties where surveys were mailed, including Portland, Salem, and Oregon City. Delays may occur in Baker County (three days), Douglas County (three to five days), Coos County (seven days), and Washington County (five to fourteen days). App. tbl.III (Or.). Oregon law requires arraignments to occur during the first thirty-six hours of custody, excluding holidays, Saturdays, and Sundays. OR. REV. STAT. § 135.010 (2007).

311. The eight-state South Atlantic Division includes Delaware, Florida, Georgia, Maryland, North Carolina, South Carolina, Virginia, and West Virginia. U.S. CENSUS BUREAU, *supra* note 308. Aside from Delaware and Florida, three of these states—Georgia, North Carolina, and West Virginia—provide timely representation in only one or two jurisdictions. App. tbl.IV. Maryland defendants are unrepresented at the initial bail hearing and, with the exception of Baltimore City and Montgomery County, counties wait at least thirty days for assigned counsel's representation in court. App. tbl.II (Md.). No defendant is guaranteed counsel anywhere in South Carolina where substantial delays also follow. App. tbl.II (S.C.).

Florida law guarantees indigent defendants' representation at the initial bail determination. *See* FLA. R. CRIM. P. 3.111, 3.130. Public defenders in seven jurisdictions confirmed their presence at initial appearances. App. tbl.I (Fla.). Clearwater Public Defender Bob Dillinger said, "we always attend first appearance bail hearings, which in Florida occur within twenty-four hours of arrest." Survey Response from Bob Dillinger, Pub. Defender, Clearwater, Fla. (Summer 2009). In Delaware, public defenders for all three counties verified that they provided counsel for indigent defendants at the initial bail hearing. App. tbl.I (Del.).

312. The seven-state West North Central Division consists of Iowa, Kansas, Minnesota, Missouri, Nebraska, South Dakota, and North Dakota. U.S. CENSUS

the group of the "YES, We Do" states. It is the only state that guarantees first appearance representation in the East North Central region.[313]

Few assigned lawyers are found within the nineteen states located within the West South Central, East South Central, Mountain, and Middle Atlantic areas. In the West South Central region,[314] indigent defendants represent themselves at bail hearings in Oklahoma and Texas.[315] In Arkansas, only indigent defendants in the city of Little Rock enjoy counsel's assistance.[316] Overall within this region, Louisiana indigent defendants stand the best chance of being represented by an assigned counsel at initial bail proceedings conducted in the state.[317]

A similar pattern exists in the neighboring East South Central region[318] where Alabama, Mississippi, and

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BUREAU, *supra* note 308. While North Dakota defenders are present at initial bail hearings throughout the State, Minnesota defenders provide similar representation in every county but one. App. tbl.I (N.D.); app. tbl.III (Minn.). Most counties in Iowa, Missouri, Nebraska, and South Dakota do not ensure legal representation at the first bail hearing (more "no" than "yes" states). App. tbl.IV. In Sioux Falls, South Dakota, indigent defendants wait only one business day before counsel advocates for their pretrial release. Yet, in Deadwood, South Dakota, poor people charged with felony crimes wait thirty days before being represented by counsel at their next appearance. App. tbl.IV (S.D.). In comparison, neighboring Kansas never provides counsel at bail for its' indigent defendants. App. tbl.II (Kan.). In Iowa and Nebraska, defendants in the cities of Dubuque, Lincoln, and Mason City are the only ones defended at their states' initial bail hearings. App. tbl.IV (Iowa, Neb.).

313. Wisconsin is one of five states in the East North Central division, along with the hybrid states of Indiana, Illinois, and Ohio, and the no-counsel state of Michigan. U.S. CENSUS BUREAU, *supra* note 308; *see also* app. tbl.II (Mich.).

314. West South Central Division states consist of Arkansas, Louisiana, Oklahoma, and Texas. U.S. CENSUS BUREAU, *supra* note 308.

315. Defenders in Oklahoma report delays of about three weeks before counsel appears to represent a poor person. App. tbl.II (Okla.). Most Texas detainees experience similar delays that extend to thirty days in some jurisdictions. App. tbl.II (Tex.).

316. App. tbl.IV (Ark.).

317. *See infra* note 356 (reporting on Louisiana counties that do and do not provide counsel); *see also* app. tbl.III (La.).

318. The East South Central Division states consist of four states: Alabama, Kentucky, Mississippi, and Tennessee. U.S. CENSUS BUREAU, *supra* note 308.

Tennessee uniformly fail to provide counsel.[319] Kentucky's indigent defendants are the most likely to be represented by assigned counsel.[320] The Mountain region[321] reflects a clear divide: lower-income defendants in Idaho and Montana are likely to be defended at their initial bail hearing in local courts.[322] An indigent arrestee faces much longer odds of finding an assigned lawyer in the states of Arizona, Colorado, New Mexico, and Wyoming.[323] In the Middle Atlantic region[324] indigent defendants in New York are more likely to be appointed counsel than in neighboring states New Jersey or Pennsylvania.[325]

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319. App. tbl.II.

320. *See* app. tbl.III (Ky.).

321. The eight Mountain Division states include Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah, and Wyoming. U.S. CENSUS BUREAU, *supra* note 308.

322. *See* app. tbl.III.

323. *See* app. tbl.IV.

324. The Middle Atlantic Division includes the hybrid states of New Jersey, New York, and Pennsylvania. U.S. CENSUS BUREAU, *supra* note 308.

325. *See* app. tbl.III (N.Y.); app. tbl.IV (N.J., Pa.). New York defendants are more likely to obtain counsel when first appearing at bail hearings in New York City, and in Albany, Buffalo, Nassau, Suffolk, Syracuse, Utica, Watertown (for felonies), and Westchester, but not in upstate districts such as Ulster County (three days), Steuben County (three to four days), St. Lawrence County (six days), Broome County (ten days), and Schenectady County (ten to twenty days). App. tbl.III (N.Y.); *see also* Telephone Interview with Renee Captor, Pub. Defender, Syracuse, N.Y. (Aug. 9, 2009); Telephone Interview with Dale Jones, Pub. Defender, Albany, N.Y. (Aug. 13, 2009); Telephone Interview with Helen Zimmerman, Pub. Defender, Buffalo, N.Y. (Aug. 9, 2009).

In New Jersey, four out of eleven responding defenders said they appear at the initial bail hearing, including those in a large city like Newark, but not Camden where defendants wait seven to twelve days for counsel to appear, or Trenton where a three to six day delay occurs. App. tbl.IV (N.J.).

Most of Pennsylvania's indigent defendants are unrepresented by counsel; only Belleforte and Philadelphia County defenders guarantee representation at the initial appearance before a judicial officer. App. tbl.IV (Pa.). Philadelphia County defender Ellen Greenlee explained that "this representation service is part of our contract to provide legal services [for] the city." Telephone Interview with Ellen Greenlee, Pub. Defender, Phila., Pa. (Aug. 13, 2009). Bellaforte Chief Public Defender David Crowley stated, "most of Pennsylvania has a three to ten day rule when assigned counsel first appears in court and meets her assigned lawyer." Telephone Interview with David Crowley, Pub. Defender, Belleforte, Pa. (Aug. 13, 2009). Cumberland defendants wait about five to ten days, similar

In brief, the New England, South Atlantic, and Pacific areas are the choice locations for predicting that a lower-income defendant will be represented when first brought to a bail hearing. Outside of these two areas, individual states that have an Office of the Public Defender are more likely to provide legal representation at indigent defendants' initial bail hearings.[326]

3. *Limited Right to Counsel in Most States*

In the four out of every five states that do not uniformly guarantee counsel, the picture is less rosy. Nearly two-thirds of these states conduct initial bail hearings in all or in most parts of their jurisdiction *without* ensuring a lawyer's representation to poor and lower-income defendants. Indigent defendants are likely to face a lengthy postponement before they are scheduled to return to court again and see their assigned counsel present for the first time.

The following Section begins by identifying the ten states that continue to deny representation when defendants first appear at a bail proceeding. It then focuses on the thirty states that fall within the hybrid pattern of assigning counsel for indigent defendants' initial appearance in only some local proceedings.

a. Ten States Deny Counsel

Compared to a decade ago, the number of states that systematically refuse to guarantee representation to indigent defendants at their initial bail hearing following arrest has been reduced almost by half. At that time, eighteen states conducted bail hearings without assigned counsel.[327] Today, ten states still decline to guarantee such protection.

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to detainees in Scranton (six days), Jim Thorpe (seven days), Media (ten days), and Somerset (ten days). App. tbl.IV (Pa.). According to the survey responses, delays were considerably longer in Reading, where Defender Glenn Welsh said defendants wait eleven to twenty-one days, in Johnstown, where Prosecutor Bob Jones estimated defendants wait twenty days, and in Lancaster where Chief Public Defender James Karl estimated a thirty-day delay. *Id.*

326. *See supra* note 306.

327. Colbert, *Illusory Right to Counsel*, *supra* note 15, at 10-11.

Indigent defendants in Alabama, Kansas, Maryland, Michigan, Mississippi, New Hampshire,[328] Oklahoma, South Carolina, Tennessee, and Texas appear alone and represent themselves at the initial bail hearing before a judicial officer.[329] Within these ten "No, We Don't" [provide a lawyer] states, many defendants unable to afford bail remain in jail for prolonged periods, often many weeks beyond the forty-eight-hour initial appearance, until their next court date when they finally receive in-court representation.

Following the initial bail hearing, a range of delays exists among the different states and within a specific state's localities. In Alabama, for instance, defendants charged with a felony crime in Birmingham, Jefferson County, usually wait fourteen to twenty-one days for in-court representation.[330] Montgomery County defendants wait seven to fourteen days after their initial appearance while Shelby County defendants wait twenty-one to twenty-four days.[331] Alabama detainees charged with misdemeanors wait ten to seventeen days in Montgomery County and about four weeks (twenty-eight days) in Jefferson County before gaining their lawyer's assistance in court.[332]

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328. New Hampshire defendants are not represented at the first bail hearing according to the counties survey responses, with one exception: in Grafton County, Hanover and Oxford public defenders represent people charged with felony crimes. *See* app. tbl.II (N.H.). Because misdemeanors represent the bulk of arrests entering a locality's criminal justice system, and because Grafton represents a fraction of the State's population (population 88,522), the author opted to place New Hampshire in the "NO" representation category to reflect New Hampshire's practice of not guaranteeing counsel at bail.

329. App. tbl.II.

330. App. tbl.II (Ala.); *see also* Telephone Interview with Bill Blanchard, Pub. Defender, Montgomery, Ala. (July 28, 2009) (estimating a delay of seven to fourteen days before indigent defendants see their assigned counsel); Telephone Interview with Bill Hill, Pub. Defender, Columbiana, Ala. (July 28, 2009) [hereinafter Hill Interview] ("[An] indigent defendant charged with felony will not see a lawyer for twenty-one to twenty-four days, 95% of the time it is at least twenty-four days."); Telephone Interview with John Lentine, Pub. Defender, Birmingham, Ala. (July 28, 2009) [hereinafter Lentine Interview] ("In-custody defendants facing felony charges will have counsel's assistance at preliminary hearing held fourteen to twenty-one days after initial appearance, and will wait twenty-eight days for misdemeanor charges.").

331. App. tbl.II (Ala.).

332. *See* Hill Interview, *supra* note 330; Lentine Interview, *supra* note 330.

Mississippi has shorter postponements for a defendant's second appearance. Gulfport defendants charged with a felony meet their assigned counsel at a preliminary hearing somewhere between two to fourteen days after their initial bail hearing; Greenville and Jackson defendants return to court and meet their assigned counsel approximately seven days after they first appeared.[333]

According to Oklahoma City Public Defender Robert Ravitz, indigent clients remain without counsel during the first ten days following arrest while prosecutors decide whether or not to pursue prosecution.[334] After the ten-day period, defenders are assigned. "We try to get there [to the jail] as soon as possible; our clients appear again in court within seventeen to twenty-four days after the initial bail determination," reports Ravitz.[335] His colleague, Tulsa Public Defender Pete Silva, agrees that "our time is essentially the same as Oklahoma City's. Defendants return to court twenty-one to twenty-four days after their first bail hearing."[336]

In Tennessee, defendants in several districts, including Nashville, have average waits of three to five days before assigned counsel appears in court.[337] Ashland City, Chattanooga, Jasper, and Maryville defendants typically remain in jail for six to twelve days following arrest before gaining counsel's courtroom assistance.[338] McMinnvale detainees have the longest delay of three weeks (twenty-one days) before returning for their second court appearance.[339]

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333. *See* App. tbl.II (Miss.).

334. Telephone Interview with Robert Ravitz, Pub. Defender, Oklahoma City, Okla. (Nov. 25, 2008).

335. *Id.* (estimating that defendants wait about thirty days for counsel's in-court appearance).

336. Telephone Interview with Pete Silva, Pub. Defender, Tulsa, Okla. (Nov. 25, 2008).

337. *See* app. tbl.II (Tenn.).

338. *See* app. tbl.II (Tenn.); *see also* Survey Response from Ardena Garth, Pub. Defender, Chattanooga, Tenn. (Summer 2009); Survey Response from Jake Lockert, Pub. Defender, Ashland City, Tenn. (Summer 2009).

339. Survey Response from Tremena Wilcher, Pub. Defender, McMinnvale, Tenn. (Summer 2009) ("[I[f they are incarcerated and request counsel at their initial [bail] appearance, counsel is appointed and the case is reset for hearing within thirty days.").

As Walter Rothgery learned, Texas defendants also are not represented at the initial bail proceeding before a magistrate. Throughout the state, in-custody detainees' next scheduled court appearances varies, depending on the prosecuting jurisdiction. San Antonio and Kaufman defendants wait thirty days before obtaining their assigned lawyer's representation in court, and Lubbock defendants wait for twenty to thirty days, while Edinburg defendants wait fifteen days.[340] El Paso defendants wait between seven to ten days.[341] Houston defendants have the speediest turnaround—"within two business days."[342]

In the remaining "NO We Don't" states—Kansas, Maryland, Michigan, New Hampshire, and South Carolina—wide differences exist. In some Maryland and Kansas counties, defendants fare best. In Montgomery and Baltimore City, Maryland, for instance, public defenders represent in-custody defendants two to three days after a judicial officer decides bail.[343] In Wichita, Kansas,

340. App. tbl.II (Tex.); *see also* Telephone Interview with Miriam Burleson, Pub. Defender, San Antonio, Tex. (Aug. 17, 2009). In Lubbock, Texas, Public Defender Jack Stoffregen reported that "representation is generally a letter from counsel to the judge; twenty to thirty days pass before a defendant who cannot afford bail appears before a judicial officer." Survey Response from Jack Stoffregen, Pub. Defender, Lubbock, Tex. (Aug. 23, 2009).

341. App. tbl.II (Tex.).

342. Houston (Harris County) criminal defense lawyer, Tom Moran, stated that Harris County conducts initial appearances before a magistrate "24/7" at the local jail. Following arrest, detainees appear in court "the next business day" where a judge appoints an attorney who is the assigned "lawyer of the day." Moran stated that indigent defendants arrested on a Monday are not represented at the initial bail hearing, but will see their appointed lawyer "not later than Wednesday." Telephone Interview with Tom Moran, Criminal Def. Attorney, Houston, Tex. (Aug. 19, 2009).

343. App. tbl.II (Md.). Though indigent defendants are never represented by assigned counsel at the initial bail hearing, Baltimore City and Montgomery County public defenders are present at detainees' second bail review hearing that is held within the next two weekdays after arrest. *See* Richmond v. Dist. Court of Md., 990 A.2d 549 (Md. 2010) (describing a class action lawsuit on behalf of unrepresented Baltimore City indigent detainees' right to counsel at the initial appearance). Outside of these two counties, defendants wait thirty days before receiving the benefit of counsel's representation in court. The ten remaining Maryland jurisdictions do not provide counsel to indigent detainees at the forty-eight hour bail review hearing; they obtain a lawyer's in-court representation at their next scheduled court appearance, thirty days later. App. tbl.II (Md.).

defendants meet their assigned counsel two days after the initial bail hearing.[344] Salina defendants wait between two and seven days, while Topeka detainees' assigned counsel appears one week later.[345]

Michigan's indigent detainees in Ingham County have their second judicial appearance two to five days following their initial bail hearing.[346] Detainees in Detroit, Grand Rapids, and Lansing, and Wayne, Michigan, though, wait ten to fourteen days.[347]

In Concord, New Hampshire, the state's Public Defender Chris Keating estimates assigned counsel's delay as between ten to thirty days "depending on the speed with which defense counsel is appointed, goes to see the client, files a bail motion, et cetera."[348] Nashua defendants wait ten days for counsel's appearance at a felony hearing and twenty-one to twenty-eight days when charged with a misdemeanor, while Stratham defendants wait ten business days to obtain counsel's assistance for felonies and thirty to forty-five days for misdemeanors.[349] In comparison, Oxford and Hanover defendants receive in-court representation for felonies, but must wait seven days when charged with misdemeanor crimes, although it is "very court dependent."[350] In Nashua and Stratham, a defendant's

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344. App. tbl.II (Kan.).

345. *Id.*

346. App. tbl.II. (Mich.).

347. *See id.* Ingham Public Defender Michael J. Nichols responded that orders of appointment "are faxed and can take time to get . . . to my desk. It seems like a phone call might speed up the client contact." Survey Response from Michael J. Nichols, Pub. Defender, Ingham Cnty., Mich. (Summer 2009). In a telephone interview, Detroit Public Defender James O'Donnell estimated that a detainee's second court appearance and meeting with counsel occurred within "fourteen days more or less," adding that a range of ten to twenty days "sounds about right, too." Telephone Interview with James O'Donnell, Pub. Defender, Detroit, Mich. (Aug. 17, 2009).

348. Telephone Interview with Chris Keating, Pub. Defender, Concord, N.H. (Aug. 13, 2009).

349. App. tbl.II (N.H.).

350. Telephone Interview with Tony Hutchins, Pub. Defender, Oxford, N.H. (Aug. 6, 2009).

second appearance might occur within twenty-one to forty-five days after the initial bail hearing.[351]

South Carolina indigent defendants unable to afford bail suffered the longest delays in jail before meeting their assigned counsel. In Charleston, defendants reappear in court "within twenty-eight days."[352] Defendants in Marlboro County wait fifteen to thirty days, while defendants in Aiken County charged with misdemeanors or felonies wait forty-five to sixty days.[353]

In conclusion, people accused of crimes in the ten states that deny representation at the defendant's initial bail determination face delays, generally ranging from two to sixty days, before they obtain a lawyer's assistance.

b. The Thirty Hybrid States: Where Were You Arrested?

In the remaining thirty "hybrid" states, a defendant's chance for a lawyer's advocacy at the initial bail hearing depends on the county where the arrest occurred. The larger hybrid group of eighteen minority hybrid states guarantee an assigned counsel's presence in less than one half of localities, and often as few as one or two counties. In these "minority hybrid" states, only select localities guarantee assigned counsel's representation. The second, smaller group of twelve hybrid states provides assigned counsel at

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351. App. tbl.II (N.H.).

352. Charleston (Charleston County) Public Defender Ashley Pennington stated that there is "not sufficient funding to provide counsel at initial bail hearings." Telephone Interview with Ashley Pennington, Pub. Defender, Charleston, S.C. (Aug. 6, 2009). Delays in other South Carolina counties sometimes fit within ten days, but more likely fall closer to the thirty days range. *See* app. tbl.II (S.C.). Delays were ten days in Laurens County, ten to fourteen days in Claredon County, fifteen to thirty days in Marlboro County, thirty days in Anderson County, and forty-five to sixty days in Aiken County. *Id.*

353. App. tbl.II (S.C.). Aiken County Public Defender Walter Aves indicated he provides in-court representation "for the first time at defendant's second judicial hearing . . . normally held forty-five to sixty days after arrest." Telephone Interview with Walter Alves, Pub. Defender, Aiken Cnty., S.C. (Aug. 6, 2009). He also indicated South Carolina law gives prosecutors forty-five to sixty days to decide whether to prosecute. *Id.* Alves added that he usually waits for a prosecutor to indicate whether they intend to pursue charges, rather than filing a habeas writ, which results in a probable cause hearing and further delay. *Id.*

the initial appearance in the majority of the state's local courtrooms ("majority hybrid").

Majority Hybrid States: Favoring Representation. The twelve "majority hybrid" states[354] provide a likely scenario for finding assigned counsel present and ready to represent indigent defendants when they are first brought before a judicial officer for a bail determination. Based on survey and telephone interview responses, an indigent defendant's odds are fifty-fifty or better for finding counsel available at the initial bail hearing in state courts in Idaho,[355] Kentucky, Louisiana,[356] Minnesota, Montana, New

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354. *See* app. tbl.III.

355. Two of Idaho's three responding Public Defenders indicated indigent defendants are represented at the initial bail appearance. App. tbl.III (Idaho). "Boise defenders appear for in-custody defendants at video broadcast, bail hearings." Telephone Interview with Alan Trimming, Pub. Defender, Boise, Idaho (Aug. 13, 2009). In the smaller county of Elmore and in Boise (Ada County), defendants' assigned counsel represents defendants within forty-eight hours of arrest. Telephone Interview with Terry Ratliff, Pub. Defender, Elmore Cnty., Idaho (July 28, 2009). In Kootenai County, Public Defender John Adams indicated that "when I have staff, I tell my lawyers to go to the initial appearance." Telephone Interview with John Adams, Pub. Defender, Kootenai Cnty., Idaho (Aug. 13, 2009). Adams indicated his lawyers typically do not begin representation for indigent defendants charged with felonies until fourteen to twenty-one days following the initial appearance. *Id.* For defendants charged with misdemeanors, Adams stated, "if they cannot make bail, it could be six months before an in-custody defendant returns to court. It happens, it is definitely possible." *Id.*

356. Survey responses from eleven Louisiana county defenders reflected the extreme differences throughout the state. In six jurisdictions—Caddo Parish, Jefferson Parish, Lafayette Parish, Orleans Parish, Ouachita Parish, and Saint Bernard Parish—defendants can expect counsel at the first bail hearing within one to three days of arrest. *See* App. tbl.III (La.). In Bossier Parish, defendants obtain assigned counsel within seventy-two hours of their initial bail hearing. *Id.* In comparison, Natchitoches Parish Public Defender Brett Brunson and St. John the Baptist Public Defender Richard Stricks declared in their surveys that indigent defendants typically waited thirty days for counsel's representation. *Id.* Lincoln Parish defendants faced longer delays where defendants "are usually in jail three to six weeks" before obtaining a lawyer's assistance. *See id.* Jefferson Davis Parish holds the dubious distinction for maintaining pretrial defendants in jail for the longest period before providing counsel. Jefferson Davis Public Defender David Marcantel stated that "the first time is typically at arraignment which can vary from about fifty to about seventy days following arrest." Telephone Interview with David Marcantel, Pub. Defender, Jennings, La. (Aug. 13, 2009).

York, Ohio,[357] Oregon, Rhode Island, Utah, Virginia,[358] and Washington. Eight of these "majority hybrid" states—Kentucky,[359] Minnesota,[360] Montana,[361] New York,[362]

357. Lawyers from nineteen Ohio counties responded to the survey. App. tbl.III (Ohio). In nine counties, including the cities of Akron (felonies), Athens, Batavia, Canton, Chillicothe, Columbus, Marietta, Sidney, and Van Wert (and sometimes Wapakaneta), public defenders confirmed that attorneys represent individuals at the initial bail hearing. *Id*. In the remaining counties, defendants are not represented at the initial hearing, but the presiding judge assigns a defender later on. Dayton Public Defender Glen Dewar describes the typical process in his county where defendants are not represented by counsel: "Public defender intake workers meet with every jailed defendant . . . judges appoint the [public defender] to every qualified defendant . . . a lawyer [then] meets with the client within a day or two." Telephone Interview with Glen Dewar, Pub. Defender, Dayton, Ohio (Aug. 9, 2009). Defendants then return to court within five to fifteen days "depend[ing] upon particular courts' practices" where they are represented by an assigned lawyer. *Id*. Other public defenders confirmed a normal delay of five to ten days before an assigned advocate appeared in county courts in Carroll County, Knox County, Lake County, Medina County, Portage County, and Springfield County. App. tbl.III (Ohio). Portage County Public Defender Dennis Day Lager explained that Ohio law requires a felony preliminary hearing be scheduled within ten days of the defendant's initial appearance where counsel appears; counsel also is present for misdemeanors "not later than three days after arrest." Telephone Interview with Dennis Day Lager, Pub. Defender, Ravenna, Ohio (Aug. 23, 2009).

358. *See supra* note 311. Aside from those in Alexandria and Petersburg, Virginia defendants are represented at initial bail proceedings in Martinsville as well. *See* app. tbl.III (Va.). Fairfax Public Defender Todd Petit, indicated that defendants obtain representation between two to four days after the bail determination. *Id.* Public Defender Susan Herman explained what happens following arrest in Richmond: "Defendants are brought before a judge within twenty-four hours and we're in some arraignments and not others." Telephone Interview with Susan Herman, Pub. Defender, Richmond, Va. (Nov. 25, 2008) [hereinafter Herman Interview]. Following the court's indigency determination, Herman adds, the public defender is appointed within twenty-four hours and sees the new client within two court days. When appropriate, the assigned lawyer will appear at a bail review within five court days. A defendant facing a misdemeanor charge may wait fourteen to twenty-eight days before returning to court and obtaining an assigned lawyer's representation. Individuals charged with a felony may remain in jail for six to eight weeks before gaining in-court representation. *Id.*

359. Kentucky provides representation at defendants' initial bail hearings in Colombia (Adair County), Covington (Kenton County), Frankfurt (Franklin County), Lagrange (Oldham County), and Morehead (Rowan County). App. tbl.III (Ky.). In Oldham County, La Grange Public Defender Liz Curtin explained that "though we are not appointed before arraignment, our office is usually present when defendants are arraigned." Survey Response from Liz

Oregon,[363] Rhode Island, Utah,[364] and Washington[365]—offer considerably better odds for an indigent defendant gaining

Curtin, Pub. Defender, La Grange, Ky. (Summer 2009). In Adair County, Public Defender Glenda Edwards indicated that defendants are represented at bail within the first twenty-four hours in the "several counties I cover. In the most rural counties, as much as six days could pass before appearance." Telephone Interview with Glenda Edwards, Pub. Defender, Columbia, Ky. (Aug. 23, 2009). Public defenders from Daviess County reported that defendants obtain counsel's representation three days after the initial appearance. App. tbl.III (Ky.). Public Defender Linda West explained that defendants in Bell County, however, wait fourteen days. *Id.* In Laurel County, Public Defender Roger Gibbs stated that, "we cover five counties, each one does it differently; average time between two to ten days." Survey Response from Roger Gibbs, Pub. Defender, London, Ky. (Fall 2009).

360. Minnesota State Public Defender, John Stuart, indicated that public defenders in Duluth (St. Louis County), Minneapolis (Hennepin County), Rochester (Olmsted County), and St. Paul (Ramsey County), represent in-custody indigent defendants at bail hearings within the first forty-eight hours after arrest, despite the fact that "we have lost 15% of staff attorneys." Telephone Interview with John Stuart, Pub. Defender, Rochester, Minn. (July 30, 2009). Duluth's Chief Public Defender Fred Friedman reported defendants obtain counsel's representation at bail hearings within two days. App. tbl.III (Minn.). Similarly, Minneapolis's Criminal Defense Attorney, Leonardo Castro, indicated that counsel is present at the initial bail hearing within two days of arrest. *Id.* The Public Defender's reduced staff, though, has resulted in some exceptions. In nine of Owatonna district's eleven counties, defenders are unable to represent indigent defendants until fourteen to twenty-one days—the length of time varies county to county—after arrest. *Id.* Public Defender Martha Albertson explained that heavy caseloads prevent her from representing indigent defendants in Steele County (population 33,000). Telephone Interview with Martha Albertson, Pub. Defender, Steele Cnty., Minn. (Aug. 10, 2009). In Kandiyohi County, Public Defender Tim Johnson stated there was a three to five-day delay. App. tbl.III (Minn.). In Beltrami County, defendants also wait three to five days. *Id.* Anoka County Chief Public Defender William Ward stated that Anoka defendants were assigned counsel within two to three days. *Id.*

361. In Montana, defenders who represent indigent clients in Billings, Bozeman, Great Falls, Helena, Lewiston, and Missoula indicated they are present at initial bail hearings. App. tbl.III (Mont.). Montana Chief Public Defender Randi Hood stated that "in-custody indigent defendants are represented at their initial appearance within twenty-four hours usually." Telephone Interview with Randi Hood, Helena, Mont. (Aug. 17, 2009). Lewistown Public Defender Douglas Day indicated that two days typically pass before counsel is assigned in Fergus County. App. tbl.III (Mont.). Kalispell Public Defender John Putikka stated the average time is four to six days in Flathead County. *Id.*

362. *See supra* note 325.

363. *See supra* note 310.

early representation in most locations within the statewide jurisdiction. At the other extreme, where a particular locality in a majority hybrid state does not provide counsel right away, an accused faces substantial delay before gaining a lawyer's in-court representation. Court postponements following the initial bail hearing may stretch the detainee's next appearance to several weeks, and sometimes even to many months later—comparable to and exceeding the longest delays that occur in "minority hybrid" states that uniformly deny counsel.[366]

Minority Hybrid States: The Exceptional County. The second hybrid category consists of eighteen states—Alaska,[367] Arizona,[368] Arkansas,[369] Colorado,[370] Georgia,[371]

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364. In Salt Lake City (Salt Lake County) public defenders represent indigent defendants at the initial bail proceeding. App. tbl.III (Utah). Assigned counsel in Davis County, Provo (Utah County), and Wasatch County also represent indigent defendants when they first appear at a bail hearing. *Id.* In American Fork (also Utah County) defendants wait three days for assigned counsel. *Id.*

365. *See supra* note 310.

366. *Compare* app. tbl.III (Idaho) (fourteen to twenty-one days for felonies and approximately six months for misdemeanor crimes in Koontenai County, Idaho), *and* app. tbl.III (La.) (fifty to seventy days in Jennings, Louisiana, a majority hybrid state), *with* app. tbl.IV (N.J.) (thirty day delay in Somerville, New Jersey, a minority hybrid state), *and* app. tbl.IV (Ark.) (thirty-five to forty-five days in Texarcana, Arkansas, a minority hybrid state).

367. Survey responses show that defendants in the Anchorage Municipality, Juneau Borough, and the Nome Census Area are most likely to have representation at their initial bail hearing. App. tbl.IV (Alaska). In Juneau, defendants are represented at their initial bail hearing which occurs one day after arrest. *Id.* In Nome, defendants charged with felony crimes see an attorney one day after arrest. *Id.* In Anchorage, defendants wait one to four days. *Id.* Defendants elsewhere in the state usually wait between two to seven days for their assigned counsel's courtroom representation. *See id.*

368. Arizona's assigned counsel in Tucson (Pima County), Florence (Pinal County), and the City of Phoenix (Maricopa County) represent indigent defendants at their initial appearance before a judicial officer. App. tbl.IV (Ariz.), In Navajo County, a defendant will be represented within two days if they specifically request counsel and five days if they do not. *Id.* Throughout the rest of the state, however, early representation is infrequent and is usually delayed until assigned counsel is appointed and appears at a defendant's next court appearance. *See id.* In La Paz County, counsel is delayed by two to ten days. *Id.* In Yuma County, counsel is delayed by four to ten days. *Id.* In Flagstaff (Coconino County), counsel is delayed by ten days. *Id.* In Apache County, defendants wait thirty days or more for counsel to appear. *Id.*

369. Little Rock (Pulaski County) attorney Mary Catherine Williams indicated that "we represent defendants [at bail hearings] who are charged with felony and misdemeanor crimes within seventy-two hours," adding that "we also have jail court on Saturdays." Telephone Interview with Mary Catherine Williams, Attorney, Little Rock, Ark. (Aug. 11, 2009). Outside of Little Rock, however, Arkansas defendants typically wait lengthy periods for counsel's representation. Defendants in Conway County wait thirty days for felony offenses and fourteen days for misdemeanors. App. tbl.IV (Ark). According to attorney James Dunham, defendants in Pope County wait thirty days for assigned counsel. In Washington County, attorneys also estimate a similar delay of thirty days. *Id.* Texarkana attorney Wayne Dowd indicates that a typical delay is thirty to forty-five days in Miller County. *Id.* Attorney Dowd explained that Arkansas criminal procedure permits a prosecutor to deliberate for sixty days before deciding whether to prosecute and file formal charges in Circuit Court. Consequently, he explained that judges usually delay appointing an assigned counsel until the defendant's Circuit Court appearance, which occurs between fourteen to sixty-five days after a prosecution commences. Telephone Interview with Wayne Dowd, Attorney, Texarkana, Ark. (Aug. 10, 2009). Dowd suggests that "counsel should be appointed at the initial appearance . . . for bond purposes." *Id.* Attorney John Bradley stated that Mississippi County defendants wait thirty to sixty days for counsel's representation in court. App. tbl.IV (Ark.).

370. Colorado Public Defender Douglas Wilson explained the variances that exist in Colorado's sixty-four counties:

> We try and often are able to represent indigent defendants at their initial bail hearing. In the larger counties, a public defender is present for individuals charged with felonies. In smaller counties, a judge or magistrate may appear once a week and defenders will be present within one to seven days from arrest.

Telephone Interview with Douglas Wilson, Pub. Defender, Colo. (Aug. 25, 2009). Wilson explained that misdemeanor cases create longer delays in some counties. In Colorado Springs, the state's second largest city, he said "it is very difficult [for the defendant] to see counsel within seven days." *Id.* Sterling Public Defender Mike Boyce, indicated that in Logan County, a lawyer will appear to represent someone charged with a felony in seven days and for a misdemeanor in fourteen days. *See* app. tbl.IV (Colo.). For most counties in the State, counsel is assigned within one to two weeks. *Id.*

371. Atlanta and Conyers defendants charged with felony crimes are the only exceptions to Georgia's statewide practice of not providing counsel to indigent defendants at their initial appearance hearing. *See* app. tbl.IV (Ga.). In Rockdale County, defendants gain a lawyer's courtroom assistance within two to ten days. *Id.* In Butts County defendants wait ten to twenty-one days, and in Douglas County the delay ranges from four to five weeks. *Id.* In DeKalb County, felony defendants see their assigned lawyer fourteen to thirty days after arrest. *Id.*

Illinois,[372] Indiana,[373] Iowa,[374] Missouri,[375] Nebraska,[376] Nevada,[377] New Jersey,[378] New Mexico,[379] North Carolina,[380]

372. Only four of the thirty-one survey responses from Illinois state that an indigent defendant is represented by a defense attorney at his or her initial bail proceeding before a judicial officer. App. tbl.IV (Ill.). In many of the remaining counties where assigned counsel does not represent indigent defendants at the initial bail hearing, less than four days pass before the defendant sees an attorney. *See, e.g.*, *id.* (Edwards County two to three days) (Shelby County three days) (LaSalle County three to four days) (Woodford County four days). However, in other counties, defendants can wait twenty days or more before an assigned defendant represents them before a judicial officer. *See, e.g.*, *id.* (Franklin County twenty days) (Saline County twenty-one to twenty-eight days) (Hamilton County twenty-one to thirty days) (DuPage County thirty days) (Wabash County thirty days).

373. Indianapolis (Marion County) and Bloomington (Monroe County) public defenders indicate that they represent indigent defendants at initial bail hearings. App. tbl.IV (Ind.). However, Gary defendants wait five to seven days for counsel to be assigned and Fort Wayne defendants wait between seven and ten days. *Id.* Auburn defendants usually wait forty-five days, while Salem defendants remain without counsel's in-court representation for fourteen to twenty-one days. *Id.*

374. In almost every Iowa district, defendants are not represented at their initial bail hearing before a judicial officer. *See* app. tbl.IV (Iowa). Defendants are only represented within twenty-four hours in Dubuque County and in Cerro Gordo County. *Id.* Delays elsewhere range from twenty days in Waterloo to ten days in Des Moines, Marshalltown, and Sioux City, and seven to ten days in Cedar Rapids. *Id.*

375. According to the survey responses, four Missouri counties, including St. Louis, reported representation at the initial bail healing. App. tbl.IV (Mo.). District Defender Mary Fox indicated that in St. Louis, defendants are represented at bail hearings within one to two days after arrest. *Id.* This fact was echoed by her colleague, St. Louis County District Defender Steven Reynolds. "A public defender is present at the initial appearance, eligible defendants are always represented." Telephone Interview with Steven Reynolds, Dist. Defender, St. Louis, Mo. (Aug. 10, 2010). Defenders also advocate for clients at the initial bail hearing within seventy-two hours in Caruthersville (Pemiscot County) and forty-eight to seventy-two hours in Clayton (St. Louis County). App. tbl.IV (Mo.). In Moberly, defenders advocate for clients "most of the time in the five counties we cover," according to Public Defender Leecia Carnes. Telephone Interview with Leecia Carnes, Pub. Defender, Moberley, Mo. (Aug. 2009). In Dunklin County, representation takes three to five days. *See* App. tbl.IV (Mo.). In Callaway County, representation takes four days. *Id.* In Lincoln County, representation takes up to a week. *Id.* Defendants wait seven to ten days in Boone County. *Id.* Defendants are not represented in Kansas City (Jackson County) for seven to twenty-one days. Telephone Interview with Leon Munday, Pub. Defender, Kansas City, Mo. (Aug. 2009). In Nevada, Missouri, Public Defender Joe Zuzul indicates that counsel appears in the four counties

his office represents in one to fourteen days. App. tbl.IV (Mo.). In Nodaway County, representation takes twenty-one days. *Id.*

376. In Lincoln (Lancaster County), Nebraska, assigned defenders are present and represent indigent defendants when they first appear at a bail hearing. App. tbl.IV (Neb.). In other counties, defendants must wait between three to seven days for their assigned counsel. *Id.* According to Madison County Defender Melissa A. Wentling, defendants in Madison wait three to five days after a client's arrest. *Id.* Platte County Public Defender Nathan Sobriakoff indicated that in Columbus, an assigned lawyer is not present at a defendant's initial appearance, but appears within one day. *Id.*

377. Three Nevada defenders responded to the survey. Jeremy Bosler, Washoe County Public Defender, indicated counsel is assigned in Reno two days after indigent defendants' initial bail hearing. App. tbl.IV (Nev.). Countering this delay, defenders in Washoe County are making a strong effort to provide early representation for their clients. Public Defender Bosler explained that, "this office currently has an attorney appearing at all initial appearances [at a video arraignment], but courts are inconsistent whether counsel can argue bail/release status." Telephone Interview with Jeremy Bosler, Pub. Defender, Washoe Cnty., Nev. (Aug. 9, 2009) [hereinafter Bosler Interview]. Bosler added that the District Attorney is challenging the defender's eligibility to appear prior to appointment. *Id.* Clark County Public Defender Philip Kohn said defendants in Las Vegas are not represented at the initial bail proceeding but, following a judge's appointment, many defendants request a bail review within the next forty-eight hours. Telephone Interview with Philip Kohn, Pub. Defender, Clark Cnty., Nev. (Aug. 9, 2009). In White Pine County, defendants in Ely charged with felonies wait seventeen days for their assigned lawyer at a scheduled preliminary hearing. App. tbl.IV (Nev.).

378. Defendants in Essex County (Newark), Gloucester County, Morris County, and Salem County, New Jersey are represented at the bail hearing within forty-eight hours following arrest, but the rest of the state is less expeditious. App. tbl.IV (N.J.). Gloucestor County Public Defender Jeffrey Wintner indicated that in-custody defendants in Woodbury are represented by assigned counsel within two days of arrest. *Id.* In Trenton, defendants wait three to six days, and in other New Jersey jurisdictions, defendants typically wait seven to fourteen days for an assigned defender. *See id.* Bridgeton Public Defender Jorge Godoy estimated a seven day delay. *Id.* Camden Public Defender Michael Friedman indicated seven to twelve days pass before assigned counsel appears in-court. *Id.* Cape May Public Defender Timothy Gorny estimated a similar seven to ten day delay. *Id.* The delay is seven to fourteen days in Burlington. *Id.* Somerset County Public Defender Johnny Mask explained his county's lengthy thirty-day delay: "we have had [the] same procedure as Texas in *Rothgery*." Survey Response from Johnnie Mask, Pub. Defender, Somerville, N.J. (Summer 2009). Ocean County Public Defender Frank Gonzalez indicated that the court does not assign an attorney until a formal bail hearing is held.

379. In Albuquerque and Las Cruces, New Mexico, public defenders represent indigent defendants at their first judicial bail appearance within one to two days. App. tbl.IV (N.M.). In Santa Fe, Public Defender Ben Bauer explained that

Pennsylvania,[381] South Dakota,[382] West Virginia,[383] and Wyoming[384]—that are selective about where assigned

indigent defendants usually wait two weeks before obtaining counsel. Telephone Interview with Ben Bauer, Pub. Defender, Sante Fe, N.M. (Aug. 13, 2009). San Juan County Public Defender Christian Hatfield estimated that in Aztec, a seven-day delay follows the video arraignment before counsel appears. App. tbl.IV (N.M.). Lea County Public Defender Rebecca Reese provided a wide range of two to fifteen days of delay for defendants in Hobbs, and explained that, "if a client cannot bond, appointed [public defender] usually requests a prompt new bond hearing but still some people fall through the cracks—misdemeanors will often plea without any contact with a lawyer. Some of our more experienced magistrates will refuse to take the plea." Telephone Interview with Rebecca Reese, Pub. Defender, Hobbs, N.M. (Aug. 20, 2009). Reese describes video bail proceedings as "the worst of the worst! No lawyer, no judge present." *Id.*

380. In North Carolina, the only county in which defendants obtain counsel's assistance at the initial bail proceeding is Durham County. App. tbl.IV (N.C.). Public Defender Lawrence Campbell explained that resources became available for first appearance representation following a suit based on the jail's overcrowding. Telephone Interview with Lawrence Campbell, Pub. Defender, Durham, N.C. (Aug. 20, 2009). Most Raleigh and Greenville defendants, however, who are charged with a felony crime wait fourteen days for their lawyer's courtroom advocacy, and up to thirty days for misdemeanors. *See* app. tbl.IV (N.C.). Winston-Salem defendants wait between fifteen to thirty days, although Public Defender Peter Clary stated that, "my office appears at first appearance to make bond reduction motions on certain defendants." Telephone Interview with Peter Clary, Pub. Defender, Winston-Salem, N.C. (Aug. 9, 2009). In Lumberton, defendants have the longest wait. Public Defender Angus Thompson, II estimates that defendants there remain without a lawyer for up to forty-eight days. *See* app. tbl.IV (N.C.).

381. *See supra* note 325 (describing length of delays in Pennsylvania).

382. In South Dakota, assigned counsel is present and represents Sioux Falls (Minnehaha County) defendants at the initial bail hearing. App. tbl.IV (S.D.). In Pierre (Hughes County), however, defendants wait seven days for assigned counsel to appear. *Id.* In Rapid City (Pennington County), indigent defendants wait up to fifteen days when charged with felony crimes, and two to five days for misdemeanor crimes. *Id.* Lawrence County Public Defender Matt Pike estimates that defendants in Deadwood wait about twenty-one days for counsel's in-court representation of felony crimes and fourteen days for misdemeanor charges. *See id.*

383. Charleston (Kanawha County) is the only West Virginia venue where counsel represents indigent defendants at the initial bail hearing. App. tbl.IV (W. Va.). In custody felony defendants in Martinsburg (Berkeley County), West Virginia typically wait ten days for counsel's courtroom advocacy, but detainees charged with misdemeanors wait forty-five days. *Id.* Defendants in Fayette County and Mingo County wait ten days and defendants in Harrison County wait between eight to ten days. *Id.* Defendants in Jefferson County, however, do not gain the assistance of counsel for up to forty-five days. *Id.* Additionally,

counsel will appear to represent indigent defendants at the initial bail hearing. Indeed, most states included in the "minority hybrid" category deny representation in all but one or two local jurisdictions within the state.

In Arkansas, for instance, only Little Rock defendants are represented when a judicial officer first determines bail or pretrial release. In all other Arkansas counties, defendants represent themselves and remain without counsel for significant periods of time.[385] The same pattern holds true for defendants who stand alone when arguing for pretrial release or bail in seven other "minority hybrid" states: Alaska, Nebraska, Nevada, North Carolina, South Dakota, West Virginia, and Wyoming.[386]

Some "minority hybrid" states ensure representation in several locations that are clear exceptions to that state's general "no counsel at initial bail hearing" practice. In Illinois, for example, defenders are present in the local courtrooms of Albion, Chicago, Urbana, and Vermillion to represent indigent defendants when they first enter the judicial system.[387] Illinois' remaining twenty-seven counties do not provide assigned defenders at the initial bail appearance, and unrepresented detainees experience lengthy delays before returning to court and meeting their assigned counsel.[388]

In sum, because eighteen "minority hybrid" states typically conduct initial appearance hearings without an assigned defender present, a person accused of a crime may

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individuals facing misdemeanor charges wait up to forty-five days for counsel's advocacy in Preston County and up to one-hundred and twenty days in Mingo County. *Id.*

384. With the exception of defendants charged with felony crimes in Gillette (Campbell County) and Cheyenne (Laramie County), Wyoming defendants are not represented at their initial bail hearing. App. tbl.IV (Wyo.). Defendants wait for assigned counsel approximately five days in Park County, five to ten days in Washakie County, and seven days in Converse County. *Id.* According to Public Defender Mike Shoumaker, defendants charged with misdemeanors in Campbell County wait sixty days for counsel's courtroom representation, but wait only ten days if charged with a felony. *Id.*

385. *See supra* note 369; *see also* app. tbl.IV (Ark.).

386. *See* app. tbl.IV.

387. *See supra* note 372; *see also* app. tbl.IV (Ill.).

388. *See* app. tbl.IV (Ill.).

wait from several days to several weeks, and possibly even longer, before returning to court and obtaining the assistance of an assigned counsel.[389] The need for enforcement of *Gideon*'s promise of counsel is profound in these minority hybrid states. A new national rule is needed.

B. *Recap*

The national survey captures two pictures showing the extent of indigent defendants' constitutional right to counsel at initial bail hearings in state courtrooms. Across half of the country, it is not unusual for indigent, often uneducated and ill-equipped incarcerated defendants, to do their best to speak and self-advocate for their liberty when brought before a judicial officer. Detainees who cannot afford bail remain in custody without the benefit of assigned counsel's representation until the next scheduled court appearance. Jailed defendants have become accustomed to waiting anywhere from several days to several weeks, and considerably longer in certain jurisdictions,[390] before seeing their assigned lawyer appear in court. Defendants who post bond, like Rothgery, may have to wait until a court-defined, "critical" moment for counsel's assignment, such as indictment or the infrequent felony preliminary hearing.

In the remaining half of the country, most indigent defendants *are* represented by assigned counsel or a public defender at the initial bail appearance. Ten states provide counsel uniformly throughout their jurisdiction.[391] In twelve other states, an accused is likely to find a lawyer present when appearing before a judicial officer at the first proceedings in most localities.[392] In counties that do not provide counsel, however, an in-custody defendant may wait weeks or even months before obtaining an assigned counsel's assistance. Some states and localities justify

389. *Compare* app. tbl.IV (Alaska, Neb.) (noting defendants usually wait between one to seven days), *with* app. tbl.IV (Ark.) (noting defendants are likely to wait a month or longer).

390. Defendants in some parts of Arizona may wait more than thirty days. *See* app. tbl.IV (Ariz.). In Arkansas, some defendants have to wait between thirty and sixty days. *Id.* (Ark.). In West Virginia, the wait can be as long as one-hundred and twenty days. *Id.* (W. Va.).

391. App. tbl.I.

392. App. tbl.III.

denying a defendant assigned counsel by arguing that it is too costly. In a perfect world, they note, counsel should be present, but the money is just not there.[393] Studies appear to refute the cost argument, however, and demonstrate that substantial savings would result from early representation, particularly involving defendants charged with the typical, nonviolent offense who are much more likely to be released from jail.[394] Pretrial, court-supervised monitoring represents a suitable and effective alternative for ensuring a defendant's reappearance in court.[395]

Timely legal representation reinforces the long-cherished principle of equal justice and presumption of innocence[396] and acts to limit pretrial incarceration to

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393. For example, current Maryland Public Defender Paul DeWolfe agrees that indigent defendants' constitutional right to counsel extends to bail, but asserts he lacks the resources and staff to implement the right. *See* Affidavit of Paul B. DeWolfe, Jr., in Support of Public Defender's Response to Plaintiff's and District Court Defendant's Motions for Summary Judgment ¶ 12, Richmond v. Dist. Court of Md., 990 A.2d 549 (2010) (No. 24-C-06-009911 CN) ("Were this Court to declare a right to appointed counsel at initial bail hearings and order the Public Defender to effectuate that right . . . [given] the Public Defender's current personnel and budget constraints, without a significant and immediate increase in funding, the Office of the Public Defender would be unable to provide adequate representation at initial bail hearings in Baltimore City (and elsewhere), while still meeting its constitutionally-derived obligation to provide effective assistance of counsel at all stages of criminal proceedings."); *see also* Transcript of Official Proceedings, Motions Hearing at 40, Richmond v. Dist. Court of Md., 990 A.2d 549 (2010) (No. 24-C-06-009911 CN) ("If the Public Defender is going to supply responsible representation when the pedal hits the metal, when it really matters [at trial], the Public Defender simply lacks the resources at this juncture to provide meaningful representation of the kinds that the plaintiffs' complaint seeks.").

394. *See, e.g.*, Colbert et al., *Counsel at Bail*, *supra* note 65, at 1720 (explaining that represented defendants charged with nonviolent offenses are 2.5 times as likely to be released on recognizance and 2.5 times as likely to receive affordable bail); *see also* Letter from M. Christine O'Connell, *supra* note 309 (stating that early representation "saves our state about nine million dollars a year").

395. *See Baltimore Behind Bars: How to Reduce the Jail Population, Save Money and Improve Public Safety*, JUST. POL'Y INST. 30 (June 2010), *available at* http://www.justicepolicy.org/images/upload/10-06_REP_BaltBehindBars_MD-PS-AC-RD.pdf.

396. *See*, *e.g.*, Stack v. Boyle, 342 U.S. 1, 4 (1951) ("Unless th[e] right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.").

"carefully limited exception[s]."[397] Depriving low-income defendants like Walter Rothgery of his ability to defend himself against unfounded charges for six months highlights the dilemma a released detainee faces. Rothgery's inability to afford bail and his experience of spending weeks in jail without a lawyer captures what happens to many defendants in a state's pretrial system.[398]

Denying indigent defendants access to representation by counsel at the earliest stage of a criminal proceeding has resulted in experiences like Rothgery's becoming the accepted practice in many state criminal courtrooms across the country. Yet, unlike most defendants who passively accept the consequences, Rothgery initiated a civil rights § 1983 suit that may now alter the legal landscape and liability for municipalities that delay assigning and providing counsel. The next Part describes and analyzes Rothgery's claim against Gillespie County, Texas.

III. SECTION 1983 REMEDY FOR DEPRIVING COUNSEL

The Supreme Court's 2008 ruling brought Rothgery's § 1983 civil rights claim sharply into focus. Texas could no longer be confident that the County had no constitutional duty to appoint counsel for a bonded defendant like Rothgery during the six months between his release from jail and indictment. Once a criminal prosecution commenced with the filing of criminal charges and the defendant's first appearance before a magistrate, a municipality had to act "within a reasonable time once a request for [counsel's] assistance is made[,]"[399] or risk § 1983 liability. At the accused's initial bail hearing, the Supreme Court held that Rothgery's Sixth and Fourteenth Amendment guarantee to counsel attached and obligated

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397. United States v. Salerno, 481 U.S. 739, 755 (1987) ("In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.").

398. *See supra* notes 17-20 and accompanying text.

399. Rothgery v. Gillespie Cnty., 554 U.S. 191, 198 (2008). In *Rothgery*, the Supreme Court declared that the attachment of the right to counsel carries "the consequent state obligation to appoint counsel within a reasonable time once a request for assistance is made." *Id.*

Gillespie County to assign a lawyer without unreasonable delay.[400]

While the Court did not delineate the exact time frame for counsel's appointment and appearance or explicitly rule that the six-month delay before assigning counsel was unreasonable,[401] the Justices raised serious doubts about Texas's practice that deprived Rothgery and other released indigent defendants of counsel's assistance during the period from the initial bail determination to indictment.[402] Several Justices also expressed concern about a state's reluctance to assign counsel and ensure representation promptly to in-custody detainees,[403] such as the period Rothgery remained in jail post-indictment while awaiting assigned counsel's appearance.

The Supreme Court ruling gave a boost to the validity of Rothgery's § 1983 claim that the County deprived him of his constitutional right to timely access of appointed counsel. The holding allowed Rothgery to pursue his claim, and should also encourage similarly situated defendants to initiate a § 1983 suit against a municipality that does not guarantee representation at a bail proceeding and delays assignment thereafter.

Rothgery's strategy of relying on the federal civil rights statute has significant potential for changing a county's practice. Simply stated, a municipality that ignores the *Rothgery* Court's concerns, risks liability and economic peril. Failing to provide counsel at an accused's first appearance before a judicial officer may expose a municipality to costly compensation where a defendant can establish that the delay "cause[d him or her] to be subjected"[404] to injury, including loss of liberty.[405] A court's

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400. *Rothgery*, 554 U.S. at 213.

401. *See id.*

402. *See supra* Part I.E (discussing the concerns raised by Justices during oral argument). The Texas Solicitor General indicated that detainees are assigned counsel one to three days after the request has been made, yet Rothgery's lawyer did not appear for two to three weeks. *See supra* notes 266-68 and accompanying text.

403. *See supra* notes 176-92 and accompanying text (referring to questions and concerns raided by the Justices during oral argument).

404. 42 U.S.C. § 1983 (2006); *supra* note 8.

granting of declaratory or injunctive relief would increase a municipality's vulnerability against similar claims.[406]

Municipalities could gamble that the Supreme Court ultimately will rule that a "reasonable" delay justifies appointing counsel sometime after a bail proceeding for a detained or released defendant. But the longer the municipality delays appointing counsel, particularly for an incarcerated defendant, the more financial risk the municipality will face. Additionally, a municipality invites further exposure when it appears "indifferent" toward monitoring the timing of counsel's actual appearance.

A. *42 U.S.C. § 1983: A Strategy for Redressing the Denial of Counsel*

Section 1983 appears to be an ideal mechanism for motivating local governments to revisit their assignment of counsel policy. Enacted in 1871, the statute holds that "[e]very person who, under color of any statute . . . custom, or usage . . . subjects, or causes to be subjected, any . . . other person . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured."[407] Congress created the remedy during the Post-War Reconstruction period because local government and law enforcement officials had failed miserably to take action against individuals and groups responsible for a reign of terror against recently freed African-Americans.[408] The Civil Rights Act of 1871

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405. Rothgery's undisputed innocence was an important factor in showing that a lawyer's early assignment would have likely accomplished the subsequent dismissal and spared him the loss of liberty for three weeks.

406. Gillespie County eventually reached a settlement with Rothgery and avoided a jury verdict that might have encouraged additional suits. *See infra* Part III.B. A municipality would be less likely to follow a similar strategy when dealing with a class-certified plaintiff.

407. § 1983.

408. *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 119-20, 203-05 (1988) (describing whites' widespread violence against black citizens after the Civil War concluded in April 1865, and localities' refusal or inability to prosecute and convict the people responsible); DONALD G. NIEMAN, TO SET THE LAW IN MOTION: THE FREEDMEN'S BUREAU AND THE LEGAL RIGHTS OF BLACKS, 1865-1868, at 25 (1979) ("[B]ecause Southern whites viewed violence as an acceptable means of labor and race control, white sheriffs, magistrates, judges, and jurors often proved unwilling to mete out justice to

empowered private lawyers to initiate litigation to deter such violence and counter a municipality's failure to hold wrongdoers accountable.[409] Despite Congress' intention, during the next ninety years, § 1983 was used sparingly;[410] narrow interpretation limited its scope and application.[411]

In 196l, the Supreme Court acted to revive the civil rights remedial statute. In *Monroe v. Pape*,[412] the Supreme Court upheld Congress's power to provide a federal torts remedy when the state's remedial procedure "though adequate in theory, was not available in practice."[413] In *Monroe*, an African-American family claimed city police officers violated their Fourth Amendment right against unlawful searches and seizures when they entered and searched their home without a warrant and held a family member in custody during a ten-hour interrogation.[414] The

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whites who committed acts of violence against freedmen."); Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1, 39-43 (1990). In response, Congress passed the Civil Rights Act of 1866, the criminal counterpart to § 1983, which empowered federal prosecutors to initiate prosecution against the responsible people who acted "under color of any law" to deprive African-Americans of enumerated federally protected rights. 14 Stat. 27 (1866) (codified as amended in 18 U.S.C § 242 (2006)); *see also* United States v. Price, 383 U.S. 787, 794 & n.7, 803-05 (1966) (comparing § 242 to § 1983 and describing congressional reports of post-War violence), *superseded by statute on other grounds*, 28 U.S.C. § 1658(a) (2006).

409. *See* § 1983.

410. *See* JOHN C. JEFFRIES, JR. ET AL., CIVIL RIGHTS ACTIONS: ENFORCING THE CONSTITUTION 42 (2d ed. 2007) (reporting that only twenty-one § 1983 cases were reported between 1871 and 1920, and very few during the next decade).

411. *See* Douglas L. Colbert, *Bifurcation of Civil Rights Defendants: Undermining* Monell *in Police Brutality Cases*, 44 HASTINGS L.J. 499, 518-19 nn.89, 92-93 (1993).

412. 365 U.S. 167 (1961), *overruled by* Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978).

413. *Id.* at 174.

414. The Supreme Court opinion described the plaintiffs' ordeal:

> The complaint alleges that 13 Chicago police officers broke into petitioners' home in the early morning, routed them from bed, made them stand naked in the living room, and ransacked every room, emptying drawers and ripping mattress covers . . . . Mr. Monroe was then taken to the police station and detained on "open" charges for 10 hours, while he was interrogated about a two-day-old murder . . . . [H]e was not taken before a magistrate, though one was accessible . . . . [H]e

Court ruled that 42 U.S.C. § 1983 was the appropriate remedy to counter the family's remote hope of success in state court after they had been wronged by the "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law."[415] Seventeen years later, in *Monell v. Department of Social Services*,[416] the Supreme Court extended § 1983 liability to a municipality whose city policy mandated that female workers take unpaid leaves of absence from their jobs after their fifth month of pregnancy.[417] In *Monell*, the Court concluded that Congress had intended to include a municipality as a "person" within the statute's coverage and hold it liable for a custom or practice that deprived individuals of a federally protected right.[418]

In 1980, in *Owen v. City of Independence*, the Supreme Court rejected a municipality's claim for Eleventh Amendment immunity[419] from § 1983 liability.[420] The Court reasoned that *Monell's* remedy against local government was needed to "create an incentive for officials who may harbor doubts about the lawfulness of their intended

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> was not permitted to call his family or attorney, [and] he was subsequently released without criminal charges being preferred against him.

Id. at 169.

415. *Id.* at 184.

416. 436 U.S. at 658.

417. *Id.* at 701.

418. *Id. Monell* reversed the Supreme Court's previous ruling in *Monroe v. Pape*, which concluded that municipal corporations could not be held liable under § 1983. *Monroe*, 365 U.S. at 187. Reviewing the congressional debate with a "fresh analysis," the *Monell* Court held that a corporation may be sued when a government policy or custom caused the constitutional deprivation. *Monell*, 436 U.S. at 665, 700-701. It affirmed *Monroe's* holding that a municipality may not be liable under a *respondeat superior* theory. *Id.* at 691.

419. U.S. CONST. amend. XI ("The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State."); *see also* Alkire v. Irving, 330 F.3d 802, 811 (6th Cir. 2003) (quoting Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 280 (1977)) ("The bar of the Eleventh Amendment to suit in federal courts extends to States and state officials in appropriate circumstances . . . but does not extend to counties and similar municipal corporations.").

420. 445 U.S. 622, 657 (1980).

actions" and to encourage these state actors "to err on the side of protecting citizens' constitutional rights."[421] The Court envisioned that § 1983's "threat that damages might be levied against the city may encourage those in a policymaking position to institute internal rules and programs designed to minimize the likelihood of unintentional infringements on constitutional rights."[422]

Such reform measures would work well when applied to indigent defendants who are denied assistance of counsel since they address the "systemic injuries" that result from delaying an assigned counsel's in-court representation.

B. *Rothgery: The Civil Rights Litigant*

Walter Rothgery was the ideal plaintiff for bringing the § 1983 action against Gillespie County. His lack of a prior criminal conviction, combined with a favorable work, military, and educational background, added to his favorable public image and credibility. The government could not dispute that a mistake had been made, and he should not have been arrested or indicted. At the first Texas bail hearing proceeding, neither a prosecutor nor defense lawyer was present to listen to Rothgery's claim that he had been incorrectly identified as a prior felon. The County magistrate responded as expected and informed Rothgery that Texas law did not entitle him to the assignment of counsel until indictment.

Rothgery's § 1983 claim required proof that he was deprived of a right secured under the Constitution, and that the deprivation was caused by a municipality's practice of not assigning counsel until indictment.[423] The Supreme Court ruling fulfilled the first requirement: Rothgery's right to counsel attached at the magistration hearing, and he was entitled to appointment of counsel within a reasonable time after he requested a lawyer.[424] The trial jury would hear evidence and determine the reasonableness of the County's six-month delay in assigning counsel.

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421. *Id.* at 651-52.

422. *Id.* at 652.

423. *See* 42 U.S.C. § 1983 (2006).

424. Rothgery v. Gillespie Cnty., 554 U.S. 191, 213 (2008).

Rothgery relied on *Monell's* § 1983 remedy against a municipality's practice of depriving him an assigned lawyer to establish that Gillespie County is a "person" for purposes of liability. *Monell* was meant to apply to circumstances like the one Rothgery faced, where the constitutional deprivation of counsel "result[ed] not so much from the conduct of any single individual, but from the interactive behavior of several government officials, each of whom may be acting in good faith."[425] Rothgery had no cause of action against any of the individual officials; the judge, prosecutor, or arresting officer could claim immunity or a good faith defense for merely following Texas procedure.[426] It was Texas state law, Rothgery argued, which gave Gillespie County the ultimate policymaking responsibility for establishing an indigent defense services system.[427] The municipality created the policies and practices. Under the Texas Fair Defense Act, each municipality decided when counsel should be appointed, and provided the bulk of the funding for the assigned lawyers.[428]

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425. *Owen*, 445 U.S. at 652.

426. The *Owen* Court noted that Supreme Court decisions:

> [C]onferring qualified immunities on various government officials are not to be read as derogating the significance of the societal interest in compensating the innocent victims of governmental misconduct. Rather, in each case we concluded that overriding considerations of public policy nonetheless demanded that the official be given a measure of protection from personal liability. The concerns that justified those decisions, however, are less compelling, if not wholly inapplicable, when the liability of the municipal entity is at issue.

Id. at 652-53 (citations omitted).

427. *See* Rothgery, 554 U.S. at 197 & nn.6-7; *see also* City of St. Louis v. Praprotnik, 485 U.S. 112, 123 (1988) (stating that state law determines the ultimate policymaker responsible for municipal liability). To establish § 1983 liability, the County must be responsible for administering indigent defense practices, not state officials who have immunity.

428. In 2001, the Texas legislature enacted the Texas Fair Defense Act, which gives counties the responsibility for administering an indigent defense program. *See* 2001 Tex. Gen. Laws 1800. The legislation established "countywide procedures" for the appointment of counsel to eligible defendants in each county. TEX. CODE CRIM. PROC. ANN. art. 26.04(a) (West 2005). It created a county commissioner court that has the budgetary and administrative authority over county government operations, such as the indigent defense program that the county selects, i.e. a public defender office or contract defender. *Id.* § 26.044(b). The Act created a statewide "Task Force on Indigent Defense" that awards

The most challenging element of Rothgery's § 1983 claim required showing that his injuries—namely being indicted and subsequently incarcerated for three weeks, as well as experiencing economic and reputation loss—were "caused" by being deprived of assigned counsel for six months.[429] Based on counsel's success in gaining a dismissal once he commenced representation, Rothgery stood a very good chance of showing that the County's custom and practice of delaying a lawyer's assignment was responsible for causing his continued prosecution, indictment, and return to jail. He might also have been able to demonstrate that his inability to gain employment and loss to reputation could have been avoided had the County assigned him counsel promptly.

Eventually, the Texas Solicitor General settled the case in the mid five figures.[430] The success of Rothgery's claim shows that § 1983 remains a strategy for relief for similarly situated defendants and detainees without counsel.

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grants and provides "technical support to assist counties in improving their indigent defense systems." 2001 Tex. Gen. Laws 1815. In 2002 and 2003, Gillespie County contributed 75% and State grants totaled 25% of the total expenses to operate the indigent defense office. *Task Force on Indigent Defense,* TEX. CTS. ONLINE, http://www.courts.state.tx.us/tfid/Resources.asp (last visited Mar. 14, 2011). The Supreme Court has ruled that the source of funding for a program—the who pays for damages issue—is "of considerable importance" to determining whether the county or state is the policymaker. Regents of Univ. of Cal. v. Doe, 519 U.S. 425, 430 (1997); *see also* Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 48 (1994).

429. Proving causation represents a necessary and often difficult aspect for establishing a § 1983 violation. In most circumstances, a jury decides whether the municipality's policy of not assigning counsel for defendants released on bail "caused" the defendant's subsequent injury of having been indicted and jailed. In some situations, a judge decides the issue as a matter of law and may find that a plaintiff's allegation of damages is too remote. *See* MARTIN A. SCHWARTZ & KATHRYN R. URBONYA, SECTION 1983 LITIGATION 104-05 (2d ed. 2008) (citing Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701, 737 (1989)).

430. Telephone Interview with Andrea Marsh, Esq., Texas Fair Defense Project (June 25, 2010).

IV. CALL FOR THE AMICUS BRIEF

In *Rothgery*, the Supreme Court ruling illustrated the value and influence[431] of the "friend of the court,"[432] or *amicus curiae* brief. The Justices' lack of knowledge about state court practices of not assigning counsel to indigent defendants paved the way for welcoming amicus participation from legal groups that could present some of the missing information.[433] Indeed, the majority opinion relied on the data offered by the National Association of Criminal Defense Lawyers that showed forty-three states designated assigned counsel "before, at, or just after" a defendant's initial appearance before a judicial officer, as well as the American Bar Association's *amicus curiae* brief.[434] The Justices cited the amicus brief to support the

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431. Scholars continue to examine the primary influences of Supreme Court decision-making to determine whether amicus briefs affect Justices' rulings. *See, e.g.*, Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 752 (2000); Kelly J. Lynch, *Best Friends? Supreme Court Law Clerks on Effective Amicus Curiae Briefs*, 20 J.L. & POL. 33 (2004).

432. The "friend of the court" label is misleading. Amicus third parties are typically advocates for a particular point of view and usually identify with one side of a dispute. They are rarely neutral. *See* Linda Sandstrom Simard, *An Empirical Study of Amici Curiae in Federal Court: A Fine Balance of Access, Efficiency, and Adversarialism*, 27 REV. LITIG. 669, 670-71, 676-77 (2008) (citing, for example, the "Brandeis Brief" that relied on social science studies to show the harmful effect of long working hours on working women in *Muller v. Oregon*, 208 U.S. 412 (1908), and Dr. Kenneth Clark's doll studies in *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), showing that segregation perpetuates African Americans' feelings of inferiority); *see also* Samuel Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 YALE L.J. 694, 695 (1963).

433. *See* Rothgery v. Gillespie Cnty., 554 U.S. 191, 204-05 & n.14 (2008) (citing the amicus brief of the National Association of Criminal Defense Lawyers ("NACDL") and the brief submitted by the American Bar Association ("ABA")). The ABA has steadfastly maintained for forty years that counsel should be appointed "certainly no later than the accused's initial appearance before a judicial officer." Brief of the Am. Bar Ass'n as Amicus Curiae in Support of Petitioner at 5-8, Rothgery v. Gillespie Cnty., 554 U.S. 191 (2008) (No. 07-440) [hereinafter ABA Brief].

434. *Rothgery*, 554 U.S. at 192, 203-04 ("We are advised without contradiction that . . . 43 [s]tates take the first step toward appointing counsel 'before, at, or just after initial appearance.'" (citing NADCL Brief, *supra* note 46, at app.)); *see also* ABA Brief, *supra* note 433, at 5-8 (declaring that since 1968, the ABA has called for counsel's appointment at the initial appearance).

finding that Texas' six-month delay was out of line with sister states' practices of counsel attaching at the initial bail hearing.[435] The Supreme Court placed high value on the amici's participation when reaching their ultimate ruling.[436]

When the Court next considers a defendant's right to counsel at initial appearance, Justices are once again likely to turn to amicus briefs to decide two issues: (1) Must states assign counsel to represent incarcerated indigent defendants at the initial appearance?; and (2) If not, what is the constitutionally permissible period for an accused to wait before being assigned a lawyer and obtaining counsel's in-court appearance? Since the Court is not likely to be aware of actual practices in states' judicial proceedings, amicus participation will be essential.

A. *The Value of Providing Additional Data*

Commentators recognize that amicus briefs assume an important role in persuading the Supreme Court to grant certiorari.[437] Once the Court accepts a case, an informative, data-filled amicus brief stands an equally good chance of influencing the Justices' eventual ruling.[438]

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435. *Rothgery*, 554 U.S. at 204-05.

436. *See generally* Paul M. Collins, Jr., *Lobbyists Before the U.S. Supreme Court: Investigating the Influence of Amicus Curiae Briefs*, 60 POL. RES. Q. 55 (2007) ("[I]ndicat[ing] that elite decision makers can be influenced by persuasive argumentation presented by organized interests."); Kearney & Merrill, *supra* note 431, at 745; Lynch, *supra* note 431, at 35-36.

437. *See* Gregory A. Caldeira & John R. Wright, *Organized Interests and Agenda Setting in the U.S. Supreme Court*, 82 AM. POL. SCI. REV. 1109 (1988) (discussing the importance of *amicus curiae* briefs).

438. Some scholars believe that Justices give weight to amicus briefs of organized "interest" groups that address policy consequences. *See, e.g.*, Collins, *supra* note 436, at 55 ("[P]ressure groups are effective in shaping the Court's policy outputs . . . [and] elite decision makers can be influenced by persuasive argumentation presented by organized interests."); *see also* Paul M. Collins, Jr., *Friends of the Court: Examining the Influence of Amicus Curiae Participation in U.S. Supreme Court Litigation*, 38 LAW & SOC'Y REV. 807, 810 (2004); Caldeira & Wright, *supra* note 437, at 1109-27. Other potential factors that may affect the success of an amicus brief include the identity, prestige, and experience of the organization or lawyers participating. Simard, *supra* note 432, at 688.

Jurists recognize the enormous value an amicus brief may serve in providing needed information.[439] Supreme Court Justice Stephen Breyer praised the informative amicus brief for "helping make us not experts, but moderately educated lay persons . . . . [E]ducation helps to improve the quality of our decisions."[440] In *Rothgery*, the amici briefs allowed the Justices to learn about the delayed assignment practices throughout the country that resulted in indigent defendants first appearing without counsel and remaining unrepresented long after the first appearance.[441]

In the next round of litigation, the Justices' interest will shift toward assessing the extent to which *Gideon's* guarantee has meaning for indigent defendants at first bail proceedings. The Court will seek information that reveals what is happening in other parts of the country.[442] Specifically, Justices will want to know whether indigent defendants receive representation at initial bail proceedings, and if not, how long they remain without counsel. The Court likely will welcome amicus briefs that illuminate the typical scene at the early stage of a state prosecution.

Public defenders and assigned counsel are in an excellent position to provide a first-hand account of practices in their local jurisdiction. The *Rothgery* Court's embrace of the National Association of Criminal Defense Lawyers' data presented the Justices with a much needed picture. Delaying counsel's appointment, as defenders know,

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439. *See id.* at 690-91. Simard distinguishes the influence of the informative amicus brief from the "affected group['s]" third party brief. *Id.* at 683-84. Other scholars conclude that the Supreme Court's refusal to limit the number of amicus briefs evidences the Court's positive view regarding their value. *See, e.g.*, Gregory A. Caldeira & John R. Wright, *Amici Curiae Before the Supreme Court: Who Participates, When, and How Much?*, 52 J. POL. 782, 786 (1990).

440. Stephen Breyer, *The Interdependence of Science and Law*, 82 JUDICATURE 24, 26 (1998). Justice Breyer has said that amicus briefs "play an important role in educating judges." Associated Press, *Justice Breyer Calls for Experts to Aid Courts in Complex Cases,* N.Y. TIMES, Feb. 17, 1998, at A17.

441. *See supra* notes 433-35 and accompanying text.

442. Compare *Jaffee v. Redmond*, in which Justice Scalia explained that the unanimous support offered by psychiatry and social worker organizations for a psychotherapist privilege reflected that "no self-interested organization out there [was] dedicated to pursuit of the truth." 518 U.S. 1, 36 (1996) (Scalia, J., dissenting).

is part one of the "waiting for a lawyer" story. Amicus briefs provide the opportunity to educate the Court about the further wait before obtaining counsel's actual representation. When the next *Rothgery* issue reaches the Court, national and state defender organizations and bar associations are in a position to detail *whether and when* indigent defendants receive an assigned counsel's in-court representation after a criminal prosecution has commenced.

Prosecutors, too, know that a system of equal justice for indigent defendants depends upon a defense lawyer's timely presence. From their perspective as "minister[s] of justice,"[443] prosecutors can speak to the fairness flowing from early representation. Absent a defender, court dockets become more congested and many defendants remain in jail longer because of the lawyer's delay.[444] The system moves more slowly and less efficiently, and cases are less likely to be resolved. Local prosecutors are aware that unnecessary delay may undermine a community's faith in the justice system.[445] When cases are postponed, prosecution witnesses become frustrated. When a family member remains unnecessarily in jail, that defendant's family or friends are less inclined to cooperate when asked to testify in an unrelated prosecution.[446] Finally, prosecutors know the

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443. MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (2010) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.").

444. *See* Colbert et. al, *Counsel at Bail*, *supra* note 65, at 1756. A 1998 study showed that represented indigent defendants charged with non-violent offenses "were substantially more likely to be released on their own recognizance . . . to have affordable bails . . . set [and] served less time in jail." *Id*.

445. Providing counsel at bail hearings may help to reassure defendants that the state intended to respect their right to liberty. *See id.* at 1759 ("Defendants represented by counsel were also queried about how fairly they thought they were treated and how satisfied they were with the procedures. In virtually every dimension investigated, defendants who had lawyers were more satisfied with the manner in which they were treated."); *see also* State v. Keller, 553 P.2d 1013, 1019 (Mont. 1976) ("Delayed criminal justice proceedings are undermining public confidence in the system itself. Justice delayed may not only be justice denied but justice brought seriously under question. The backbone of law enforcement and the justice system is public support. The courts must not permit the erosion of that support by permitting unnecessary delay between charge and conviction or release.").

446. *See id.* It stands to reason that when a state denies counsel, thereby adding to the time an accused remains in jail, the individuals are unlikely to

difference an advocate can make at bail determinations for nonviolent offenses.[447] Their ethical duty to justice has resulted in the support of measures that would guarantee a lawyer for the indigent defendant.[448] Consequently, a prosecutor's amicus brief may speak directly to the policy implications of failing to extend *Gideon's* guarantee.

B. *Policy Concerns and Consequences*

Research suggests that Supreme Court Justices attach considerable weight to amicus briefs that highlight the "far-reaching societal consequences" of a ruling.[449] Amicus briefs are likely to influence a ruling when the policy analysis coincides with a Justice's philosophy.[450] As Justice Sandra Day O'Connor explained, an amicus brief that discusses policy consequences, "invaluably aid[s] our decision-making process and often influence[s] either the result or the reasoning of our opinions."[451]

Consider the social and political impact that would have resulted had the Supreme Court decided *Rothgery* differently and affirmed Texas's lengthy delay procedures of assigning counsel. Such a ruling would have undermined *Gideon's* commitment to equal justice.

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cooperate with law enforcement officials who are seen as responsible for depriving people of liberty.

447. Colbert et al., *Counsel at Bail*, *supra* note 65, at 1762.

448. In 1998, the American Bar Association's Criminal Justice Council, which is comprised of prosecutors, defense attorneys, and judges, proposed a resolution that would guarantee representation at the initial bail stage. *Annual Report of the American Bar Association Including Proceedings of the 120th Annual Meeting of the House of Delegates,* 123 No. 2 ANNU. REP. A.B.A. 1998, at 389, 392. The resolution was approved. *Id*.

449. Collins, *supra* note 436, at 58. After reviewing Supreme Court amicus briefs between 1946 and 1995, Collins concluded that an amicus participant aims at the "broader societal ramifications of the case, while advocating for a particular policy outcome." *Id.* (citing LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE (1998); James F. Spriggs, II & Paul J. Wahlbeck, *Amicus Curiae and the Role of Information at the Supreme Court*, 50 POL. RES. Q. 365 (1997)).

450. *See* Collins, *supra* note 436, at 58.

451. Sandra Day O'Connor, Supreme Court Justice, Henry Clay and the Supreme Court, Speech Delivered to the Henry Clay Memorial Foundation (Oct. 4, 1996) (transcript available in the Register of the Kentucky Historical Society, Vol. 4, No. 4 (1996)).

Ruling for Texas would have had other harmful consequences to the perceived unfairness of a state's justice system. State prosecutors could choose, if they wanted, to proceed as cautiously as they thought "reasonable" against a lower-income detainee since no lawyer would be present to challenge their actions. Many prosecutors would regard the ruling as a signal that it was okay to take months before deciding whether to pursue a prosecution.

Amicus support for Rothgery's situation allowed the Justices to appreciate the "broad policy concerns" if the Court sanctioned these practices. The briefs submitted by the American Bar Association,[452] law professors,[453] and the criminal defense bar,[454] demonstrated the legal system's embrace and insistence upon equal justice for "any person haled into court."[455] In short, amici's focus on the impact of the Court's right-to-counsel ruling presented the Justices with a clear choice: affirm *Gideon's* principles at the outset of a judicial criminal proceeding or postpone a lawyer's assistance until a future date.

C. *The Influential Amicus*

Research shows that Supreme Court Justices may be influenced by the particular party who submits an amicus brief. The position of the United States Solicitor General, for instance, enjoys considerable weight.[456] Law clerks acknowledge that they "always consider[]" the Solicitor General's brief because it represents "excellent written and oral advocacy" and an extremely well-researched argument.[457] According to their law clerks, Justices also examine the amicus brief of legal organizations known for their high quality of work, including the ABA, ACLU, AFL-CIO, and NAACP.[458] The clerks also value amicus briefs

452. ABA Brief, *supra* note 433.

453. Twenty-Four Professors Brief, *supra* note 108.

454. NACDL Brief, *supra* note 46.

455. Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

456. *See* Lynch, *supra* note 431, at 46. For example, 81.6% of all employment discrimination cases supported by the Solicitor General have won at the Supreme Court level. *Id.*

457. *Id.* at 47.

458. *Id*. at 46, 50-51.

submitted by certain attorneys, such as a former Solicitor General, or a well-known law professor.[459] An amicus filed by an individual state "warrant[s] close consideration . . . because of federalism concerns."[460] A Justice "with strong allegiance to states['] rights theories" usually gives additional attention to their position.[461]

D. *Recap*

The Supreme Court is likely to look to amicus briefs to gain a state-by-state picture of when indigent defendants are receiving counsel's assistance and how long they wait. While this Article's survey contributes to the Justices' understanding, amici can fill in the additional important details. Amicus briefs of defenders and prosecutors can complete the picture and tell the full story of the right to counsel in their jurisdictions. When they do, the Court will better appreciate the high stakes involved in deciding what *Gideon* requires to make the right to counsel meaningful. Additionally, the position taken by the United States Solicitor General, states' attorney generals, and the organized bar may be pivotal. Clearly, amici have a vital role to play.

CONCLUSION

Chief Justice Roberts' final comment at the close of Rothgery's counsel's oral argument revealed a hurdle that indigent defendants must overcome if they are to persuade the high court to extend *Gideon's* fundamental right to the initial bail determination stage of a criminal proceeding. "Well," said the Chief Justice, "what's in it for the State to provide this additional layer [of a magistration hearing]? Because, of course, the person gets *Miranda* warnings when he is arrested. And so why—why should the State do this?"[462] Speaking for unrepresented indigent defendants

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459. *Id*. at 52-53.

460. *Id*. at 48.

461. *Id.*

462. Transcript of Oral Argument, *supra* note 1, at 57. A defendant's invocation of *Miranda's* right to counsel never meant that the State must immediately produce a lawyer, but only required counsel when the police wanted to continue interrogation and sought the defendant's waiver of the right

everywhere who have no lawyer to explain, advise, or advocate, Ms. Spinelli replied that, "this is the proceeding at which the defendant is informed: You are now a criminal defendant. This is the accusation against you, and these are your rights as a defendant in a criminal proceeding."[463]

Ms. Spinelli might well have asked the Chief Justice the following questions as well: How can a state's criminal justice system maintain the respect and even-handedness required when it denies representation to people unable to retain a private lawyer? What justifies local government prosecuting and jailing the poor and lower-income person without guaranteeing legal representation until after prosecution when judicial proceedings have already commenced? What compelling reason trumps *Gideon's* fundamental right to counsel to ensure equal justice and justifies delaying representation for days and often weeks? And she might have asked the Chief Justice, who appreciates parallels to his role as an impartial baseball umpire,[464] whether he would consider the officiating fair where the other side's most important defender and offensive player was ruled ineligible before the game even began and for many innings following.

Ultimately, the Supreme Court's answer to the "what's in it for the State" question will determine whether the Justices extend *Gideon's* promise of representation. The amicus participation of the legal community is likely to play a decisive role in contributing more details to the fifty-state survey that describes what currently occurs in local courts across the country. Nearly fifty years after *Gideon* spoke to

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to remain silent. During the 2010 term, the Supreme Court ruling in *Berghuis v. Thompkins*, 130 S. Ct. 2250 (2010), modified *Miranda's* protection of suppressing a statement obtained after a defendant invokes silence. Now a defendant's invocation of *Miranda's* right to remain silent requires an affirmative and unambiguous statement to suppress any subsequent statement. *See Berghuis*, 130 S. Ct. at 2264.

463. Transcript of Oral Argument, *supra* note 1, at 57.

464. *See Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (testimony of Judge John G. Roberts, Jr.) ("Judges are like umpires. Umpires don't make the rules, they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules, but it is a limited role. Nobody ever went to a ball game to see the umpire.").

equal justice for every person "haled into court" and facing a criminal charge, the bar can provide the critical answer to the "what is in it" for every State dedicated to ensuring fair safeguards for an accused facing a criminal charge.

The Justices' sharp reaction to Texas's practice of failing to provide counsel to an incarcerated defendant suggests that the Supreme Court may now be ready to extend *Gideon's* protection to the initial bail stage of a criminal prosecution and to what the high court recognized long ago is "perhaps the most critical period of the proceedings . . . from the time of . . . arraignment until the beginning of . . . trial, when consultation, thoroughgoing investigation and preparation [are] vitally important."[465] It lends hope that the day is near when every state will guarantee representation to an incarcerated defendant at the initial assessment of bail, and soon thereafter for released indigent defendants. That is, after all, what is necessary to restore the fundamental American principle of guaranteed right counsel.

APPENDIX

I. "YES WE DO" STATES

Location: City (Cnty.)	Represented at Initial Bail Hearing?	If No, Days of Delay?[466]	Attorney
CALIFORNIA			
San Mateo	Yes	2	Myra A. Weiker
San Diego (San Diego Cnty.)	Yes	2 – 3	Vincent Garcia
Madera (Madera Cnty.)	Yes	2	Michael Fitzgerald
Riverside (Riverside Cnty.)	Yes	1 – 2	Robert Dahlstedt

465. Powell v. Alabama, 287 U.S. 45, 57 (1932).

466. Unless otherwise indicated, the period of delay does not include a weekend day when a local court may be closed.

(Solano Cnty.)	Yes	2	Jeffrey E. Thoma
San Joaquin (San Joaquin Cnty.)	Yes	2	Peter Fox
Sacramento (Sacramento Cnty.)	Yes	2	David Hunt
Sonoma (Sonoma Cnty.)	Yes	2	John Abrahams
Merced (Merced Cnty.)	Yes	2 – 3	Michael Pro
(Kern Cnty.)	Yes	2 – 3	Mark Arnold
Ventura (Ventura Cnty.)	Yes	2	Howard Asher
(Siskiyou Cnty.)	Yes	2	Lael Kayfetz
Napa (Napa Cnty.)	Yes (felony)	2	Terry Davis
San Francisco (San Francisco Cnty.)	Yes	2 – 4	Rebecca S. Young
Monterey (Monterey Cnty.)	Yes	2 – 3	Charles Murphy
Santa Cruz (Santa Cruz Cnty.)	Yes		Larry Bigam
CONNECTICUT			
Hartford (Hartford Cnty.)	Yes	1 – 2	Sandra Davis Susan Brown
Litchfield (Litchfield Cnty.)	Yes	2	Carol R. Goldberg
New Haven (New Haven Cnty.)	Yes	2	Omar A. Williams
DELAWARE			
New Castle (New Castle Cnty.)	Yes	1	Brian J. Bartley
(Kent Cnty.)	Yes	1 – 2	Dawn Williams

(New Castle Cnty.) (Sussex Cnty.)			
DISTRICT OF COLUMBIA			
Washington, D.C.	Yes	1	Amanda Davis Jason Downs
FLORIDA			
Palm Beach (Palm Beach Cnty.)	Yes	1	Carey Haughwout
Tampa (Hillsborough Cnty.)	Yes	1	Julianne M. Holt
Polk City (Polk Cnty.)	Yes	1	J. Marion Moorman
Tallahassee (Leon Cnty.)	Yes	1 – 2	Nancy Daniels
(Putnam Cnty.) Daytona Beach (St. Johns Cnty.)	Yes	1 – 2	James S. Purdy Craig Dyer
Jacksonville (Duval Cnty.)	Yes	1	Bill White
Fort Lauderdale (Broward Cnty.)	Yes	1	Diane Cuddiky
HAWAII			
Kauai (Kauai Cnty.)	Yes	2	Edmund Acoba
Maui (Maui Cnty.)	Yes	1 – 2	Wendy Hudson
MASSACHUSETTS			
(Berkshire Cnty.)	Yes	1	Nathaniel Green
Worcester (Worcester Cnty.)	Yes	1	Michael S. Hussey
Boston (Suffolk Cnty.)	Yes	1	Christopher Skinner

(Barnstable Cnty.)	Yes	1	William Robinson
MAINE			
Portland (Cumberland Cnty.) Lewiston (Androscoggin Cnty.)	Yes	2	Robert Ruffner
Portland (Cumberland Cnty.)	Yes	2	Deidre Smith Prof. Chris Northrup
NORTH DAKOTA			
(Barnes Cnty.)	Yes	2	Robin Huseby
(Stark Cnty.)	Yes	2	Kevin McCabe
VERMONT			
Windsor (Windsor Cnty.)	Yes	1 – 2	Kevin Griffin
Addison (Addison Cnty.)	Yes	1 – 3	Jerry L. Schwarz
Franklin (Franklin Cnty.)	Yes	1	Dan Albert
WISCONSIN			
(Washington Cnty.)	Yes	1	John P. Kuczmanski
Madison (Dane Cnty.)	Yes	1 – 3	Catherine Dorl
Milwaukee (Milwaukee Cnty.)	Yes	1 – 3	Thomas Reed
(Outagamie Cnty.)	Yes	1	Eugene A. Bartman
Shawano (Shawano Cnty.)	Yes	1	Steve Weerts
Sauk City (Sauk Cnty.)	Yes	1 – 3	Catherine Ankenbrauwelt
(Dodge Cnty.)	Yes	1 – 3	Joe Moore
Eau Claire (Eau Claire Cnty.)	Yes	1 – 2	Dana Smetana

(Lincoln Cnty.)	Yes	3	Jim Lex
Ashland (Ashland Cnty.)	Yes	1 – 4	Mark Perrine
Marathon (Marathon Cnty.)	Yes	1	Suzanne O'Neill
Jefferson (Jefferson Cnty.)	Yes	2	John Rhiel
Winnebago (Winnebago Cnty.)	Yes	1 – 3	John W. Kuech
(Portage Cnty.)	Yes	1 – 3	David R. Dickmann
Fond du Lac (Fond du Lac Cnty.)	Yes	2	Mary Wolfe

II. "NO, WE DON'T" STATES

Location: City (Cnty.)	Represented at Initial Bail Hearing?	If No, Days of Delay?	Attorney
ALABAMA			
Columbiana (Shelby Cnty.)	No	21 – 24	Bill Hill
Birmingham (Jefferson Cnty.)	No	14 – 21	John Lentine
Montgomery (Montgomery Cnty.)	No	7 – 14	Bill Blanchard
KANSAS			
Salina (Saline Cnty.)	No	2 – 7	Mark J. Dinkel
Wichita (Sedgwick Cnty.)	No	2	Steve Osburn
Topeka	No	7	Tom Bartee

(Shawnee Cnty.)			
Liberal (Seward Cnty.)	No	14 – 30	Razmi Tahirkheli
MARYLAND[467]			
Annapolis (Anne Arundel Cnty.)	No	30	
(Montgomery Cnty.)	No	2	
(Prince George's Cnty.)	No	30	
Baltimore City (Baltimore City Cnty.)	No	2	
(Baltimore Cnty.)	No	30	
(Carroll Cnty.) (Howard Cnty.)	No	30	
Fredrick (Fredrick Cnty.)	No	30	
Aberdeen (Harford Cnty.)	No	30	
MICHIGAN			
Lansing (Ingham Cnty.)	No	14	Fred Bell
(Ingham Cnty.)	No	2 – 5	Michael J. Nichols
Detroit (Wayne Cnty.)	No	10 – 20	James O'Donnell
(Wayne Cnty.)	No	10	Donald L. Johnson
Grand Rapids	No	14	Richard E. Hillary

467. Information provided by Maryland Public Defender Paul DeWolfe and General Counsel to the Office of the Public Defender Peter Rose. The Maryland Public Defender does not represent indigent defendants at the first bail hearing; it indicated that defenders represent indigent defendants at a subsequent judicial bail review hearing in three out of Maryland's twelve jurisdictions. E-mail from Peter Rose, General Counsel, Md. Office Pub. Defender, to author (July 19, 2010) (on file with author); *see also supra* note 393.

(Kent Cnty.)			
(Kent Cnty.)	No	2	Richard E. Hillary
MISSISSIPPI			
Gulfport (Harrison Cnty.)	No	14	Glenn F. Rishel, Jr.
Greenville (Washington Cnty.)	No	7	Carol L. White-Richard
NEW HAMPSHIRE[468]			
Concord (Merrimack Cnty.)	No	10 – 30	Chris Keating
Stratham (Rockingham Cnty.)	No	F:[469] 10 M:[470] 30 – 45	Luci A. Smith
Hanover, Oxford (Grafton Cnty.)	M: No F: Generally Yes	7	Tony Hutchins
Nashua (Hillsborough Cnty.)	No	F: 10 M: 21 – 28	James D. Quay
OKLAHOMA			
Tulsa (Tulsa Cnty.)	No	24	Peter Silva
Oklahoma City (Oklahoma Cnty.)	No	30	Robert Ravitz
SOUTH CAROLINA			
Charleston (Charleston Cnty.)	No	28	Ashley Pennington
Anderson (Anderson Cnty.)	No	30	Robert A. Gamble

468. *See supra* note 328.

469. Felonies are represented by "F".

470. Misdemeanors are represented by "M".

Aiken (Aiken Cnty.)	No	45 – 60	Wallis Alves
New Zion (Clarendon Cnty.)	No	10 – 14	Harry L. Devoe, Jr.
Bennettsville (Marlboro Cnty.)	No	15 – 30	Daniel Blake
Walterboro (Colleton Cnty.) Columbia (Richland Cnty.)	Yes	14	Harris L. Beach, Jr.
Clinton (Laurens Cnty.)	No	10	Claude H. Chip Howe, III
Darlington (Darlington Cnty.)	No	30	Robert Kilgo
TENNESSEE			
Nashville (Davidson Cnty.)	No	5	Dawn Deaner
Dresden (Weakley Cnty.)	No	4	Joe Atnip
Dandridge (Jefferson Cnty.)	No	3	Ed Miller
Maryville (Blount Cnty.)	No	5 – 10	Mark Garner
Jasper (Marion Cnty.)	No	10	Phillip A. Condra
Somerville (Fayette Cnty.)	No	4 – 5	Gary F. Antrican
TEXAS			
San Antonio (Bexar Cnty.)	No	30	Angelo Moore Melissa Barlow
Lubbock (Lubbock Cnty.)	No	20 – 30	Jack Stoffregen

El Paso (El Paso Cnty.)	No	7 – 10	Robert Riley
(Kaufman Cnty.)	No	30	Andrew Jordan
Edinburgh (Hidalgo Cnty.)	No	15	Jaime Gonzalez

III. HYBRIDS: 50-50 OR MORE "YES" THAN "NO"

Location: City (Cnty.)	Counsel at Initial Appearance within 48 Hours?	Days Between Arrest and Representation	Attorney
IDAHO			
(Kootenai Cnty.)	No	F: 14 – 21 M: up to 6 months	John Adams
(Elmore Cnty.)	Yes	2	Terry Ratliff
Boise (Ada Cnty.)	Yes	2	Alan Trimming
KENTUCKY			
Frankfurt (Franklin Cnty.)	Yes	4 – 10	Rodney Barnes Dennis Shepard
Covington (Kenton Cnty.)	Yes	1 – 2	John Delaney
Pineville (Bell Cnty.)	No	14	Linda West
La Grange (Oldham Cnty.)	Yes	1	Liz Curtin
Morehead (Rowan Cnty.)	Yes	2	Steven Geurin
Columbia (Adair Cnty.)	Yes (except 6 days in	1 (unless weekend)	Glenda Edwards

	"the most rural" counties)		
Owensboro (Daviess Cnty.)	No	3	Jerry Johnson
London (Laurel Cnty.)	No (differences in 5 counties)	2 – 10	Roger Gibbs
LOUISIANA			
New Orleans (Orleans Parish)	Yes	1	Christine Lehmann
Shreveport (Caddo Parish)	Yes	1 – 3	Alan Golden
Lafayette (Lafayette Parish)	Yes	1 – 3	David Balfour
Natchitoches (Natchitoches Parish)	No	30	Brett Brunson
Jennings (Jefferson Davis Parish)	No	50 – 70	David Marcantel
Ruston (Lincoln Parish)	Yes	21 – 42	Lewis Jones
Monroe (Ouachita Parish)	Yes	1 – 3	Michael Courteau
Gretna (Jefferson Parish)	Yes	1 – 3	Richard Tompson
LaPlace (St. John the Baptist Parish)	No	30	Richard Stricks
Chalmette (Saint Bernard Parish)	Yes	1	Gregory Duley
Benton (Bossier Parish)	No	3	James Phillips

MINNESOTA			
Owatonna (11 counties)	2 counties Yes 9 counties No	N 14 – 21	Karen Duncan
Anoka (Anoka Cnty.) (8 counties)	5 counties Yes 3 counties sometimes	2 – 3	M. Ward
Bemidji (Beltrami Cnty.)	No	3 – 5	
Duluth (St. Louis Cnty.)	Yes	2	Fred Friedman
Minneapolis (Hennepin Cnty.)	Yes	2	Leonardo Castro
Willmar (Kandiyohi Cnty.)	No	3 – 5	Tim Johnson
St. Paul (Ramsey Cnty.)	Yes	2	James Hankes
Rochester (Olmsted Cnty.)	Yes	2	State PD John Stewart
MONTANA			
Helena (Lewis and Clark Cnty.)	Yes (in-custody)	1 – 2	Randi Hood Chris Abbot
Missoula (Missoula Cnty.)	Yes	1 – 3	Brian Smith Ed Sheehy
Billings (Yellowstone Cnty.)	Yes		Kris Copenhaver
Lewiston (Fergus Cnty.)	No	3 – 6	Douglas Day John Oldenberg
Bozeman (Gallatin Cnty.)	Yes	1	Peter Ohman
Kalispell (Flathead Cnty.)	No	4 – 6	John Putikka
Great Falls (Cascade Cnty.)	Yes	1 – 2	Betty Carlson

NEW YORK			
Albany (Albany Cnty.)	Yes	3	Dale Jones
Binghamton (Broome Cnty.)	No	10	Jay Wilber
Kingston (Ulster Cnty.)	No	3 – 5	Majer Gold
Utica (Oneida Cnty.)	Yes	1 – 3	Frank Nebush David Cooke
(Jefferson Cnty.)	Yes	1	Julie Hutchins
(Steuben Cnty.)	No	3 – 4	Byrum Coope, Jr.
Batavia (Genesee Cnty.)	Varies	1 – 5	Gary Horton Jerry Ader
Canton (St. Lawrence Cnty.)	No	1 – 6	Brian Pilatzke
Syracuse (Onondaga Cnty.)	Yes	1 – 2	Renee Captor
Buffalo (Erie Cnty.)	Yes	1 – 2	Helen Zimmerman
OHIO			
Columbus (Franklin Cnty.)	F: Yes	1	Yeura Venters
Dayton (Montgomery Cnty.)	No	5 – 15	Glen Dewar
Wapakoneta (Auglaize Cnty.)	Generally No	1 – 5	S. Mark Weller
Akron (Summit Cnty.)	F: Y M: N	1	Joe Kodish
Batavia (Clermont Cnty.)	Yes	1	R. Daniel Hannon
Medina (Medina Cnty.)	No	F: 10 M: 2	Tim Lutz

Clairsville (Cnty)	No	F: 3 M: 5	James Nichelson
Wooster (Wayne Cnty.)	No	14	John Leonard
Athens (Athens Cnty.)	Yes	1	Mike Westfall
Van Wert (Van Wert Cnty.)	Yes	3	Kelly Rauch Steve Diller
Mt. Vernon (Knox County.)	No	5 – 7	Bruce Maler
Springfield (Clark Cnty.)	No	F: 10 M: 5	Jim Marshall
Greenville (Darke Cnty.)	No	Varies	Paul Wagner
Sidney (Shelby Cnty.)	Yes	1	Timoney Sell
Painesville (Lake Cnty.)	No	F:10 M: 14	Paul La Plante
(Carroll Cnty.)	No	F: 10 M: 3	
Canton (Stark Cnty.)	Yes	1	Tammi Johnson
Marietta (Washington Cnty.)	Yes	1	Raymond Smith
Chillicothe (Ross Cnty.)	Yes	1 – 2	Dan Siclott Jessica McDonald
Ravenna (Portage Cnty.)	No	F: 10 M: 3	Dennis Day Lager
OREGON			
Salem (Marion Cnty.)	Yes		Richard Cowan
Bend	Yes	1 – 2	Jacques A. Delkalb

(Deschutes Cnty.)			Wade Whiting
Hillsboro (Washington Cnty.)	No	5 – 14	Steve Verhulst Robert Harris
Baker City (Baker Cnty.)	No	3	Kenneth Bardizian
Portland (Multnomah Cnty.)	Yes	1 – 2	Brian Aaron Paul Petterson Chris O'Connor
Oregon City (Clackamas Cnty.)	Yes	2 – 3	Aimee McGee
The Dalles (Wasco Cnty.)	Yes	2	Lonnie Smith
Roseburg (Douglas Cnty.)	No	3 – 5	Tom Bernier
Pendleton (Umatilla Cnty.)	Yes	2 – 4	Douglas Fischer
Grants Pass (Josephine Cnty.)	Yes	1 – 2	Holly Preslar Peter Smith
Coos Bay (Coos Cnty.)	No	F: 7	Sharon Mitchell
RHODE ISLAND			
(Bristol Cnty.) (Kent Cnty.) (Providence Cnty.)	Yes	1 – 3	John Hardiman
(Newport Cnty.) (Washington Cnty.)	No		John Hardiman
Warwick (Kent Cnty.)	Yes	1	M. Christine O'Connell
UTAH			
Salt Lake City (Salt Lake Cnty.)	Yes	Within 3 days	Patrick Anderson

(Davis Cnty.)			
Provo (Utah Cnty.)	Yes		Josh Esplin
American Fork (Utah Cnty.)	No	3	Sean Patton
(Wasatch Cnty.)	Yes		Dana Facemyer
Ogden (Weber Cnty.)			Matthew Nebeker
VIRGINIA[471]			
Alexandria	Yes	1 – 3	Melinda Douglas
Richmond	No	5 – 28[472]	Susan Herman
Fairfax	No	2 – 4	Todd Petit
Petersburg	Yes		
Martinsville	Yes	1	Thomas Stanley
WASHINGTON			
Everett (Snohomish Cnty.)	Yes	1	Bill Jaquette
Wenatchee (Chelam Cnty.)	Yes	1	Keith Howard
Port Townsend (Jefferson Cnty.)	No	10	Ben Critchlow
Seattle (King Cnty.)	Yes	1	Anny Daly
Port Angeles	No	3 – 10	Harry G. Gasnick

471. Most of the major cities in the state of Virginia are not part of counties, but rather are independent cities.

472. "We're in some arraignments and not others," said Public Defender Susan Herman. Typically, a jailed defendant charged with a misdemeanor gains the benefit of a lawyer's representation within two to four weeks, while a defendant facing a felony charge will wait four to six weeks or longer for a drug charge. Herman stressed that following the initial appearance, a lawyer will appear at a bail review "within five court days where appropriate." Herman Interview, *supra* note 358.

(Clallam Cnty.)			
Spokane (Spokane Cnty.)	Yes	F: 1 M: 14	Kathy Knox Mark Hannibal
Bellingham (Whatcom Cnty.)	Yes	1	Stark Follis
Tacoma (Pierce Cnty.)	Yes	1	Michael R. Kawamura

IV. HYBRIDS: MORE "NO" THAN "YES"

Location: City (Cnty.)	Counsel at Initial Appearance within 48 Hours?	Days Between Arrest and Representation	Attorney
ALASKA			
Anchorage (Anchorage Municipality)	No	1 – 4	Marjorie Allard
Palmer (Matanuska-Susitna Borough)	No	2	John Richard
Nome (Nome Census Area)	Yes	1	Kirsten Bey
Dillingham (Dillingham Census Area)	No	3 – 4	Terry Rodgers
Kotzebue (Northwest Arctic Borough)	No	F: 7 M: 2 – 3	Stephen Hale
Bethel (Bethel Census Area)	No	3 – 6	Megan Brady

Sitka (Sitka Borough)	No	2 – 7	Jude Pate
Juneau (Juneau Borough)	Yes	1	Eric Hedland Kevin Higgins
ARIZONA			
Florence (Pinal Cnty.)	Yes		Mary Wisdom
Tucson (Pima Cnty.)	Yes	1	Robert Hirsh
Phoenix (Maricopa Cnty.)	Yes	1	Jimi Haas
Yuma (Yuma Cnty.)	No No	F: 4 – 10	Michael Breeze Jose DelaVara
Holbrook (Navajo Cnty.)	No (unless counsel requested)	2 (if requested) 5 (if no request)	Alan LoBue Emery LaBarge
Flagstaff (Coconino Cnty.)	No	10	H. Gerhardt
Parker (La Paz Cnty.)	No	2 – 10	Michael Breeze
Window Rock (Apache Cnty.)	No	30+	Kathleen Bowman
ARKANSAS			
Russellville (Pope Cnty.)	No	30	James Dunham
Texarcana (Miller Cnty.)	No	35 – 45	Wayne Dowd
Morrilton (Conway Cnty.)	No	F: 30 M: 14	Michael Allison
Fayetteville (Washington Cnty.)	No	30	Greg Paris
Blytheville	No	30 – 60	John Bradley

(Mississippi Cnty.)			
Little Rock (Pulaski Cnty.)	Yes	2 – 3	Mary Catherine Williams, Bill Simpson
COLORADO			
Sterling (Logan Cnty.)	No	7 – 14	Mike Boyce
La Junta (Otero Cnty.)	No	7 – 14	
Denver (Denver Cnty.)	Yes	F: 1 – 2 M: 1 – 7	Douglas Wilson
Burlington (Kit Carson Cnty.)	Yes	2	Douglas Wilson Jennifer Ahnstedt
Pueblo (Pueblo Cnty.)	No	1 – 2	Douglas Wilson Michael Garlan
GEORGIA			
Conyers (Rockdale Cnty.)	Yes	3	James Purvis
(Rockdale Cnty.)	No	2 – 10	Tom Humphries
Atlanta (Fulton Cnty.)	Yes	2 – 3	Vernon Pitts, Jr.
Jackson (Butts Cnty.)	No	10 – 21	Donna Seagraves
(Glynn Cnty.)	No	Varies	Karen Maid
Douglas (Coffee Cnty.)	No	28 – 35	Michell Entie
(DeKalb Cnty.)	No	14 – 30	Claudia Saari
ILLINOIS			
Harrisburg (Saline Cnty.)	No	21 – 28	Jason Olson
Murphysboro	No	12 – 14	Patricia Gross

(Jackson Cnty.)			
Effingham (Effingham Cnty.)	No	2 – 5	Lupita Thompson
Albion (Edwards Cnty.)	Yes	2 – 3	Jerry Crisel
McLeansboro (Hamilton Cnty.)	No	21 – 30	Nathan Rowland
Carthage (Hancock Cnty.)	No	4	William Rasmussen
Wheaton (DuPage Cnty.)	No	30	Valerie Pacis
(Clinton Cnty.)	No	2 –14	Richard Goff
Chicago (Cook Cnty.)	Yes	2-3	Lindsay Huge
(Fulton Cnty.)	No	7 – 14	Walter Barra
Mason City (Mason Cnty.)	No	4	Roger Thomson
(Vermilion Cnty.)	Yes	2	Robert McIntire
Madison (Madison Cnty.)	No	5 – 10	John Rekowski
Kankakee (Kankakee Cnty.)	No	10	Edward Glazar
Fairfield (Wayne Cnty.)	No	7	David Williams
Pekin (Tazewell Cnty.)	No	5 – 10	Frederick Bernard, I
Urbana (Champaign Cnty.)	Yes	1	Randy Rosenbaum
Rockford (Winnebago Cnty.)	No	7	Karen Sorenson
Ottawa (LaSalle Cnty.)	No	3 – 4	Timothy Lapellini

Mt. Carmel (Wabash Cnty.)	No	30	Cassandra Goldman
Macomb (McDonough Cnty.)	No	Varies	John Carter
White Hall (Greene Cnty.)	No	10 – 30	Thomas Piper
Belvidere (Boone Cnty.)	No	7 – 10	Azhar Minhas
(Clark Cnty.) (Edgar Cnty.)	No	7 – 14	
Cambridge (Henry Cnty.)	No	5	Eugene Stockton
Eureka (Woodford Cnty.)	No	4	Don Pioletti
Nashville (Washington Cnty.)	No	7 – 10	Brian Trentman
(Marion Cnty.)	No	2 – 7	L. E. Broeking
Benton (Franklin Cnty.)	No	20	Eric Dirnbeck
Oregon (Ogle Cnty.)	No	14 – 24	Dennis Riley
Shelbyville (Shelby Cnty.)	No	3	Robert Swiney
INDIANA			
Bloomington (Monroe Cnty.)	Yes	3	Michael Hunt Anne Payne
Fort Wayne (Allen Cnty.)	No	7 – 10	Randall Hammond Krista Cook
Auburn (Dekalb Cnty.)	No	45	Pappas
Indianapolis (Marion Cnty.)	Yes	3	Ann Sutton

Salem (Washington Cnty.)	No	14 – 21	Mark Clark
Gary (Lake Cnty.)	No	5 – 7	Alex Woloshansky
IOWA			
Des Moines (Polk Cnty.)	No	10	Valorie Wilson
Sioux City (Woodbury Cnty.) (Plymouth Cnty.)	No	10	Matt Pittenger
Dubuque (Dubuque Cnty.)	Yes	1 – 3	Paul Kaufman
Waterloo (Black Hawk Cnty.)	No	15 – 20	David Staudt
Nevada (Story Cnty.)	No	2 – 10	Paul Rounds
Cedar Rapids (Linn Cnty.)	No	8 – 10	Brian Sissel
Iowa City (Johnson Cnty.)	No	10	John Robertson
Mason City (Cerro Gordo Cnty.)	Yes	1 – 3	Susan Flunder
Fort Madison (Lee Cnty.)	No	10	D Sallen
Marshalltown (Marshall Cnty.)	No	10	Tomas Rodriguez
Council Bluffs (Pottawattamie Cnty.)	Yes	1 – 3	Roberta Megel
MISSOURI			
Sedalia (4 rural counties)	No	1 – 7	Kathleen Brown
Kennett	No	3 – 5	Catherine Rice

(Dunklin Cnty.)			
Columbia (Boone Cnty.)	No	7 – 10	Kevin O'Brien
Caruthersville (Pemiscot Cnty.)	Yes	2	Brandon Sanchez
Clayton (St. Louis Cnty.)	Yes	1 – 3	Patrick Brayer David Reynolds
St. Louis City (St. Louis City Cnty.)	Yes	1 – 2	Mary Fox Steven Reynolds
Moberley (5 rural counties)	Yes	1 – 3	Leecia Carnes Robert Fleming
Nevada (4 counties)	No	1 – 14	Joe Zuzul
Kansas City (Jackson Cnty.)	No	7 – 21	Leon Munday
Fulton (Callaway Cnty.)	No	4	Justin Carver
Maryville (Nodaway Cnty.)	No	21	Michelle Davidson
Troy (Lincoln Cnty.)	No	7	Thomas Gabel
NEBRASKA			
Lincoln (Lancaster Cnty.)	Yes	1 – 2	Dennis Keefe
Columbus (Platte Cnty.)	No	7 (in custody)	Nathan Sohriakoff
Madison (Madison Cnty.)	No	3 – 5	Melissa Wentling
Norfolk (Madison Cnty.)	No	7	Ted Lohrberg

NEVADA			
Reno (Washoe Cnty.)	Yes[473]	2	Jeremy Bosler[474]
Ely (White Pine Cnty.)	No	17	Kelly Brown
Las Vegas (Clark Cnty.)	No	2 – 3	Philip Kohn
NEW JERSEY			
Mount Holly (Burlington Cnty.)	No	7 – 14	Kevin Walker
Toms River (Ocean Cnty.)	No	Varies	Frank Gonzalez
Woodbury (Gloucester Cnty.)	Yes	2 (in custody)	P. Jeffrey Wintner
Salem (Salem Cnty.)	Yes	4 – 7	Nathan Davis
Trenton (Mercer Cnty.)	No	3 – 6	Susan Silver
Somerville (Somerset Cnty.)	No	30	Johnnie Mask
Camden (Camden Cnty.)	No	7 – 12	Michael Freedman
Cape May (Cape May Cnty.)	No	7 – 10	Timothy Gorny

473. "This office currently has an attorney appearing at all IAs, but courts are inconsistent whether counsel can argue bail/release status, and official PD appointment occurs days later." Bosler Interview, *supra* note 377.

474. Public Defender Bosler decided to staff the initial appearance video bail hearings after he read about the Maryland right to counsel lawsuit. *See* Richmond v. Dist. Court of Md., 990 A.2d 549 (Md. 2010). His lawyers are stationed at the jail, although the Reno prosecutors have objected since formal appointment does not occur until seven to ten days after the initial appearance. Bosler Interview, *supra* note 377.

Newark (Essex Cnty.)	Yes	1 – 2	Michael Marucci
Bridgeton (Cumberland Cnty.)	No	7	Jorge Godoy
Morristown (Morris Cnty.)	Yes	2 – 3	Dolores Mann
NEW MEXICO			
Santa Fe (Santa Fe Cnty.)	No	14	Ben Bauer
Aztec (San Juan Cnty.)	No	7	Christian Hatfield
Hobbs (Lea Cnty.)	No	2 – 15	Rebecca Reese
Albuquerque (Bernalillo Cnty.)	Yes	1 – 2	Sergio Viscoli
Las Cruces (Doña Ana Cnty.)	Yes	1 – 2	Ken Henri
NORTH CAROLINA			
Raleigh (Wake Cnty.)	No	F: 14 M: 30	Bryan Collins
Winston-Salem (Forsyth Cnty.)	No	15 – 30	Peter Clary
Brevard (Transylvania Cnty.)	No	4	Paul Welch
Durham (Durham Cnty.)	Yes	2 – 3	Lawrence Campbell
Charlotte (Mecklenburg Cnty.)	No	F: 10 M: 40	Mark Touler Tony Purcelle
Greenville (Pitt Cnty.)	No	14 – 30	Robert Kemp, III
Lumberton (Robeson Cnty.)	No	28 – 48	Angus Thompson, II

PENNSYLVANIA			
Jim Thorpe (Carbon Cnty.)	No	7	Greg Mousseau
Lancaster (Lancaster Cnty.)	No	30	James Karl
Reading (Berks Cnty.)	No	11 – 21	Glen Welsh
Johnstown (Cambria Cnty.)	No	20	Bob Jones
Philadelphia (Philadelphia Cnty.)	Yes	3	Ellen Greenlee Charles Anthony Cunningham, III
Doylestown (Bucks Cnty.)	No	2 – 3	Stephen Shantz
(Belleforte Borough)	Yes	3 – 10	David Crowley
Huntingdon (Huntingdon Cnty.)	No	5 – 10	F. R. Gutshall
Scranton (Lackawanna Cnty.)	No	6	Joseph Kalinowski
(Cumberland Cnty.)	No	5 – 10	Taylor P. Andrews
St. Lewisburg (Union Cnty.)	No	7 – 10	Brian Ulmer
Media (Delaware Cnty.)	No	10	Douglas Roger
(Somerset County)	No	10	William R. Carroll
SOUTH DAKOTA			
Pierre (Hughes Cnty.)	No	7	Pat Carlson
Sioux Falls (Minnehaha Cnty.)	Yes	1	Traci Smith
Deadwood (Lawrence Cnty.)	No	F: 21 M: 14	Matt Pike
Rapid City	No	F: 15	Paula Peterson

(Pennington Cnty.)		M: 2 – 5	
WEST VIRGINIA			
Charleston (Kanawha Cnty.)	Yes		Randy Markum
Berkeley (Jefferson Cnty.)	No	45	T. Delaney
Williamson (Mingo Cnty.)	No	F: 10 M: up to 120 days	Teresa McCune
Fayetteville (Fayette Cnty.)	No	F: 10	Nancy Fraley
Martinsburg (Berkeley Cnty.)	No	F: 10 M: 45	Deborah A. Lawson
Kingwood (Preston Cnty.)	No	F: 10 M: 30 – 45	Randy Goodrich
Clarksburg (Harrison Cnty.)	No	8 – 10	Nancy Ulrich
WYOMING			
Cheyenne (Laramie Cnty.)	Yes	3	Scott Mitchel Guthrie
Casper (Natrona Cnty.)	No	M: 10 – 14	Kerri Johnson
Gillette (Campbell Cnty.)	No	F: 10 M: 60	Mike Shoumaker
Douglas (Converse Cnty.)	No	7	Bill Disney
Cody (Park Cnty.)	No	5	Brigita Krisjansons
Worland (Washakie Cnty.)	No	5 – 10	Richard Hopkinson