No. 07-440

IN THE

Supreme Court of the United States

WALTER ALLEN ROTHGERY,
Petitioner,
v.
GILLESPIE COUNTY, TEXAS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF AMICUS CURIAE THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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The National Association of Criminal Defense Lawyers is the preeminent organization advancing the mission of the criminal defense bar to ensure justice and due process for persons accused of crime or wrongdoing. A professional bar association founded in 1958, NACDL's 12,000-plus direct members in 28 countries — and 90 state, provincial and local affiliate organizations totaling more than 40,000 attorneys — include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges committed to preserving fairness and promoting a rational and humane criminal justice system. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates.

The question of precisely when the right to counsel attaches is one of obvious importance to NACDL and its members. As our members are keenly aware, counsel delayed is often effective counsel denied, and an accused's immediate access to counsel can be the difference — as it was for Mr. Rothgery — between freedom and confinement. Fortunately, most States have recognized this

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[1] No counsel for a party authored this brief in whole or in part. No person or entity other than NACDL and their counsel made a monetary contribution to the preparation or submission of this brief, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. Both petitioner and respondent have consented to the filing of this brief, and, pursuant to Rule 37.3(a), NACDL has filed the letters of consent with the Clerk of the Court.

important truth, and they provide counsel at or immediately after the accused's first appearance before a judge, at which time he is informed of the accusation against him. With members in all 50 States and the District of Columbia, and with substantial experience in all aspects of the representation of criminal defendants, NACDL is uniquely positioned to inform the Court of the practice in the States and of the consequences of the radical reworking of that practice that Respondent proposes here.

SUMMARY OF ARGUMENT

I. The Sixth Amendment, as applied to the States by the Fourteenth Amendment, guarantees that no individual shall face a criminal accusation by the government without the assistance of counsel. This Court has long recognized that the right to counsel is the primary protection standing between the defendant and the vast power of the State.

In determining the time at which the Sixth Amendment demands the provision of counsel, this Court has focused on the first formal proceeding as a trigger point — the stage at which the individual develops from a "suspect" to an "accused." *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."). At this point, a defendant must be able to rely on counsel to act as a barrier between him and the State — to manage the intricacies of the procedural web of the law, to investigate vigorously essential evidence, to secure his pre-trial rights, and to begin

preparations for his defense at trial. This Court's cases thus hold that the right to counsel attaches, at the latest, after initial arraignment. *See Michigan v. Jackson*, 475 U.S. 625 (1986); *Brewer v. Williams*, 430 U.S. 387 (1977).

II. The Fifth Circuit nevertheless held that the Sixth Amendment right to counsel does not attach after initial arraignment whenever the prosecution is not yet involved in the case. This holding is flatly contrary to this Court's case law and ignores the fundamental purpose of the right to counsel. Though counsel is surely needed when a prosecutor stands as a representative of the State in a criminal proceeding, this Court has made clear that the right to counsel exists not just to enable the defendant to meet the arguments of an "experienced and learned" adversary, but also — and of critical importance — to guide the accused through an "intricate procedural system." *United States v. Ash*, 413 U.S. 300, 306, 309 (1973); *see also Evitts v. Lucey*, 469 U.S. 387, 394 n.6 (1985).

III. This Court's affirmance of its existing case law and rejection of the Fifth Circuit's novel prosecutorial involvement test would conform to existing practice in the States. A vast majority of the States, along with the federal system, already provide counsel either before, at, or just after initial arraignment. Thus, while the Sixth Amendment right at the core of this case has enormous implications for criminal defendants, a decision striking down the Fifth Circuit rule will not wreak havoc in States throughout the country. Rather, this Court's decision would merely push the few States

who fail to provide counsel after the first formal proceeding in line with the great majority of States that do.

IV. Should the Fifth Circuit rule stand, the practical consequences of the "prosecutorial involvement" test would be severe. Prompt investigation is critical to effective representation. Delaying an accused's access to counsel after initial arraignment for weeks or even months until indictment will hinder counsel's ability to find and talk to witnesses, gather physical evidence, and document their clients' mental, physical, and emotional states near the time of the alleged crime. Further, defendants will be forced to face the procedural hurdles embedded in our criminal justice system without the assistance of trained counsel. As a result, they may lose important rights, for example, to testify before the grand jury and to obtain a speedy indictment. The consequences for criminal defendants would be harsh. But so, too, would the consequences for the Constitution, which recognizes that a robust reading of the Sixth Amendment right to counsel is the best defense against injustice.

ARGUMENT

I. Mr. Rothgery's Constitutional Right To Counsel Attached Upon His Initial Arraignment, A Formal Proceeding In Which He Was "Accused" Of A Crime.

The Sixth Amendment, made applicable to the States through the Fourteenth Amendment, provides that "[i]n all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for

his defense." This Court's cases have sensibly understood the amendment to require that, at the latest, once a defendant has appeared before a court that has officially informed him of the accusation against him, a criminal prosecution has begun and the Sixth Amendment has attached. At that point, the accused has the right to the "Assistance of Counsel" to navigate the procedural shoals that lie before him. *See, e.g.*, *McNeil*, 501 U.S. at 180-81 ("The Sixth Amendment right to counsel attaches at the first formal proceeding against an accused."). In the decision below, the Fifth Circuit engrafted an additional requirement, namely, that, in order for the Sixth Amendment to attach, a prosecutor must have been involved in that first proceeding or in the underlying arrest. That requirement is flatly inconsistent with this Court's cases. Moreover, it reflects a cramped view of the protections provided by the Sixth Amendment and would be an unwise and unwarranted restriction on the principal bulwark against unjust confinement.

1. Both the Sixth Amendment and this Court's cases reflect the importance of the right to counsel to the assurance of a fair and just administration of the criminal law. The Court has long recognized that "[t]he right [of a defendant] to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law.… He requires the guiding hand of counsel at every step in the proceedings against him." *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932); *see also United States v. Cronic*, 466 U.S.

648, 654 (1984). The Court's implementation of the Sixth Amendment right thus reflects "the recognition and awareness that an unaided layman ha[s] little skill in arguing the law or in coping with an intricate procedural system." *Ash*, 413 U.S. at 307; *see also Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (noting that "any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth."). *See generally Wright v. Van Patten*, No. 07-212, __ S. Ct. __, 2008 WL 59980, at *5 (2008) (Stevens, J., concurring).

2. In defining the point at which the Sixth Amendment attaches, this Court's cases have sensibly focused on the first formal proceeding in which the "suspect" becomes the "accused." *Brewer v. Williams* and *Michigan v. Jackson* establish the governing law. In *Brewer*, the defendant was arraigned before a judge on an outstanding arrest warrant. The Court embraced the "well established" position that the Sixth Amendment had attached: "Whatever else it may mean, the right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him 'whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'" 430 U.S. at 398 (quoting *Kirby v. Illinois*, 406 U.S. 682, 689 (1972)). In the Court's view, "[t]here can be no doubt…that judicial proceedings had been initiated against Williams," because "[a] warrant had been issued for his arrest, he had been arraigned on

that warrant before a judge in a…courtroom, and he had been committed by the court to confinement in jail." *Id.* at 399.

In *Michigan v. Jackson*, this Court reaffirmed that the right to counsel attaches no later than initial arraignment. At that point, a person "who had previously been just a 'suspect' has become an 'accused,'" and the Sixth Amendment attaches. *Jackson*, 475 U.S. at 632. The Court held that "[t]he arraignment signals 'the initiation of adversary judicial proceedings' and thus the attachment of the Sixth Amendment." *Id.* at 629 (quoting *United States v. Gouveia*, 467 U.S. 180, 187 (1984)); *see also Jackson*, 475 U.S at 630 n.3 (rejecting the State's contention that the right to counsel had not attached as "untenable" "[i]n view of the clear language in our decisions about the significance of [the] arraignment").

In short, this Court's cases make resoundingly clear that, as Justice Scalia stated for the Court in *McNeil*, 501 U.S. at 180-81, "[t]he Sixth Amendment right to counsel attaches at the first formal proceeding against an accused."

3. Against this backdrop, it defies this Court's precedent to claim that, following the Texas procedure at issue here, Mr. Rothgery did not stand "accused" and did not have the right to appointed counsel. At this initial appearance, the magistrate clearly informed Mr. Rothgery, as required by the governing statute, *see* Tex. Code. Crim. P. art. 15.17, that he was "'accused of the criminal offense of: unlawful possession of a firearm by a felon." Pet.

App. 35a. Moreover, the magistrate informed Mr. Rothgery that charges on that offense "will be filed in…District Court." *Id.* Accordingly, the State — through the person of the judge — unequivocally conveyed that Mr. Rothgery was accused of a crime and that the State intended to proceed against him. Thus, following his initial arraignment, Mr. Rothgery stood "accused" within the meaning of the Sixth Amendment. Under settled law, his right to counsel had attached.

II. The Fifth Circuit's "Prosecutorial Involvement" Test Both Ignores The Sixth Amendment's Commitment To Providing A Guide Through The "Intricate Procedural System" And Would Be Difficult To Apply.

Misconstruing this Court's decision in *Kirby v. Illinois*, the Fifth Circuit held that Mr. Rothgery's initial appearance was insufficient to trigger his right to counsel because "the relevant prosecutors were not aware of or involved in Rothgery's arrest or appearance before the magistrate." Pet. App. 7a. But there is no support for this so-called "prosecutorial involvement" test in *Kirby* or any other decision of this Court. Indeed, that approach is directly at odds with *Brewer* and *Jackson*. In *Kirby*, this Court addressed the question whether the right to counsel attached during a "police station showup" following the suspect's initial arrest. *Kirby v. United States*, 406 U.S 682, 690-91 (1972). The critical issue before the Court was thus the application of the Sixth Amendment in advance of *any* judicial criminal proceedings. Indeed, the Court made that clear, noting that the question was the application of the

Sixth Amendment to a showup that occurred before the initiation of any formal judicial proceedings. *See id.* at 684.

The Fifth Circuit relied, then, not on any inherent inconsistency between *Kirby* and this Court's holdings in *Brewer*, *Jackson*, and *McNeil*. Rather, it plucked out of context this Court's statement in *Kirby* that the initiation of judicial criminal proceedings is significant, in part, because "it is only then that the government has committed itself to prosecute," and only then "that a defendant finds himself faced with the prosecutorial forces of organized society." 406 U.S. at 689. That language from *Kirby* cannot bear the weight the Fifth Circuit would put on it.

At the outset, of course, *Kirby* pre-dates this Court's decisions in *Brewer*, *Jackson*, and *McNeil*, all of which recognize unambiguously that the Sixth Amendment attaches "at the first formal proceeding against the accused." But more importantly, nothing in *Kirby*, *Brewer*, *Jackson*, or *McNeil* supports the Fifth Circuit's prosecutorial involvement test. Indeed, quite to the contrary. This Court has been clear that a defendant's right to counsel attaches upon the first formal proceeding – without any suggestion that a prosecutor must be involved in either the underlying arrest or the formal appearance.

Further, the Fifth Circuit's approach ignores the broader purpose of the Sixth Amendment. To be sure, this Court's cases dealing with the right to counsel "have often focused on the defendant's need

for an attorney to meet the adversary presentation of the prosecutor," *Evitts*, 469 U.S. at 394 n.6, and one principal aim of the Amendment is to level the playing field when an accused faces an "experienced and learned counsel." *See Johnson v. Zerbst*, 304 U.S. 458, 462-63 (1938) (noting that the Sixth Amendment "embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel"); *see also United States v. Gouveia*, 467 U.S 180, 189 (1984) (noting one purpose of the amendment is to "protect[] the unaided layman at critical confrontations with his adversary"); *Kirby*, 406 U.S. at 688-89. Thus, when a prosecutor *has* committed to prosecute, the rationale for the Sixth Amendment protections surely applies with significant force.

But this Court has repeatedly recognized that "meet[ing] the adversary presentation of the prosecutor" is *not* the sole purpose of the Sixth Amendment right. *See e.g., Evitts*, 469 U.S. at 394 n.6. To the contrary, the Sixth Amendment protects "a different, albeit related, aspect of counsel's role, that of expert professional whose assistance is necessary in a legal system governed by complex rules and procedures for the defendant to obtain a decision at all — much less a favorable decision — on the merits of the case." *Id.* Thus, time and again, this Court has recognized counsel's critical role as a "guide through complex legal technicalities," *Ash*, 413 U.S. at 307, providing advice to those "immersed

in the intricacies of substantive and procedural criminal law," *Jackson*, 475 U.S. at 631 (quoting *Gouveia*, 467 U.S. at 189); *see, e.g.*, *Halbert v. Michigan*, 545 U.S. 605, 621-22 (2005) (noting that "[n]avigating the appellate process without a lawyer's assistance is a perilous endeavor for a layperson, and well beyond the competence of individuals, like Halbert, who have little education, learning disabilities, and mental impairments" and that "Michigan's very procedures for seeking leave to appeal after sentencing on a plea, moreover, may intimidate the uncounseled"); *Ash*, 413 U.S. at 307 ("A concern of more lasting importance was the recognition and awareness that an unaided layman had little skill in arguing the law or in coping with an intricate procedural system."); *see also Gouveia*, 467 U.S. at 189 (noting that the Court has extended the right to counsel to situations in which "the accused [is] confronted, just as at trial, *by the procedural system*, or by his expert adversary, *or by both*") (internal quotation marks omitted; alteration in original) (emphasis added). The Fifth Circuit's approach ignores this critical function of counsel.

Moreover, while underprotecting core Sixth Amendment values, the Fifth Circuit's "prosecutorial involvement" test introduces uncertainty and fact-specific inquiry into an area that benefits strongly from clear lines. That is, rather than adopting a bright-line rule in which the right to counsel attaches at a point that is no later than after formal proceedings against the accused, the Fifth Circuit adopted an approach in which analysis of the right to counsel requires all parties to look to the "specific

circumstances of th[e] case and the nature of the affidavit filed at [the defendant's] appearance before the magistrate." Pet. App. 11a. As the brief for petitioner makes clear, that approach is an invitation to disaster. *See, e.g.*, *Davis v. United States*, 512 U.S. 452, 461 (1994) (noting the benefits of "a bright line that can be applied by officers in the real world of investigation and interrogation" and the harms of compelling "difficult judgment calls" about entitlement to counsel). *Cf. Fare v. Michael C.*, 442 U.S. 707, 718 (1979) (noting benefits of clear rules in the Fifth Amendment context that inform police, prosecutors, and the Courts "with specificity as to what they may do").

In short, the Fifth Circuit's prosecutorial involvement test is an unwise and ill-considered addition to this Court's Sixth Amendment jurisprudence that little serves the values that the Sixth Amendment was intended to protect.

III. The Overwhelming Majority Of The States Already Provide Counsel Upon Initial Arraignment, Without Regard To The Presence Of Prosecutorial Involvement.

There is nothing novel, revolutionary, or impractical about the position advanced here that judicial proceedings commenced — and the Sixth Amendment right to counsel attached — when Mr. Rothgery was taken before a magistrate who informed him of the criminal accusation against him and found probable cause based on a police officer's sworn affidavit, and was then confined to jail pending trial or the posting of bail. Indeed, that

position is not only compelled by Supreme Court precedent concerning the initiation of formal judicial proceedings; it is also in line with the current practice of the vast majority of the States, as well as the federal government. Thus, reaffirming the law established in *Kirby*, *Brewer*, *Jackson*, and *McNeil* will not dramatically alter the functioning of state criminal justice systems across the country.

Considering the clear precedent this Court has established on the matter, it comes as no surprise that a survey of the federal criminal justice system, the fifty States, and the District of Columbia confirms that the vast majority already provide counsel, at the latest, upon the completion of an initial appearance such as Mr. Rothgery's initial appearance before the magistrate. An appendix to this brief contains the results of that survey. *See* App. 1a. The survey reveals that 43 States, the District of Columbia, and the federal government supply counsel to indigent defendants either before, at, or directly after an initial appearance. By contrast, there are only seven jurisdictions where the State does not provide counsel directly after initial appearance in all instances, or where there is ambiguity on the matter. Even in some of these seven jurisdictions, NACDL members report that counsel is often provided upon initial appearance, notwithstanding the statutory scheme. *See generally* App. 1a (summarizing practice).

As these statistics illuminate, the States and the federal government generally already provide counsel to criminal defendants at the initiation of

formal proceedings — at or just after the defendant's initial appearance.

Some even go beyond this mark, supplying counsel as soon after arrest as is logistically possible. New Mexico, for example, stipulates that "[a] needy person who is being detained by a law enforcement officer…is entitled to be represented by an attorney to the same extent as a person having his own counsel and to be provided with the necessary services and facilities of representation, including investigation and other preparation." N.M. Stat. § 31-16-3(A). Thus, under New Mexico law, defendants are not only entitled to counsel following initial appearance; they have the right to appointed assistance upon *initial detainment*. *See also id.* 31-16-3(B)(1). North Carolina, too, provides counsel to indigent defendants well before initial appearance. By statute, "entitlement to the services of counsel begins as soon as feasible after the indigent is taken into custody or service is made upon him of the charge, petition, notice or other initiating process. Entitlement continues through any critical stage of the action or proceeding…" N.C. Gen. Stat. Ann. § 7A-451(b). Thus many States already provide even more than the Constitution demands.

Even in the States within the jurisdiction of the Fifth Circuit, the provision of counsel after initial arraignment is less the exception than the rule. The Louisiana Code of Criminal Procedure states: "The sheriff or law enforcement officer having custody of an arrested person shall bring him promptly, and in any case within seventy-two hours from the time of the arrest, before a judge for the purpose of

appointment of counsel.…and a judge shall appoint counsel to represent the defendant within seventy-two hours from the time of arrest." La. Code Crim. P. art. 230.1. Mississippi, too, provides counsel to indigent defendants upon initial appearance. In *Jimpson v. State*, 532 So. 2d 985 (Miss. 1988), the Mississippi Supreme Court explained, "[t]he most recent formulation of when the right to counsel attaches under Mississippi law begins with *Cannaday v. State,* 455 So. 2d 713 (Miss. 1984), where the Court held that the right to counsel may attach as early as the issuance of a warrant.… More recently we have refined our view to hold that state law effects attachment of the right to counsel after arrest and at the point when the initial appearance 'ought to have been held.'" *Jimpson*, 532 So. 2d at 988 (internal citations omitted). The Encyclopedia of Mississippi Law further explains, "[o]rdinarily, the right [to counsel] attaches under state law once the accused has been taken into custody and at least functionally arrested… This may well be earlier than current federal constitutional jurisprudence recognizes that the Sixth Amendment right to counsel attaches. The *initial appearance* has become the benchmark for measuring *the latest moment when the right attaches*." 3 James L. Robertson, *Encyclopedia of Mississippi Law* § 19:72 (Jeffrey Jackson & Mary Miller eds. 2007) (emphasis added; footnote omitted).

As the case law and statutory provisions cited in the appendix make clear, these examples are by no means anomalous. To the contrary, they reflect a shared understanding throughout the land about the

requirements of the Sixth Amendment and a broad commitment to the values that amendment protects.

In sum, while the Sixth Amendment question at the heart of this case has enormous implications for criminal defendants in the few States that do not provide access to counsel upon initial arraignment, *see infra* Part IV, a decision striking down the Fifth Circuit rule will not necessitate any significant reworking in criminal justice systems across the country. To the contrary, such a holding would merely work to bring the few outlier states in line with generally accepted procedures throughout the nation.

IV. The Practical Consequences Of Adopting The Fifth Circuit's "Prosecutorial Involvement" Test Would Be Severe.

The Fifth Circuit's novel prosecutorial involvement test not only is contrary to this Court's jurisprudence and the settled practice throughout the States, it would have drastic consequences for the defendants denied counsel, and also for the integrity and efficiency of our criminal justice system. As NACDL members can attest, the time period after initial arraignment is often critical to providing effective representation. A delay of months or even weeks in the defendant's access to counsel can be the difference between freedom and confinement and, in many cases, such delay will prevent access to counsel during the only time the evidence needed to support a meritorious defense can be gathered. Thus, defendants forced to wait weeks

and even months for appointed counsel are at a severe disadvantage against the power of the State.

1. A rule requiring prosecutorial involvement before the State must provide counsel to a defendant would severely limit an attorney's ability to investigate cases properly. Attorneys are under strict obligation to investigate their clients' cases in a timely and thorough manner. The American Bar Association Guidelines, for example, dictate that "[d]efense counsel should conduct a *prompt* investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case." ABA, *Criminal Justice Section Standards: Defense Section*, Standard 4-4.1: Duty to Investigate, *available at* http://www.abanet.org/crimjust/standards/dfunc_blk.html#4.1 (emphasis added); *see also* 1 *The Public Defender Service for the District of Columbia, Criminal Practice Institute: Criminal Practice Manual*, 2.1 (2006) ("The importance of thorough investigation cannot be over emphasized. Even the most skillful lawyer's effectiveness is undermined by inadequate knowledge of the facts."). The reason for the emphasis on "prompt" investigation is clear. There are a myriad of situations where delay of a few days — much less weeks or months — can render an investigation futile. As one practitioner has explained, "Every good investigator knows the importance of early investigation because witnesses can disappear, memories fade, and physical evidence is likely to be lost or destroyed." Mary Prosser, *Reforming Criminal Discovery: Why Old Objections Must Yield To New Realities*, 2006 Wis. L. Rev. 541,

598 (2006); *see also 1 Criminal Practice Institute: Criminal Practice Manual* at 2.1 ("It is counsel's obligation to find out as much as possible about every case, as soon as possible. Speed is essential. Physical evidence disappears, memories fade, and witnesses move away or are forgotten.").

One critical problem facing defense counsel is that witnesses are often transient. In many cases, it is not just the defendants, but the victims and witnesses that are indigent. Those victims and witnesses often have less stable and predictable lives: they move more often, and their work schedules or place of employment (if they are even employed) can change quickly. For example, if a homeless man is arrested for assault in a park, many of the witnesses are likely to be other homeless people who sleep in the park. If the accused does not have access to counsel for weeks or even months, effective investigation by his lawyer is all but impossible.[2] *See 1 Criminal Practice Institute: Criminal Practice Manual* at 2.14 (detailing the need to interview both government and defense witnesses).

Delayed investigations are also complicated by the fact that memories fade as time passes. Whereas the details of a typical drug crime, for instance, may

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[2] One NACDL member from Arkansas explains that he once visited a crime scene twenty nights in a row to search for witnesses vital to his client's case. He eventually came upon evidence that the government had failed to discover and that proved essential to his client's defense. If he had not gotten access to his client soon after the initial appearance, this key information would have been lost.

be fresh in a witness's mind just after the exchange, as time goes on, that witness becomes less able to identify the key players and to recall the timing of the sale. The attorney must quickly unearth these vital facts to ensure a robust defense. If a defendant is forced to wait weeks or months to obtain an attorney, that delay may mean the difference between a verdict of innocent or guilty if essential evidence is lost to the workings of time.

Physical evidence, too, is often compromised or lost if investigation does not occur promptly after the alleged crime. Crime scenes can change quickly. For example, if the view from a location is relevant to a witness's accurate recollection of a crime scene, the subsequent pruning of trees and shrubs, or other changes in the landscape, may make it impossible to obtain adequate understanding of the conditions at the time of the incident. Further, if an alleged crime occurred in a rented apartment, it can be essential for the attorney to investigate the placement of the furniture, the blood splatterings on the walls or floors, or even the contents of a refrigerator. If too much time passes between incident and investigation, spoliation of the crime scene inevitably occurs. *See 1 Criminal Practice Institute: Criminal Practice Manual* at 2.3 ("Personal inspection of the scene of the incident, preferably under conditions similar to those at the time of the alleged crime, is imperative. It is important to view the scene as soon as possible, because lighting, weather and structures may change quickly."). A relative may move the furniture, a landlord may repaint the walls, or a neighbor might clean the kitchen. In any of these

circumstances, the lawyer's ability to recover accurately essential evidence is lost. In short, a lawyer cannot be expected to perform the duties required of him — he cannot "explore all avenues leading to facts relevant to the merits of the case" — if he is denied access to his client until all of those avenues have become blocked.

2. The Fifth Circuit standard would not only make it difficult for a defendant's attorney to discover key evidence, it would also make it impossible for the attorney to ascertain key facts from the defendant himself following the alleged crime. *See* ABA, *Criminal Justice Section Standards: Defense Section*, Standard 4-3.2: Interviewing the Client ("As soon as practicable, defense counsel should seek to determine all relevant facts known to the accused."). Just as witnesses' memories fade, so do defendants' recollections of the events. If an attorney does not have access to his client until months after the incident, the defendant will be less likely to be able to recall accurately essential details of the event, or to provide the basis of an alibi defense.

For certain kinds of cases, it is imperative that the attorney have quick access to the defendant so that an account of the defendant's mental and physical state may be recorded. For example, in cases where the defendant is likely to assert an insanity defense, an attorney must be able to seek an evaluation of the defendant's mental state as close to the time of the crime as possible — before the defendant is treated by state personnel, and particularly where personality-altering medications

are administered. Without a defense record of the defendant's state near the time of the incident, it is much more difficult for the defendant to present a credible claim of insanity.

In other instances, the defense attorney will need to make a record of the physical state of the defendant, as in cases involving self-defense. If a defendant claims that he was provoked before attacking another individual, it is essential for the attorney to seek proper medical documentation of any wounds on his client's body. If an attorney does not meet his client until weeks or months after the incident, this documentation cannot be done. Again, an attorney can only effectively perform his investigative role if he is given prompt access to his client.

3. As this Court has recognized, "[e]ven the intelligent and educated layman has small and sometimes no skill in the science of law.…He requires the guiding hand of counsel at every step in the proceedings against him." *Powell*, 287 U.S. at 69. Delayed access to a lawyer forces the defendant to navigate the procedural maze of the law without the assistance of trained counsel. For example, in Texas, if the State delays seeking an indictment, a defendant has the right to move for an examining trial. *See* Texas Code Crim. P. art. 16.01. An examining trial can result in discharge of the matter if the State's evidence does not meet the burden of proof.[3] On a more strategic level, the examining

[3] Under Texas law, a defendant loses the right to an examining trial after indictment. *See* Tex. Code Crim. P. art. 16.01

trial is a procedural means of forcing the State either to act on a case or dismiss it. In many counties, a defense request for an examining trial often pushes the prosecutors to present their case to the grand jury and seek indictment. In these instances, the defendant avoids the perpetual state of uncertainty that a looming indictment produces. Indigent defendants cannot be expected to know these intricacies of the law.[4] And, they should not be punished merely because of their lack of funds. A defendant would almost certainly be unaware of this procedural intricacy without advice from counsel. Yet, even if the defendant were somehow informed of its existence, it is unlikely that the typical indigent defendant would be capable of attempting the "perilous endeavor," *see Halbert*, 545 U.S. at 621-22, of asserting this right without the assistance of counsel. As such, without that assistance, many

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(detailing that a defendant "shall have the right to an examining trial *before* indictment…") (emphasis added). Thus, if the defendant does not request an examining trial and is then indicted, he loses the chance to force the State to demonstrate that it meets its burden of proof. Defendants, then, may be indicted under questionable charges and may be unable to prove their innocence until well after indictment – forcing the matter closer to trial and causing the defendant, and the State as well, to endure the unnecessary burdens of a fruitless criminal accusation. *See infra*, Part IV.4.

[4] Under Texas Code Crim. P. art. 15.17, a defendant charged with a felony must be informed of his right to an examining trial at magistration. However, at no time does the State explain what an examining trial is or how the defendant may initiate it. Thus, without counsel, the defendant remains helpless to navigate these procedural workings on his own.

indigent defendants could face unnecessary and prolonged uncertainty.

Similar procedural hurdles exist throughout the country. In New York, for example, a person who is about to be criminally charged by the grand jury has the right to testify before it. *See* N.Y. Crim. P. art. 190.50(5)(a). He also has the right to "request the grand jury, either orally or in writing, to cause a person designated by him to be called as a witness in such proceeding." N.Y. Crim. P. art. 190.50(6). At the grand jury stage, a prosecutor may not initially be involved in the matter, as the grand jury in New York stands as a body separate from the District Attorney. Thus, under the Fifth Circuit rule, the accused may not have the right to appointed counsel at this time. However, to exercise successfully the rights delineated in article 190.50, the accused must know how to manage the procedural requirements dictated by the Rule — he must give written notice of his desire to make a presentation before the grand jury or give notice to the grand jury of his request for a witness to be called. An indigent individual, with no training in the formalities of the law, will be severely limited in his ability to exercise these rights.[5] Not infrequently a meaningful presentation to the grand jury, either by the defendant himself or by witnesses he designates, may result in lesser charges, or even no indictment at all. With serious liberties at stake, counsel is surely necessary to

[5] New York law provides counsel to indigent individuals who are under investigation by the grand jury and who wish to appear as a witness, without regards to a prosecutor's involvement in the investigation. *See* N.Y. Crim. P. art. 190.52.

manage the procedural challenges our systems of justice create.

4. Finally, denying a defendant access to counsel until prosecutorial involvement will often result in a needless waste of the criminal justice system's resources. If an indigent defendant is not provided counsel until after formal indictment — often the stage at which a prosecutor becomes involved — cases that should never have proceeded to indictment will nonetheless clog the justice system. Mr. Rothgery's case provides a perfect example. The charges for which Mr. Rothgery was eventually indicted had no merit and could never have led to conviction, a fact his lawyer was able to confirm shortly after commencing work on the case. However, because Mr. Rothgery was denied legal representation for months, the State used precious resources, not the least of which was the jail space for the three-week period in which Mr. Rothgery was incarcerated, for a futile cause. *See* Pet. App. 16a-17a. Once counsel became involved, he easily showed that the charges were meritless, and Mr. Rothgery's case was dismissed. *Id.* at 17a.

Sound public policy encourages the quick and just resolution of litigation in many areas of the law, most notably through settlement in civil litigation and plea bargaining in criminal matters. *See e.g., McDermott, Inc. v. AmClyde*, 511 U.S. 202, 215 (1994) ("public policy wisely encourages settlements…"); *United States v. Mezzanatto*, 513 U.S. 196, 206 (1995) (noting policy in Federal Rules of "'promotion of disposition of criminal cases by compromise'" (quoting Advisory Committee Notes to

Fed. R. Evid. 410)). There is no reason why similar considerations do not apply here. By failing to provide counsel at a time where it would be most efficient for the prompt resolution of cases, the Fifth Circuit rule pushes criminal matters further towards trial — the most expensive and high-stakes stage in the criminal process.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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APPENDIX

Survey of Federal and State Rules Regarding Whether Counsel Is Provided to Indigent Defendants Before, At, Or Just After Initial Appearance

The following 45 jurisdictions — 43 States, the federal government, and the District of Columbia — provide counsel before, at, or just after initial appearance.

Federal	Fed. R. Crim. P. 5, 44
Alaska	Alaska Stat. § 18.85.100; Alaska R. Crim. P. 5
Arizona	16A Ariz. Rev. Stat., R. Crim. P. 4.2, 6.1
Arkansas	Ark. R. Crim. P. 8, 8.2; *Bradford v. State*, 927 S.W.2d 329 (Ark. 1996)
California	Cal. Penal Code §§ 858, 859; *In re Johnson*, 398 P.2d 420, 422-23 (Cal. 1965)
Connecticut	Conn. Gen. Stat. § 54-1b;. Conn. Super. Ct. R. §§ 37-1, 37-3, 37-6 ; *State v. Stenner*, 917 A.2d 28 (Conn. 2007)

Delaware	Del. Code tit. 29, §§ 4604, 5103; Del. R. Crim. P. 5, 44; *Markward v. State*, 1995 WL 496936 (Del. 1995); *Deputy v. State*, 500 A.2d 581 (Del. 1985)
District of Columbia	D.C. R. Crim. P. 5, 44
Florida	Fla. R. Crim. P. 3.111
Georgia	Ga. Code Ann. §§ 17-4-26, 17-12-23; *O'Kelley v. State*, 604 S.E.2d 509 (Ga. 2004)
Hawaii	Haw. Rev. Stat. §§ 802-1, 803-9
Idaho	Idaho Crim. R. 5, 44; Idaho Code § 19-852
Illinois	725 Ill. Comp. Stat. 5/109-1
Indiana	Ind. Code § 35-33-7-5, 35-33-7-6
Iowa	Iowa Code, Ct. R. §§ 2.2, 2.28
Kentucky	Ky. R. Crim. P. § 3.05
Louisiana	La. Code. Crim. P. art 230.1
Maine	Me. R. Crim. P. 5C

Maryland	Md. Code, Crim. Law, Art. 27A, § 4; Md. R. 4-214; *McCarter v. State*, 770 A.2d 195 (Md. 2001)
Massachusetts	Mass. R. Crim. P. 7
Michigan	Mich. Comp. Laws 6.005
Minnesota	Minn. R. Crim. P. 5.01, 5.02
Mississippi	*Jimpson v. State*, 532 So. 2d 985 (Miss. 1988); 3 James L. Robertson, *Encyclopedia of Mississippi Law* § 19:72 (Jeffrey Jackson & Mary Miller eds. 2007)
Missouri	Mo. Rev. Stat. § 600.048; 19 Williams A. Knox, *Mo. Prac., Crim. Prac. & P.* § 8:10 (3d ed. 2007)
Montana	Mont. Code § 46-8-101
Nebraska	Neb. Rev. Stat. § 29-3902
Nevada	Nev. Rev. Stat. 178.397
New Hampshire	N.H. Rev. Stat. 604-A:3
New Jersey	N.J. R. Crim. P. 3:4-2; *State v. Tucker*, 645 A.2d 111 (N.J. 1994)
New Mexico	N.M. Stat. § 31-16-3

New York	N.Y. Crim. P. Law § 180.10
North Carolina	N.C. Gen. Stat. § 7A-451
North Dakota	N.D. R. Crim. P. 5, 44
Ohio	Ohio R. Crim. P. 5, 44
Oregon	Or. Rev. Stat. §§ 135.010; 135.040; 135.050
Pennsylvania	Pa. R. Crim. P. 122 and Comments to the Rule; Pa. R. Crim. P. 519
Rhode Island	R.I. Dist. Ct. R. Crim. P. 5, 44
South Dakota	S.D. Crim. L. § 23A-40-6
Tennessee	Tenn. R. Crim. P. 44
Utah	Utah Code Ann. § 77-32-302
Vermont	Vt. Stat. Ann. tit. 13, § 5234; Vt. R. Crim. P. 5, 44
Washington	Wash. Super. Ct. Crim. R. 3.1
West Virginia	W.Va. Code § 50-4-3; *State v. Barrow*, 359 S.E.2d 844 (W. Va. 1987)
Wisconsin	Wis. Stat. § 967.06
Wyoming	Wyo. Stat. 1977 § 7-6-105; Wyo. R. Crim. P. 5, 44

In the following three jurisdictions, there is either disparity between the law as written and the law as practiced, or the statutory requirements are ambiguous. Nonetheless, NACDL members in some of the States reported that counsel is often provided, despite the ambiguities.

Kansas††	Kan. Stat. §§ 22-2901, 22-4503
Oklahoma‡‡	22 Okla. Stat. § 251
Virginia§§	Va. Code §§ 19.2-157, 19.2-158

†† Kan. Stat. § 22-4503 states that once a defendant is charged with a complaint by the State, he is entitled to appointed counsel. Kan. Stat. § 22-2901 suggests that a complaint must be filed at approximately the same time as an initial appearance before a magistrate following a warrantless arrest. Combined, these statutes suggest that Kansas provides counsel to indigent defendants upon initial appearance. However, *State v. Waugh*, 712 P.2d 1243, 1250 (Kan. 1986), suggests that in some instances, a defendant will appear before a magistrate for initial appearance before a complaint is filed. Erring on the side of caution, we have deemed Kansas's law unclear.

‡‡ Under 22 Okla. Stat. § 251, a defendant is informed at initial appearance of his right to counsel. However, it is not clear from the statute whether counsel is actually appointed directly following the appearance. Further, according to an NACDL member, if a defendant is released on bond following initial appearance, he may wait for a period of time for counsel because the judge must determine whether he meets the requirements of indigency. In practice, this determination can result in delayed provision of counsel. For these reasons, we have deemed Oklahoma's law and practice ambiguous.

§§ An NACDL member in Virginia reports that the State appoints counsel upon initial appearance. Further, § 19.2-157

In the following four jurisdictions, it appears that counsel is not currently provided in all instances upon initial appearance.

Alabama***	Ala. R. Ct. 6.1; Ala. R. Crim. P. 4.4; *Ex Parte Stewart*, 853 So. 2d 901 (Ala. 2002)
Colorado†††	Colo. Rev. Stat. §§ 16-7-207, 16-7-301; Colo. R. Crim. P. 5; 14 Robert J. Dieter, *Colo. Prac., Crim. Prac. & P.* § 1.9 (2d ed. 2007); *People v. Anderson*, 842 P.2d 621 (Colo. 1992)

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details that whenever an eligible person "appears before *any court* without being represented by counsel, the court shall inform him of his right to counsel" and "if appropriate, the statement of indigence…may be executed." While these sources strongly suggest that Virginia does, in fact, provide counsel upon initial appearance, the precise timing of appointment is not perfectly clear on the face of the statute, and we have therefore deemed the State's practice to be unclear.

*** An NACDL member in Alabama reports that, notwithstanding the authorities noted here, the State appoints counsel immediately following initial appearance. He explains that counsel then appears at the preliminary hearing, at which point a probable cause determination is made.

††† Colorado law makes a distinction for the provision of counsel between felonies and misdemeanors. *See* Colo. Rev. Stat. § 16-7-207. For felonies, defendants are entitled to make an application for counsel at initial appearance. The statute does

South Carolina‡‡‡	S.C. App. Ct. R. 602
Texas§§§	Tex. Code. Crim. P. art. 1.051

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not make entirely clear, however, at what point counsel is actually assigned. And, according to an NACDL member, if felony defendants are released from jail, they have the obligation to go in person to the public defenders' office to apply for counsel. For misdemeanors, under Col. Rev. Stat. § 16-7-207 and § 16-7-301, the court cannot assign counsel until after the prosecutor has spoken with the defendant to discuss a potential plea. Though the defendant is not obligated to reveal information to the prosecutor, "application for appointment of counsel and the payment of the application fee shall be deferred until after the prosecuting attorney has spoken with the defendant…" *Id.* § 16-7-301. This rule, then, is even harsher than the Fifth Circuit "prosecutorial involvement" test because it allows direct prosecutorial interaction with the defendant before any assignment of counsel can be made.

‡‡‡ South Carolina law is currently in flux. Rule 602 suggests that counsel is provided following initial appearance. However, according to an NACDL member in South Carolina, the State is creating "differentiated case management" in each county. *See* Sept. 19, 2007 Order Re: Bond Hearing Procedures in Summary Courts, Supreme Court of South Carolina, *at* http://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2007-09-19-01. As a result, we cannot characterize with precision the practice in South Carolina.

§§§ Since the passage of the 2001 Fair Defense Act, Texas does provide counsel following arrest and initial appearance for persons held in custody. For those released on bond, however, counsel is appointed either at arraignment on the information or indictment, or when adversarial judicial proceedings commence – whichever occurs first. Thus, the appointment of counsel for those charged and released on bail depends on when the Constitution requires the attachment of the right to counsel.