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NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

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ROTHGERY *v.* GILLESPIE COUNTY, TEXAS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 07–440. Argued March 17, 2008—Decided June 23, 2008

Texas police relied on erroneous information that petitioner Rothgery had a previous felony conviction to arrest him as a felon in possession of a firearm. The officers brought Rothgery before a magistrate judge, as required by state law, for a so-called "article 15.17 hearing," at which the Fourth Amendment probable-cause determination was made, bail was set, and Rothgery was formally apprised of the accusation against him. After the hearing, the magistrate judge committed Rothgery to jail, and he was released after posting a surety bond. Rothgery had no money for a lawyer and made several unheeded oral and written requests for appointed counsel. He was subsequently indicted and rearrested, his bail was increased, and he was jailed when he could not post the bail. Subsequently, Rothgery was assigned a lawyer, who assembled the paperwork that prompted the indictment's dismissal.

Rothgery then brought this 42 U. S. C. §1983 action against respondent County, claiming that if it had provided him a lawyer within a reasonable time after the article 15.17 hearing, he would not have been indicted, rearrested, or jailed. He asserts that the County's unwritten policy of denying appointed counsel to indigent defendants out on bond until an indictment is entered violates his Sixth Amendment right to counsel. The District Court granted the County summary judgment, and the Fifth Circuit affirmed, considering itself bound by Circuit precedent to the effect that the right to counsel did not attach at the article 15.17 hearing because the relevant prosecutors were not aware of, or involved in, Rothgery's arrest or appearance at the hearing, and there was no indication that the officer at Rothgery's appearance had any power to commit the State to prosecute without a prosecutor's knowledge or involvement.

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Held: A criminal defendant's initial appearance before a magistrate judge, where he learns the charge against him and his liberty is subject to restriction, marks the initiation of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel. Attachment does not also require that a prosecutor (as distinct from a police officer) be aware of that initial proceeding or involved in its conduct. Pp. 5–20.

(a) Texas's article 15.17 hearing marks the point of attachment, with the consequent state obligation to appoint counsel within a reasonable time once a request for assistance is made. This Court has twice held that the right to counsel attaches at the initial appearance before a judicial officer at which a defendant is told of the formal accusation against him and restrictions are imposed on his liberty. See *Michigan* v. *Jackson*, 475 U. S. 625, 629, n. 3; *Brewer* v. *Williams*, 430 U. S. 387, 398–399. Rothgery's hearing was an initial appearance: he was taken before a magistrate judge, informed of the formal accusation against him, and sent to jail until he posted bail. Thus, *Brewer* and *Jackson* control. Pp. 5–10.

(b) In *McNeil* v. *Wisconsin*, 501 U. S. 171, 180–181, the Court reaffirmed that "[t]he Sixth Amendment right to counsel attaches at the first formal proceeding against an accused," and observed that "in most States . . . free counsel is made available at that time." That observation remains true today. The overwhelming consensus practice conforms to the rule that the first formal proceeding is the point of attachment. The Court is advised without contradiction that not only the Federal Government, including the District of Columbia, but 43 States take the first step toward appointing counsel before, at, or just after initial appearance. To the extent the remaining 7 States have been denying appointed counsel at that time, they are a distinct minority. Pp. 10–12.

(c) Neither the Fifth Circuit nor the County offers an acceptable justification for the minority practice. Pp. 12–19.

(1) The Fifth Circuit found the determining factor to be that no prosecutor was aware of Rothgery's article 15.17 hearing or involved in it. This prosecutorial awareness standard is wrong. Neither *Brewer* nor *Jackson* said a word about the prosecutor's involvement as a relevant fact, much less a controlling one. Those cases left no room for the factual enquiry the Circuit would require, and with good reason: an attachment rule that turned on determining the moment of a prosecutor's first involvement would be "wholly unworkable and impossible to administer," *Escobedo* v. *Illinois*, 378 U. S. 478, 496. The Fifth Circuit derived its rule from the statement, in *Kirby* v. *Illinois*, 406 U. S. 682, 689, that the right to counsel attaches when the government has "committed itself to prosecute." But what counts as

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such a commitment is an issue of federal law unaffected by allocations of power among state officials under state law, cf. *Moran* v. *Burbine*, 475 U. S. 412, 429, n. 3, and under the federal standard, an accusation filed with a judicial officer is sufficiently formal, and the government's commitment to prosecute it sufficiently concrete, when the accusation prompts arraignment and restrictions on the accused's liberty, see, *e.g., Kirby, supra,* at 689. Pp. 12–15.

(2) The County relies on *United States* v. *Gouveia*, 467 U. S. 180, in arguing that in considering the initial appearance's significance, this Court must ignore prejudice to a defendant's pretrial liberty, it being the concern, not of the right to counsel, but of the speedy-trial right and the Fourth Amendment. But the County's suggestion that Fifth Amendment protections at the early stage obviate attachment of the Sixth Amendment right at initial appearance was refuted by *Jackson*, 475 U. S., at 629, n. 3. And since the Court is not asked to extend the right to counsel to a point earlier than formal judicial proceedings (as in *Gouveia*), but to defer it to those proceedings in which a prosecutor is involved, *Gouveia* does not speak to the question at issue. Pp. 15–17.

(3) The County's third tack gets it no further. Stipulating that the properly formulated test is whether the State has objectively committed itself to prosecute, the County says that prosecutorial involvement is but one form of evidence of such commitment and that others include (1) the filing of formal charges or the holding of an adversarial preliminary hearing to determine probable cause to file such charges, and (2) a court appearance following arrest on an indictment. Either version runs up against *Brewer* and *Jackson:* an initial appearance following a charge signifies a sufficient commitment to prosecute regardless of a prosecutor's participation, indictment, information, or what the County calls a "formal" complaint. The County's assertions that *Brewer* and *Jackson* are "vague" and thus of limited, if any, precedential value are wrong. Although the Court in those cases saw no need for lengthy disquisitions on the initial appearance's significance, that was because it found the attachment issue an easy one. See, *e.g., Brewer, supra,* at 399. Pp. 17–19.

491 F. 3d 293, vacated and remanded.

SOUTER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and STEVENS, SCALIA, KENNEDY, GINSBURG, BREYER, and ALITO, JJ., joined. ROBERTS, C. J., filed a concurring opinion, in which SCALIA, J., joined. ALITO, J., filed a concurring opinion, in which ROBERTS, C. J., and SCALIA, J., joined. THOMAS, J., filed a dissenting opinion.