

tutes a national consensus, which might result in the chilling effect that Justice Alito and Louisiana suggested occurred in the case of capital rape provisions. If it is impracticable for the Court objectively to discern a national consensus or to discover natural law through its independent judgment, how much more impossible is the state legislatures' task of predicting the conclusions the Court will reach? That chilling effect can result in the Court being able to claim a standard of decency has evolved even if the phenomenon is really a result of prior Court decisions changing the standard. A presumption of constitutionality would allow states to continue to change their statutes during periods of apparent disagreement as to a national consensus, and require the Court to wait to see if a consensus truly emerges before declaring a standard of decency to exist by forcing it into existence.

3. *Sixth Amendment — Attachment of Right to Counsel.* — Ever since the Supreme Court's decision in *Kirby v. Illinois*,¹ the "attachment" of the Sixth Amendment right to counsel has turned on the commencement of adversary judicial proceedings. In various opinions over the years, courts have parsed the pretrial stages of criminal investigation and adjudication to identify the precise moment at which such proceedings actually commence.² Last Term, in *Rothgery v. Gillespie County*,³ the Supreme Court continued this project, holding that a criminal defendant's Sixth Amendment right to counsel attaches after the defendant's initial appearance before a judicial officer where he learns of the charge against him and his liberty is subject to restraint. The Court's holding was, by its own account, narrow, redundant, and of little consequence to the defendant in question. Despite these features, the decision was an important one. *Rothgery* provides a great deal of doctrinal clarity and has very real practical effects. It is particularly notable for its formalist methodology, and, going forward, will be remembered for the fundamental purposive question that it raises.

On July 15, 2002, Texas police executed a warrantless arrest of suspected felon Walter Rothgery for illegal possession of a firearm.⁴ While he was being booked at Gillespie County jail, Rothgery requested that the State appoint him counsel.⁵ No counsel was appointed. The following morning, pursuant to the Texas Code of Criminal Procedure, the police brought Rothgery before a magistrate judge.⁶ Rothgery once again insisted upon a right to appointed coun-

¹ 406 U.S. 682 (1972).

² See, e.g., *Coleman v. Alabama*, 399 U.S. 1, 9–10 (1970) (plurality opinion) (right to counsel attached at pre-indictment preliminary hearing); *United States v. Wade*, 388 U.S. 218, 236–37 (1967) (right to counsel attached at post-indictment, pretrial line-up).

³ 128 S. Ct. 2578 (2008).

⁴ See *Rothgery v. Gillespie County*, 413 F. Supp. 2d 806, 807 (W.D. Tex. 2006).

⁵ *Id.*

⁶ See *id.* at 807 n.2.

sel, but temporarily waived the right to expedite his release on bail.⁷ The judge determined that probable cause existed for Rothgery's arrest, informed Rothgery of his rights and of the accusations against him (noting that formal charges had not yet been filed), and set bail.⁸ After posting bail, Rothgery repeatedly requested the appointment of counsel, first in writing and then again through personal inquiries, but none was appointed.⁹ Six months later, a grand jury indicted Rothgery.¹⁰ He again requested the appointment of counsel. The following day, Rothgery was re-arrested and his bail was tripled.¹¹ He was unable to post bail and remained in jail for three weeks.¹² Transferred to a different county jail because of overcrowding, he again requested the appointment of counsel.¹³ It was this fourth written request that was finally honored. Within a few months, Rothgery's state-assigned lawyer proved that he had never been a felon, and the charges were dismissed.¹⁴

Rothgery then brought a civil action under 42 U.S.C. § 1983 challenging the County's unwritten practice of not providing a lawyer until after indictment.¹⁵ Specifically, he alleged that he should have been appointed counsel after his initial appearance before the magistrate judge and that the failure to do so had violated the Sixth and Fourteenth Amendments of the Federal Constitution.¹⁶ Rothgery further alleged that the County's practices created an unreasonable risk of untimely and non-meaningful appointment of counsel.¹⁷

The District Court for the Western District of Texas granted summary judgment against Rothgery.¹⁸ Noting that "[f]ederal courts look to state law in evaluating whether adversary judicial proceedings have been initiated," the court stated that Texas had no "'bright-line rule' to determine when adversary judicial proceedings begin."¹⁹ Looking to the particular features of the judicial process that Rothgery faced, the court concluded that the magistrate hearing was a simple probable cause determination and that the accusations stated against Rothgery during the hearing did not constitute formal charges.²⁰ Because no

⁷ *Id.* at 808 n.3.

⁸ *Id.* at 808.

⁹ *Id.* at 808–09.

¹⁰ *Id.* at 809.

¹¹ *Rothgery*, 128 S. Ct. at 2582.

¹² *Id.*

¹³ *Rothgery*, 413 F. Supp. 2d at 807–09.

¹⁴ *Id.*

¹⁵ *Id.* at 809–10.

¹⁶ *Id.*

¹⁷ *Id.* at 810.

¹⁸ *Id.* at 811.

¹⁹ *Id.* at 812.

²⁰ *Id.* at 814.

formal charges had been filed, the court held, there had been no initiation of adversary judicial proceedings and Rothgery's right to counsel had not attached, meaning that there could not have been a Sixth Amendment violation.²¹

The Fifth Circuit Court of Appeals affirmed.²² The court heeded the strong circuit precedent of *McGee v. Estelle*²³ and stated that "a warrantless arrestee's Sixth and Fourteenth Amendment right to counsel does not attach in Texas when he appears before a magistrate for statutory warnings if prosecutors are unaware of and uninvolved in the arrest and appearance" of the defendant.²⁴ According to the Fifth Circuit, without prosecutorial awareness there could be no initiation of adversary judicial proceedings, and so Rothgery's right to counsel had not yet attached.²⁵

The Supreme Court granted certiorari, vacated, and remanded.²⁶ Writing for the majority, Justice Souter²⁷ first held that "the right to counsel guaranteed by the Sixth Amendment applies at the first appearance before a judicial officer at which a defendant is told of the formal accusation against him and restrictions are imposed on his liberty."²⁸ The Court characterized its holding as a mere reaffirmance of its Sixth Amendment precedents — *Brewer v. Williams*²⁹ and *Michigan v. Jackson*³⁰ — in which the Court "twice held that the right to counsel attaches at [a defendant's] initial appearance before a judicial officer."³¹ Finding that both "*Brewer* and *Jackson* control,"³² the Court held that, in the instant case, the defendant's right to counsel attached at the time of his initial appearance before the magistrate judge. The Court then bolstered its holding by citing additional precedent — the case of *McNeil v. Wisconsin*³³ — as the latest reaffirmation that the Sixth Amendment right to counsel attaches at "the first formal proceeding against an accused,"³⁴ and noted that the fed-

²¹ *Id.* at 815.

²² Rothgery v. Gillespie County, 491 F.3d 293, 294 (5th Cir. 2007).

²³ 625 F.2d 1206 (5th Cir. 1980).

²⁴ Rothgery, 491 F.3d at 294.

²⁵ See *id.* at 301.

²⁶ Rothgery, 128 S. Ct. at 2592.

²⁷ Chief Justice Roberts and Justices Stevens, Scalia, Kennedy, Ginsburg, Breyer, and Alito joined Justice Souter.

²⁸ Rothgery, 128 S. Ct. at 2581.

²⁹ 430 U.S. 387 (1977).

³⁰ 475 U.S. 625 (1986).

³¹ Rothgery, 128 S. Ct. at 2584.

³² *Id.*

³³ 501 U.S. 171 (1991).

³⁴ Rothgery, 128 S. Ct. at 2586 (quoting *McNeil*, 501 U.S. at 181) (internal quotation mark omitted).

eral government and forty-three states already follow this guideline.³⁵ Second, the Court explicitly rejected the Fifth Circuit's notion that a prosecutor must be aware of a proceeding for it to qualify as the initiation of adversary judicial proceedings. It reasoned that the prosecutorial awareness standard was wrong because the Court's previous cases had not attributed any controlling relevance to a prosecutor's involvement.³⁶ It further noted that such a standard would be unworkable and impractical.³⁷ Finally, the Court emphasized that its decision was a narrow one: the Court merely decided the point of initiation of adversary judicial proceedings. It made a passing reference to the notion that counsel might be appointed within a "reasonable time" thereafter.³⁸ However, it did not decide whether such an appointment was required; that is, it did not decide whether deprivation of counsel actually resulted in prejudice to Rothgery's Sixth Amendment rights.³⁹

Justice Alito⁴⁰ concurred to further explain the narrowness of the Court's decision. He started by distinguishing between the right to counsel and the right to appointed counsel: "As I interpret our precedents, the term 'attachment' signifies nothing more than the beginning of the defendant's prosecution. It does not mark the beginning of a substantive entitlement to the assistance of counsel."⁴¹ Justice Alito noted that this distinction is grounded in the text of the Sixth Amendment. The attachment inquiry addresses "*when* the right may be asserted ('[i]n all criminal prosecutions')."⁴² The appointment inquiry addresses "*what* the right guarantees ('the right . . . to have the Assistance of Counsel for his defense')."⁴³ The Court in the instant case merely clarified when the right to counsel had attached; it did not state that counsel had to be appointed for Rothgery at the time of attachment.⁴⁴ Justice Alito explained that the appointment of counsel turns on a separate "critical stage" analysis, whereby the presence of counsel is required at trial and at critical stages before trial.⁴⁵ He closed by emphasizing that the Court left open the question whether there was any critical stage prior to indictment that warranted appointment of counsel in Rothgery's case.⁴⁶

³⁵ *Rothgery*, 128 S. Ct. at 2586–87 & n.14.

³⁶ *Id.* at 2587–88.

³⁷ *Id.*

³⁸ *Id.* at 2591.

³⁹ *Id.* at 2592.

⁴⁰ Chief Justice Roberts and Justice Scalia joined Justice Alito.

⁴¹ *Rothgery*, 128 S. Ct. at 2592 (Alito, J., concurring).

⁴² *Id.* (quoting U.S. CONST. amend. VI).

⁴³ *Id.* (quoting U.S. CONST. amend. VI).

⁴⁴ *Id.* at 2593–94.

⁴⁵ *Id.* at 2594. See, e.g., *United States v. Wade*, 388 U.S. 218 (1967) (critical stage analysis).

⁴⁶ *Rothgery*, 128 S. Ct. at 2595 (Alito, J., concurring).

Justice Thomas dissented. He portrayed the majority opinion as a novel one — a holding that emerged “for the first time after plenary consideration.”⁴⁷ He objected to the Court’s holding first on the grounds that it was not supported by the Sixth Amendment’s original meaning.⁴⁸ Examining Blackstone, a Founding-era dictionary, and early Supreme Court decisions, Justice Thomas concluded that the Sixth Amendment right to counsel attaches only after the filing of formal charges, and not at a defendant’s initial judicial appearance.⁴⁹ In a second objection to the majority opinion, Justice Thomas refuted the Court’s interpretation and construal of precedent.⁵⁰ Examining *Kirby*, *Brewer*, and *Jackson* in turn, Justice Thomas found that none of the cases directly addressed the attachment issue presented in *Rothgery*.⁵¹ He also found their precedential value dubious. Moreover, Justice Thomas argued that all three cases were consistent with the view that attachment requires prosecutorial involvement, since none of the cases specifically precluded this possibility.⁵²

Chief Justice Roberts, joined by Justice Scalia, filed a concurring opinion. The Chief Justice recognized the “compelling” nature of Justice Thomas’s originalist inquiry, but ultimately concluded that the precedents of *Brewer* and *Jackson* controlled and that “[a] sufficient case [had] not been made for revisiting those precedents.”⁵³ The Chief Justice also underscored Justice Alito’s careful distinction between the right to counsel and the right to appointed counsel.⁵⁴

The Court’s decision in *Rothgery* is certainly narrow and seemingly ministerial. Despite these features, and the opinion’s own self-effacing language, the decision is notable doctrinally, practically, and methodologically. Doctrinally, it clarified the Court’s position in an area where precedent was murky. Practically, it had a clear impact on a number of jurisdictions. Methodologically, it cemented the formalist approach within Sixth Amendment jurisprudence. And ultimately, it set up a fundamental question over the purpose of the Sixth Amendment right to counsel.

Rothgery is doctrinally significant because it clearly and definitively settles the threshold issue in Sixth Amendment right-to-counsel jurisprudence. Prior to this decision, the question of when the right to

⁴⁷ *Id.* (Thomas, J., dissenting).

⁴⁸ *Id.*

⁴⁹ *Id.* at 2598.

⁵⁰ *See id.* at 2599–604.

⁵¹ *Id.* at 2599–603.

⁵² *Id.* at 2604.

⁵³ *Id.* at 2592 (Roberts, C.J., concurring).

⁵⁴ *Id.*

counsel attaches had “still not been fully resolved.”⁵⁵ The Court’s guidance on the matter was vague, indirect, and presented in metaphorical terms. In *Kirby*, the Court spoke of the right attaching when the government’s “commit[ment]” to prosecute had “solidified.”⁵⁶ In *Brewer*, the Court noted in dicta that the right attached “at least . . . at or after the time that judicial proceedings have been initiated against [the defendant].”⁵⁷ “Judicial proceedings” can be an unclear term, so the Court gave examples of such proceedings — “formal charge, preliminary hearing, indictment, information, or arraignment” — but these examples were non-exhaustive.⁵⁸ The Court’s guidance in *Jackson* was similarly oblique, confined to a mere footnote, and largely repetitive of previous cases.⁵⁹ *Rothgery* crystallizes this doctrinal muddle. In clear terms, it establishes that the point of attachment is the initial appearance before a judicial officer where a defendant learns of the charges against him and his liberty is subject to restraint. It specifies that this is *the* point of attachment, not merely *a* point of attachment. Finally, it indicates that attachment turns on the defendant’s interactions with the legal system, not the prosecutor’s.

Rothgery also has significant practical impact for at least three reasons. First, for a Court oft-accused of being out of step with the empirical realities of criminal procedure,⁶⁰ *Rothgery* provides a clear, universally applicable, “bright-line” rule for law enforcement officers⁶¹ and lower courts⁶² to follow. This is because, for the first time, the Court defined the attachment of the right to counsel in neutral terms, avoiding jargon like “arraignment” and “preliminary hearing” that have different definitions in different jurisdictions.⁶³ As a result, the *Rothgery* rule provides clear guidance in all American jurisdictions.

⁵⁵ Diarmuid F. O’Scannlain, *Lawmaking and Interpretation: The Role of a Federal Judge in Our Constitutional Framework*, 91 MARQ. L. REV. 895, 910 n.49 (2008); see also James S. Montana, Jr., & John A. Galotto, *Right to Counsel: Courts Adhere to Bright-Line Limits*, CRIM. JUST., Summer 2001, at 4, 6, 8 (2001) (noting a circuit split in when the right to counsel attaches).

⁵⁶ *Kirby v. Illinois*, 406 U.S. 682, 689 (1972).

⁵⁷ *Brewer v. Williams*, 430 U.S. 387, 398 (1977) (emphasis added).

⁵⁸ *Id.* (quoting *Kirby*, 406 U.S. at 689) (internal quotation mark omitted).

⁵⁹ See *Michigan v. Jackson*, 475 U.S. 625, 629 n.3 (1986).

⁶⁰ See, e.g., *Georgia v. Randolph*, 126 S. Ct. 1515, 1539 (2006) (Roberts, C.J., dissenting) (criticizing the majority and concurring opinions as resulting in “a complete lack of practical guidance for the police in the field, let alone for the lower courts”).

⁶¹ See Devallis Rutledge, *Pinpointing the Right to Counsel*, POLICE, Aug. 2008, <http://www.policemag.com/Articles/2008/08/Pinpointing-the-Right-to-Counsel.aspx> (noting that *Rothgery* “clarifies” for law enforcement officers when a suspect’s right to counsel attaches so that they can “avoid engaging in interrogation at the wrong time”).

⁶² See, e.g., *United States v. Morriss*, 531 F.3d 591, 594 (8th Cir. 2008) (noting that the *Rothgery* Court “unambiguously reaffirmed” the “bright-line rule” “requiring appearance before a judicial officer” to trigger attachment).

⁶³ See *Rothgery*, 128 S. Ct. at 2584–86 (discussing the distinctions between an initial arraignment and an arraignment on the indictment).

Second, because of this clear guidance, the decision effects widespread error-correction and uniformity among the states. This is particularly true of the seven states that, prior to *Rothgery*, did not reliably recognize the attachment of the right to counsel before, at, or just after an initial appearance: Kansas, Oklahoma, Virginia, Alabama, South Carolina, Texas, and Colorado.⁶⁴ In the first five states, which had exceptions, delays, or deviations from this rule, *Rothgery* will bring consistency.⁶⁵ In Texas, *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.⁶⁶ In Colorado, *Rothgery* will significantly alter the current practice: misdemeanor defendants' right to counsel will no longer be conditioned on the defendant first speaking directly with the prosecutor to discuss a potential plea.⁶⁷

Third, the decision affects the content and timing of investigative activity. Certain investigative techniques, such as deliberate elicitation of statements⁶⁸ and pre-trial lineups for identification,⁶⁹ cannot be conducted in the absence of counsel once the right to counsel has attached.⁷⁰ To the extent that *Rothgery* moves this point of attachment forward in time, investigators will adjust accordingly by moving their own investigative activities even further forward⁷¹ and making greater use of investigative techniques that do not require the presence of counsel.⁷² In the case of Texas, for example, where a magistrate hearing is immediately triggered by a warrantless arrest — and thus the right to counsel would attach “very shortly” after arrest⁷³ — investigators are now more likely to conduct questioning and monitoring prior to arrest and to execute more warranted arrests.

⁶⁴ Brief of Amicus Curiae the National Association of Criminal Defense Lawyers in Support of Petitioner at 5a-7a, *Rothgery*, 128 S. Ct. 2578 (2008) (No. 07-440), available at http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/07-440_PetitionerAmCuNACDL.pdf.

⁶⁵ See *id.* at 5a-7a, nn.††, ‡‡, §§, ***, †††.

⁶⁶ *Id.* at 7a n. §§§.

⁶⁷ *Id.* at 6a-7a n. †††.

⁶⁸ See *Massiah v. United States*, 377 U.S. 201 (1964).

⁶⁹ See *United States v. Wade*, 388 U.S. 218 (1967).

⁷⁰ See Brief for Respondent at 54, *Rothgery*, 128 S. Ct. 2578 (2008) (No. 07-440), available at http://abanet.org/publiced/preview/briefs/pdfs/07-08/07-440_Respondent.pdf.

⁷¹ Cf. Neil Colman McCabe, *The Right to a Lawyer at a Lineup: Support from State Courts and Experimental Psychology*, 22 IND. L. REV. 905, 906 (1989).

⁷² E.g., *United States v. Ash*, 413 U.S. 300 (1973) (ruling that photo arrays are not a critical stage).

⁷³ See Brief of Amicus Curiae Texas Association of Counties and Texas District and County Attorneys Association in Support of Respondent at 12, *Rothgery*, 128 S. Ct. 2578 (2008) (No. 07-440), available at http://abanet.org/publiced/preview/briefs/pdfs/07-08/07-440_RespondentAmCuTexasAssocs.pdf.

Methodologically, *Rothgery* represents a triumph of formalism⁷⁴ over functionalism in Sixth Amendment right-to-counsel jurisprudence. This controversy first arose in a series of Warren Court-era cases involving incriminating statements elicited in the absence of counsel. On one side was the formalist position that the right to counsel's attachment is triggered at a certain rigidly demarcated point on the judicial timeline. Justice Stewart emerged as the leading proponent of this approach. In *Spano v. New York*,⁷⁵ a case involving a post-indictment confession, Justice Stewart put aside the coercive nature of the confession and argued, in his concurring opinion, that "the absence of counsel [after indictment] when this confession was elicited was *alone* enough to render it inadmissible."⁷⁶ Justice Stewart later commanded a majority of the Court in *Massiah v. United States*,⁷⁷ a case involving a post-indictment informant. There he noted simply that "the Sixth Amendment directly applies" and found the absence of counsel after indictment completely dispositive.⁷⁸

On the other side is the functionalist position that the right to counsel's attachment is determined by the nature of the defendant's interaction with state actors. For the functionalists, Justice Stewart's rule requiring the initiation of formal judicial proceedings was a "sterile syllogism":⁷⁹ an "abstract consideration" that was "completely irrelevant" to whether or not counsel was necessary or useful in the situation at hand.⁸⁰ More important to the functionalists was the substance of the interaction between the defendant and prosecution. This became clear when the functionalist contingent commanded a majority of the Court in *Escobedo v. Illinois*,⁸¹ a case involving a pre-indictment confession. The Court held that the defendant's right to counsel had been violated, even though formal adversary judicial proceedings had not been initiated. Writing for the majority, Justice Goldberg emphasized that the defendant had become the "focus"⁸² of the investigation and that "the purpose of the interrogation was to 'get

⁷⁴ For a description of formalism, see Cass R. Sunstein, *Must Formalism Be Defended Empirically?*, 66 U. CHI. L. REV. 636, 638–39 (1999) (noting that formalism includes commitments "to promoting compliance with all applicable legal formalities (whether or not they make sense in the individual case), to ensuring rule-bound law (even if application of the rule, statutory or contractual, makes little sense in the individual case), and to constraining the discretion of judges in deciding cases").

⁷⁵ 360 U.S. 315 (1959).

⁷⁶ *Id.* at 326 (Stewart, J., concurring) (emphasis added).

⁷⁷ 377 U.S. 201 (1964).

⁷⁸ *Id.* at 205.

⁷⁹ *Id.* at 209 (White, J., dissenting) (noting that the government's conduct did not substantively interfere with the defendant's right to counsel).

⁸⁰ *Kirby*, 406 U.S. at 696–97 (Brennan, J., dissenting).

⁸¹ 375 U.S. 478 (1964).

⁸² *Id.* at 490.

him' to confess."⁸³ Thus, for Justice Goldberg: "It would exalt form over substance to make the right to counsel, under these circumstances, depend on whether at the time of the interrogation, the authorities had secured a formal indictment. [The defendant] had, for all practical purposes, already been charged with murder."⁸⁴ Justice Brennan continued this line of reasoning in *United States v. Wade*,⁸⁵ a case involving a pre-trial lineup. Writing for the majority, Justice Brennan held that "the accused . . . need not stand alone against the State at any stage of the prosecution, *formal or informal*, in court or out, where counsel's absence might derogate from the accused's right to a fair trial."⁸⁶ As Justice Brennan would later note, this is because "identical hazards" inhere in certain investigative interactions — like interrogations and lineups — regardless of whether those interactions occur before or after the initiation of formal adversary proceedings.⁸⁷

It was Justice Stewart and the formalists who had the last word in this debate. Dissenting in *Escobedo*, Justice Stewart insisted that "the constitutional guarantees . . . which pertain to a criminal trial" attach only after "the institution of formal, meaningful judicial proceedings."⁸⁸ Leading a plurality in *Kirby*, a case involving a pre-indictment lineup, Justice Stewart redrew the rigid formalist line. He declined to apply *Wade*'s requirement of counsel at lineups to any lineup that took place prior to indictment or formal charge.⁸⁹ In *Brewer*, Justice Stewart re-commanded a majority of the Court to embrace *Kirby*'s formal "adversary judicial proceedings" language.⁹⁰ *Rothgery* is the modern Court's embrace of this language, and a signal that the formalist approach is now well-entrenched in Sixth Amendment jurisprudence.

Not only is *Rothgery* formalist — it is far more formalist than its predecessor cases. Previously, whenever the Court held that the right to counsel attached, it also held that the defendant was entitled to the appointment of counsel. In so doing, the Court conferred concrete substantive protections — like the presence of counsel at interrogations and lineups — through its formalism. *Rothgery* does not do this.

For the courts, and for *Rothgery*, this will be the next key question: what substantive protection will follow from this attachment of the right to counsel? The answer will turn on what the courts believe is

⁸³ *Id.* at 485.

⁸⁴ *Id.* at 486.

⁸⁵ 388 U.S. 218 (1967).

⁸⁶ *Id.* at 226 (emphasis added).

⁸⁷ *Kirby*, 406 U.S. at 698 (Brennan, J., dissenting).

⁸⁸ *Escobedo*, 375 U.S. at 493–94.

⁸⁹ *Kirby*, 406 U.S. at 684, 690 (plurality opinion).

⁹⁰ *Brewer v. Williams*, 430 U.S. 387, 398 (1977).

the very purpose of the Sixth Amendment right to counsel. The *Rothgery* opinions signaled several possible answers. Justice Alito appeared to view the right narrowly, as providing for the appointment of counsel “only as necessary to guarantee the defendant effective assistance at trial.”⁹¹ This included “certain pretrial events” that could prejudice an accused’s defense at trial, but did not include any “defense in relation to other objectives that may be important to the accused.”⁹² Justice Souter hinted at a broader interpretation of the right, noting that the appointment of counsel is important not only for the defendant “to be ready with a defense when the trial date arrives” but also “to attempt to avoid that trial” in the first place.⁹³

Given these differing purposes, there are at least three possible outcomes of any ensuing critical stage analysis. First, courts might find that the period after the magistrate hearing was a critical stage because the defendant had the opportunity to waive an examining trial. The examining trial is akin to a preliminary hearing, and is itself conceded to be a critical stage. The idea here would be that waiver of such a right is also a critical stage because one purpose of the right to counsel is to ensure that a defendant understands and is able to assert all his rights.⁹⁴ This outcome could prevail if a majority of the Court adopted the broad view of the right to counsel or if the Justices, even under the narrow view, believe that depriving a defendant of counsel at the time that he has to make this decision prejudices his actual trial. Second, courts might find that *Rothgery*’s pre-trial detention was a critical stage. The Court’s precedent here is debatable. Militating in favor of appointment at this stage is *Argersinger v. Hamlin*,⁹⁵ which noted that “the guiding hand of counsel’ [is] so necessary when one’s liberty is in jeopardy,” and required the appointment of counsel for any indigent criminal defendant sentenced to post-trial incarceration.⁹⁶ Militating against appointment at this stage is *United States v. Gouveia*,⁹⁷ which showed resistance to appointing counsel for the purposes of preventing pre-trial detention or facilitating pre-indictment private investigation.⁹⁸ Nevertheless, this outcome is plausible: Justice Souter expressed a willingness to consider a defendant’s pretrial liberty in the Sixth Amendment analysis, rejecting the argument that such concerns are exclusively appropriated to the Fifth Amendment,⁹⁹ and several of

⁹¹ *Rothgery*, 128 S. Ct. at 2594 (Alito, J., concurring).

⁹² *Id.* at 2593–94.

⁹³ *Id.* at 2590 (majority opinion).

⁹⁴ See *Estelle v. Smith*, 451 U.S. 454, 471 (1981).

⁹⁵ 407 U.S. 25 (1972).

⁹⁶ *Id.* at 40 (quoting *Powell v. Alabama*, 287 U.S. 45, 69 (1932)).

⁹⁷ 467 U.S. 180 (1984).

⁹⁸ *Id.* at 189–91.

⁹⁹ *Rothgery*, 128 S. Ct. at 2589–90.

the Justices appeared legitimately concerned about the pre-trial detention aspect of the case at oral argument.¹⁰⁰ This view appears unlikely to sway Justice Alito and Justice Thomas, but could still sway a majority of the Court. Last, it is quite possible that courts will find that no critical stage existed after Rothgery's arrest and prior to his indictment, despite the attachment of the right to counsel during that period. Justice Alito acknowledged this possibility in his concurrence.¹⁰¹ If this is indeed the outcome, the Court's attachment holding in *Rothgery* would be purely academic and meaningless to the defendant — formalism in true form.

4. *Sixth Amendment — Competency Standard for Self-Representation at Trial.* — In 1975, the Supreme Court held in *Faretta v. California*¹ that criminal defendants have a constitutional right to conduct their own defense at trial. This right has never been absolute, and *Faretta* itself emphasized that “the trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct”² and may appoint “standby counsel” over a defendant's objection.³ Last Term, in *Indiana v. Edwards*,⁴ the Supreme Court held that the Constitution does not forbid a state from establishing a standard of competence for self-representation at trial that is higher than that required to stand trial. In so holding, the Court created a new means of limiting the self-representation right, one that diverges from the Court's previous preference for providing trial courts tools with which to manage pro se defendants rather than facilitating courts' denying self-representation prior to trial. The shift toward a framework that allows for more preemptive denials of self-representation requests indicates not simply a change in how the Court directs lower courts to cabin self-representation, but also a subtle yet fundamental shift in the core values that define the meaning of the underlying right. The self-representation regime permitted under *Edwards* may allow courts to better protect important interests such as trial accuracy, judicial efficiency, and dignity than did the ex post limitations previously used to manage the practical implications of *Faretta*,

¹⁰⁰ Transcript of Oral Argument at 28–30, *Rothgery*, 128 S. Ct. 2578 (2008) (No. 07-440), available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/07-440.pdf (recording concern expressed by Justices Kennedy, Souter, and Scalia).

¹⁰¹ *Rothgery*, 128 S. Ct. at 2595 (Alito, J., concurring) (“It follows that defendants in Texas will not necessarily be entitled to the assistance of counsel within some specified period after their magistrations.”).

¹ 422 U.S. 806 (1975).

² *Id.* at 834 n.46 (citing *Illinois v. Allen*, 397 U.S. 337 (1970)).

³ *Id.* at 835 n.46 (quoting *United States v. Dougherty*, 473 F.2d 1113, 1125 n.18 (D.C. Cir. 1972) (internal quotation marks omitted)).

⁴ 128 S. Ct. 2379 (2008).