## Note

# From *Powell* to Present: Defining the Right to Counsel Beyond *Rothgery*

*Amy M. Cohen*∗

*Every morning in jails across America, new arrestees are woken up and ushered into a courtroom to be heard on their release. Some might be coming down from a high, dealing with the consequences of binge drinking, or distressed about what this arrest might mean for their future. No matter the condition in which these defendants arrive to court, many will be forced to represent themselves and plead their own case for release without ever having spoken to an attorney. This leaves the defendant at risk of being detained pretrial, incriminating themselves in the courtroom, or even pleading guilty on the spot to avoid more jail time. Unfortunately, the initial appearance is not the only time a defendant may be placed in this position. Any time a hearing is not deemed "critical" by the courts, a defendant may find themselves alone in a courtroom opposite a prosecutor and a judge, without legal representation of their own. And nearly no jurisdiction offers defendants a remedy if that uncounseled hearing seriously harms their case.*

*The Sixth Amendment guarantees certain fundamental rights that are at the heart of the American criminal justice system: the right to a speedy and public trial, the right to an impartial jury of your peers, the right to know the accusations against you, the right to confrontation, the right to compulsory process,*

∗ J.D. Candidate 2024, University of Minnesota Law School. I would like to thank Professor Kevin Reitz and my faculty advisor, Professor Myron Orfield, for their guidance throughout this process. I would also like to thank Jackie Cuellar and Calvin Lee for their excellent advice and feedback, as well as the other *Minnesota Law Review* staff and editors of Volumes 107 and 108. Lastly, I am very grateful for my friends and family who were patient with me during the writing process, especially my parents, Richard and Mary Cohen, who have always been very supportive of all of my pursuits. 

*and the right to assistance of counsel. Thanks to* Miranda*, the right to assistance of counsel may be the most widely known of these guarantees, but most do not know what that right* actually *entails. When the Supreme Court handed down their 2008 decision in* Rothgery v. Gillespie County*, many commentators saw it as finally clarifying the right to counsel. However, this supposed clarity has left lower courts divided on whether the initial appearance in court, as well as other post-attachment proceedings, qualify under the Sixth Amendment's right to counsel guarantee. This Note examines the post-*Rothgery *right to counsel and the issues with continued confusion in the lower courts about what the right entails. Ultimately, the Note argues for a new rule: that every hearing in front of an officer of the court qualifies as a "critical stage" of the proceedings requiring appointed counsel. This bright-line rule provides a simple solution for the decades-old problem of trying to figure out which hearings require counsel, and which do not. It also offers sufficient protection for defendants in jurisdictions that do not currently guarantee the right through the courts. Having representation at that initial appearance can affect every other aspect of how a case proceeds, and thus no defendant should be compelled to stand up in a courtroom without an attorney by their side.*

## INTRODUCTION

The right to counsel is one of the most fundamental American rights.[1] Since its incorporation,[2] the right to counsel has been a popular subject of litigation.[3] Who exactly has the right to appointed counsel? When does that right to counsel begin? How do we know when the right to counsel is being violated? Courts have tried to answer these questions for decades, and still uncertainty remains.[4] The meaning imposed on the right to counsel is malleable and often based on subjective judgments of when leaving defendants to apply their own defense would prejudice them in their criminal cases. The Framers never envisioned the constitutional right as we see it today, nor contemplated the vast network of public defenders that now exist in every jurisdiction in one way or another.[5] Like many constitutional rights, the legal profession's understanding of the Sixth Amendment right to counsel is ever-changing and requires combing through extensive precedent to decipher its current judicial meaning.

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1. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."); Gideon v. Wainwright, 372 U.S. 335, 342 (1963) ("We think the Court in *Betts* was wrong, however, in concluding that the Sixth Amendment's guarantee of counsel is not one of [the] fundamental rights.").

2. Incorporation describes the gradual process of applying the Bill of Rights to the states by way of the Fourteenth Amendment, which occurred primarily during the Warren Court era. *See generally* YALE KAMISAR ET AL., BASIC CRIMINAL PROCEDURE 24–26 (15th ed. 2019).

3. *See, e.g.*, Coleman v. Alabama, 399 U.S. 1, 9 (1970) ("The determination whether the hearing is a 'critical stage' requiring the provision of counsel depends . . . upon an analysis 'whether potential substantial prejudice to defendant's rights inheres in the . . . confrontation and the ability of counsel to help avoid that prejudice.'" (quoting United States v. Wade, 388 U.S. 218, 227 (1967))); Kirby v. Illinois, 406 U.S. 682, 689 (1972) (holding that the right to counsel begins once "the government has committed itself to prosecute"); United States v. Gouveia, 467 U.S. 180, 187 (1984) ("[O]ur cases have long recognized that the right to counsel attaches only at or after the initiation of adversary judicial proceedings against the defendant.").

4. *See infra* Part I (discussing the evolution of right-to-counsel jurisprudence and its unresolved ambiguities).

5. *See infra* note 23 and accompanying text (discussing the original meaning of the Sixth Amendment right to counsel).

When the Supreme Court handed down its 2008 decision in *Rothgery v. Gillespie County*, commentators saw it as a resolution to the right to counsel question once and for all.[6] In *Rothgery*, the Court held that the Sixth Amendment right to counsel attaches once the government has signaled its intent to prosecute,[7] and, once that attachment occurs, a defendant is entitled to counsel "within a *reasonable time* after attachment to allow for adequate representation at any *critical stage* before trial."[8] This two-part holding includes a compilation of prior case law in one inquiry ("critical stage") while adding a new requirement ("reasonable time") without defining its limits beyond the language.[9] While *Rothgery* may have been revered as reconciling prior case law,[10] its holding is not as clear as it may seem.

First, the opinion fails to precisely define the phrase "critical stage."[11] The debate over what comprises a "critical stage" precedes *Rothgery*, and *Rothgery* does not provide sufficient clarity to resolve the debate. When presented with an opportunity to provide guidance to lower courts and government actors as to exactly when the presence of counsel is constitutionally required,

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6. *See Leading Cases*, 122 HARV. L. REV. 276, 311 (2008) [hereinafter *Leading Cases*] ("First, for a Court oft-accused of being out of step with the empirical realities of criminal procedure, *Rothgery* provides a clear, universally applicable, 'bright-line' rule for law enforcement officers and lower courts to follow." (footnotes omitted)). For further discussion of the decision, see *infra* Part I.B.

7. *Kirby*, 406 U.S. at 689–90 ("For it is only [at the initiation of judicial criminal proceedings] that the government has committed itself to prosecute . . . . It is this point, therefore, that marks the commencement of the 'criminal prosecutions' to which alone the explicit guarantees of the Sixth Amendment are applicable.").

8. Rothgery v. Gillespie County, 554 U.S. 191, 212 (2008) (emphasis added).

9. *See id.*

10. *See Leading Cases*, *supra* note 6, at 306 ("*Rothgery* provides a great deal of doctrinal clarity and has very real practical effects.").

11. The "critical stage" question is typically framed in terms of its constitutional requirements rather than how to determine what aspects of a proceeding make the stage "critical." *See Rothgery*, 554 U.S. at 211–12 (defining the "critical stage" question as a determination of whether counsel must be present or the right validly waived). *But cf. id.* at 212 n.16 ("The cases have defined 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.'" (first quoting United States v. Wade, 388 U.S. 218, 226 (1967); and then quoting United States v. Ash, 413 U.S. 300, 313 (1973))).

the *Rothgery* Court declined to do so. The lack of judicial guidance concerning the critical stage inquiry has resulted in a string of conflicting federal and state rulings, which inconsistently identify stages at which a public defender is first required, leaving criminal defendants in some areas of the country substantially more protected than others.[12] Without further guidance from the highest court, what constitutes a "critical stage" will remain a purely jurisdictional question.

Adding to the uncertainty, *Rothgery* declined to decide whether an initial appearance in court qualifies as a "critical stage." Whether a criminal defendant receives appointed counsel at their first appearance or subsequent hearing may seem like a marginal distinction, but it can have dire consequences for the individual. For context, Maryland defendants who had already spent two to three weeks in jail following an uncounseled bail hearing were released two-thirds of the time when law students later argued for a bail reduction.[13] One report observed that most defendants who were advised they had the right to appointed counsel at a later hearing but were not entitled to counsel at their initial hearing waived their right and pleaded guilty at the initial hearing to secure their release.[14] Without adequately prepared[15] counsel, defendants may be prejudiced at any judicial proceeding, no matter how inconsequential it may seem.

The second and less developed issue posed by *Rothgery* is what constitutes a "reasonable time" by which counsel must be appointed for a "critical stage" of the proceedings after the right

12. *See infra* Part II.A.1–2 (discussing post-*Rothgery* lower court rulings regarding the "critical stage" issue).

13. Doug Colbert, *Can't Afford Bail, So They Sit in Jail*, BALT. SUN (Dec. 18, 2007), https://www.baltimoresun.com/news/bs-xpm-2007-12-18-0712180266-story.html [https://perma.cc/V7Kp-67JG] (recounting one professor's experience with student advocacy).

14. NAT'L RIGHT TO COUNS. COMM., JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 85–86 (2009) [hereinafter JUSTICE DENIED] (discussing an earlier study from the National Right to Counsel Committee).

15. Counsel without adequate time to prepare a defense can also disadvantage the defendant. *Id.* at 86 ("The late appointment of counsel not only affects the attorney-client relationship, but it also undermines a defendant's right to be heard on pretrial release and the ability to prepare a defense.").

to counsel has attached.[16] In its holding, the Court made no finding on whether the six months between that initial hearing and the point at which Rothgery received appointed counsel was an unreasonable delay resulting in a constitutional violation.[17] Eventually, Rothgery settled with Gillespie County, meaning that the lower court never determined on remand whether the six month period violated the "reasonable time" requirement.[18] Lower court rulings have tried to answer this relatively new question in various ways[19] and have almost exclusively ruled against the party claiming a violation of their constitutional right to be appointed counsel within a reasonable time.[20]

While *Rothgery* is somewhat of a victory for indigent defendants, the precise moment at which a defendant is entitled to counsel remains uncertain. *Rothgery* may have helped close the gap, but it did not settle the long-held debate.[21] This Note proposes a bright-line rule that goes further than *Rothgery*: every hearing in front of an officer of the court qualifies as a "critical

16. *See generally* KAMISAR ET AL., *supra* note 2, at 84 (discussing the "reasonable time" requirement from *Rothgery*).

17. Rothgery v. Gillespie County, 544 U.S. 191, 213 (2008) ("Our holding is narrow. 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.").

18. *See* Douglas L. Colbert, *Prosecution Without Representation*, 59 BUFF. L. REV. 333, 419 (2011) ("Eventually, the Texas Solicitor General settled the case in the mid five figures.").

19. *See generally* Order Regarding Motion to Dismiss Third Amended Complaint at 15, Farrow v. Lipetzky, No. 12-CV-06495, 2017 WL 1540637 (N.D. Cal. Apr. 28, 2017) ("With the exception of *Grogen*, . . . this Court is not aware of any decision articulating a standard by which to examine whether a delay in appointing counsel is reasonable within the meaning of *Rothgery*."). The U.S. District Court for the Northern District of California went on to apply a totality of the circumstances test to decide whether the "reasonable time" requirement had been violated, finding that the plaintiffs' allegations of being denied the right to counsel for between five to thirteen days did not amount to an unreasonable delay. *Id.* at 15–16.

20. *See infra* Part II.A.3 (discussing lower court rulings on the reasonable time requirement).

21. *See, e.g.*, John P. Gross, *The Right to Counsel but Not the Presence of Counsel: A Survey of State Criminal Procedures for Pre-Trial Release*, 69 FLA. L. REV. 831, 840 (2017) ("The Supreme Court has never specifically addressed whether there is a legal requirement that counsel be present at a defendant's initial appearance where his liberty is subject to restriction."); JUSTICE DENIED, *supra* note 14, at 26 ("[T]he Supreme Court has not specified the exact time by which defense counsel must be offered to the indigent accused . . . .").

stage" of the proceedings requiring the right to counsel.[22] Defining the right to counsel in this way would prevent further confusion regarding the "attachment" of the right to counsel and subsequent point at which appointed counsel or a waiver of that right is required for a defendant's court appearance, consequently eliminating the "reasonable time" caveat altogether.

Part I of this Note examines Supreme Court right-to-counsel rulings leading up to *Rothgery* and analyzes the *Rothgery* decision itself, including the strategic choices that went into it. Part II discusses post-*Rothgery* decisions that reach opposing conclusions following the same case law and highlights the continuing need for clarification on the right to counsel. Part III considers the consequences of the current rule for defendants in jurisdictions offering fewer protections and how having counsel at every appearance could work in practice. Finally, Part IV outlines the bright-line rule, arguing that the rule is both constitutionally supported and feasible to achieve through litigation.

## I. THE MEANING OF THE RIGHT TO COUNSEL TODAY

From the Framers to the Roberts Court, our understanding of the Sixth Amendment right to counsel has changed dramatically. Until the twentieth century, the notion that the Sixth

22. This Note will not consider the scope of the right to counsel for preindictment proceedings outside of a courtroom. The proposed rule—that every hearing in front of an officer of the court qualifies as a "critical stage" requiring the presence of counsel—does not foreclose the idea that there are critical stages that occur before a defendant is ever brought into court or other "critical" stages happening outside of a courtroom. Many commentators have argued that certain out-of-court proceedings occurring before formal charges have been filed are "critical stages" for purposes of the appointment of counsel. *See generally* Turner v. United States, 885 F.3d 949 (6th Cir. 2018) (holding that the right to counsel does not extend to preindictment plea negotiations); Steven J. Mulroy, *The Bright Line's Dark Side: Pre-Charge Attachment of the Sixth Amendment Right to Counsel*, 92 WASH. L. REV. 213, 228–47 (2017) (discussing differing interpretations of the right to counsel at preindictment plea negotiations and arguing that the right to counsel should be recognized at this stage); Brandon K. Breslow, *Signs of Life in the Supreme Court's Uncharted Territory: Why the Right to Effective Assistance of Counsel Should Attach to Pre-Indictment Plea Bargaining*, FED. LAW., Oct./Nov. 2015, at 34 (contemplating whether the right to counsel attaches to preindictment plea bargaining); Clayton Prickett, Note, *The* Kirby *Cop-Out: How Strict Adherence to* Kirby*'s Bright-Line Attachment Rule Undermines Sixth Amendment Protections*, 88 U. CIN. L. REV. 339, 359–63 (2019) (arguing that the right to counsel should expand to preindictment plea negotiations).

Amendment imposed an affirmative obligation on the government to appoint counsel to indigent defendants was widely unheard of.[23] A century and a half after the adoption of the Sixth Amendment, the Supreme Court held for the first time that there are some circumstances warranting appointed counsel.[24] Six years later, the Court held in *Johnson v. Zerbst* that the Sixth Amendment required appointed counsel for federal defendants.[25] But shortly thereafter, the Court ruled in *Betts v. Brady* that the Sixth Amendment did not apply to the states in the same way it applied to the federal government.[26] Instead, the Court reasoned that whether a defendant was entitled to appointed counsel depended upon whether the totality of the circumstances indicated that denial of counsel would amount to a

23. At the time of the Founding, the Sixth Amendment was thought of as recognizing a right to retain counsel of choice but not as a right to have counsel appointed by the government. KAMISAR ET AL., *supra* note 2, at 65 (discussing the reasoning behind the right to counsel at the time of adoption and how it was understood at that time); United States v. Gonzalez-Lopez, 548 U.S. 140, 147–48 (2006) ("The right to select counsel of one's choice . . . . has been regarded as the root meaning of the constitutional guarantee.").

24. *See* Powell v. Alabama, 287 U.S. 45, 72 (1932) ("In a case such as this, whatever may be the rule in other cases, the right to have counsel appointed, when necessary, is a logical corollary from the constitutional right to be heard by counsel."). *Powell* presented the case of the Scottsboro Boys, where nine Black men, charged with the rape of two white women, were rushed to trial as early as six days after the indictment, convicted, and sentenced to death. *See id.* at 49–53. As this Note will discuss later, language from *Powell* is still relevant in determining entitlement to appointed counsel today. *See infra* Part I.A.

25. Johnson v. Zerbst, 304 U.S. 458, 463 (1938) ("The Sixth Amendment withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel." (footnote omitted)). *Johnson v. Zerbst* was interpreted as applicable to indigent federal defendants charged with felonies. KAMISAR ET AL., *supra* note 2, at 65.

26. Betts v. Brady, 316 U.S. 455, 473 (1942) ("[W]e cannot say that the [Sixth] Amendment embodies an inexorable command that no trial for any offense, or in any court, can be fairly conducted and justice accorded a defendant who is not represented by counsel."). Prior to complete incorporation in *Gideon v. Wainwright*, the Court extended the right to counsel to state defendants charged with capital crimes but not to other state felony defendants. *See, e.g.*, Bute v. Illinois, 333 U.S. 640, 676–77 (1948) (suggesting that defendants have a right to counsel in all capital cases); Hamilton v. Alabama, 368 U.S. 52, 54–55 (1961) (holding that an arraignment is so critical a stage in proceedings for a capital offense in Alabama that denial of the right to counsel amounted to a due process violation).

violation of due process.[27] Although many states required appointed counsel for felony defendants anyway, *Betts* struck a huge blow to indigent defendants in unprotected jurisdictions.[28] The denial of the Sixth Amendment right to counsel in the twenty-one years that *Betts* remained good law had devasting effects for individual indigent defendants.[29]

During the era of incorporation,[30] the Warren Court issued a landmark ruling that would forever alter our criminal justice system. Clarence Gideon—charged with a felony offense in Florida—requested appointed counsel to represent him, but the judge denied his request, as Florida only appointed counsel for defendants in capital cases, the bare minimum protection universally guaranteed by courts at that time.[31] After he was convicted and exhausted all avenues of relief in the state court appellate system, Gideon petitioned the Supreme Court for review.[32] The ruling that followed Gideon's plight extended the right to appointed counsel to the states by way of the Fourteenth

27. *Betts*, 316 U.S. at 462 ("Asserted denial is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial."). Evidently, Betts' appellate attorney, confident that the Court would extend Sixth Amendment protections to the states, did not present examples of how Betts was prejudiced without the assistance of counsel. *See* KAMISAR ET AL., *supra* note 2, at 68. Consequently, the Court held that the circumstances of Betts' case did not warrant appointed counsel. *Betts*, 316 U.S. at 472–73 (pointing out that Betts was a man "of ordinary intelligence" and had been in a criminal court once before).

28. Donald A. Dripps, *Why* Gideon *Failed: Politics and Feedback Loops in the Reform of Criminal Justice*, 70 WASH. & LEE L. REV. 883, 895 (2013) ("By 1963, only a few states, concentrated in the south, did not appoint counsel for all felony defendants.").

29. Brief for the Petitioner at 7–8, Gideon v. Wainwright, 372 U.S. 335 (1963) (No. 155) (summarizing the impact the absence of assistance of counsel can have on a criminal defendant).

30. *See generally* Mapp v. Ohio, 367 U.S. 643 (1961) (incorporating the Fourth Amendment against unreasonable searches and seizures); Malloy v. Hogan, 378 U.S. 1 (1964) (incorporating the Fifth Amendment privilege against self-incrimination); Duncan v. Louisiana, 391 U.S. 145 (1968) (incorporating the Sixth Amendment right to a jury trial).

31. Gideon v. Wainwright, 372 U.S. 335, 336–37 (1963) (describing Gideon's request for counsel prior to his trial).

32. *Id.* at 337–38.

Amendment and hence incorporated it into our modern understanding of fundamental rights.[33] In overturning *Betts*, the Court held that the Sixth Amendment right to counsel is a fundamental right that must be afforded to every defendant in every courtroom, meaning that state governments are obligated to provide counsel to indigent defendants.[34] When the Court handed down *Gideon v. Wainwright*, its holding was interpreted as applying only to defendants facing felony charges,[35] but the Court applied *Gideon* to misdemeanor prosecutions nine years later.[36]

While *Gideon* is the foundation on which the right to counsel rests for the vast majority of criminal defendants (that is, those tried in state court), the ruling does no more than generally extend this specific provision of the Sixth Amendment to the states.[37] The decision does not specify at what point the right to counsel is triggered for a criminal defendant.[38] This Part discusses key post-*Gideon* cases further defining the right to counsel up to and including *Rothgery*.

### A. EVOLUTION OF THE RIGHT TO COUNSEL

Before the Court handed down *Gideon*, it had already pondered ideas that would set the stage for determining the specifics of the right to counsel. Most notably, *Powell v. Alabama* concluded that the defendants had been deprived assistance of counsel during the "most *critical period* of the proceedings."[39] This language has endured to the modern day, forming the basis for the "critical stage" inquiry under *Rothgery*. Against the backdrop of Jim Crow, the out-of-town Black defendants were indicted, tried, and sentenced to death over the course of about one week,

33. *Id.* at 342.

34. *See id.* at 344–45 ("[A]ny person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.").

35. *See id.* at 351 (Harlan, J., concurring) ("The Court has come to recognize, in other words, that the mere existence of a *serious* criminal charge constituted in itself special circumstances requiring the services of counsel at trial." (emphasis added)).

36. Argersinger v. Hamlin, 407 U.S. 25, 37 (1972) ("[A]bsent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial.").

37. *See Gideon*, 372 U.S. at 342.

38. *See id.*

39. Powell v. Alabama, 287 U.S. 45, 57 (1932) (emphasis added).

only appearing with counsel on the day of their trials.[40] The "critical period" for the *Powell* defendants was the time between their arraignment and trial, because the Court believed "thoroughgoing investigation and preparation were vitally important," and the defendants were equally entitled to assistance of counsel during that time as the trial itself.[41] While a reading of *Powell* in isolation may suggest *all* criminal defendants are or should be appointed counsel for every proceeding between arraignment and trial, the circumstances in *Powell* were unique. Although the *Powell* defendants may have been in an extreme situation, *Powell*'s holding laid the foundation upon which the modern interpretation of the right to counsel is built.[42]

Once the Supreme Court incorporated the Sixth Amendment right to counsel, there came a number of cases that tried to clarify the bounds of that right.[43] After *Gideon* and before *Rothgery*, the most important considerations in determining when criminal defendants were entitled to appointed counsel were (1) when the right "attached" to the proceedings and (2) which proceedings were "critical" to the defense.

1. Adversary Judicial Proceedings Signal Attachment

Citing *Powell*, a plurality in *Kirby v. Illinois* held that the right to counsel "attaches only at or after the time that adversary judicial proceedings have been initiated" against the criminal defendant.[44] It is at this point that "the government has committed itself to prosecute."[45] Specifically, the *Kirby* plurality relied on *Powell* to find that "the right attaches at the time of the arraignment, and . . . the time of a preliminary hearing."[46] *Kirby* listed five categories of adversarial judicial proceedings, presumably

40. *Id.* at 49–53. *See generally* Ellis Cose, *The Saga of the Scottsboro Boys*, ACLU (July 27, 2020), https://www.aclu.org/issues/racial-justice/saga-scottsboro-boys [https://perma.cc/2NVU-FNPN] (outlining the case of the Scottsboro Boys).

41. *Powell*, 287 U.S. at 57–58.

42. *See* JUSTICE DENIED, *supra* note 14, at 18 ("The landscape respecting the right to counsel began to change with the Supreme Court's 1932 decision in *Powell v. Alabama* . . . ." (footnote omitted)).

43. *Id.* at 22–27 (laying out these cases in detail).

44. Kirby v. Illinois, 406 U.S. 682, 688 (1972).

45. *Id.* at 689.

46. *Id.* at 688–89 (footnote omitted).

triggering attachment: formal charge, preliminary hearing, indictment, information, and arraignment.[47] Unfortunately for Kirby himself, this holding meant that he had no claim to counsel during a police station lineup occurring after his arrest but *before* any charges had been filed, though the identification had been crucial to his conviction.[48] The Court later reaffirmed *Kirby*'s reasoning in the majority holding in *United States v. Gouveia*.[49]

Two other decisions would later become crucial to the *Rothgery* holding. Five years after *Kirby*, the Court in *Brewer v. Williams* found there was "no doubt" that adversary judicial proceedings had been initiated against the defendant after a warrant had been issued for his arrest, he had appeared for an arraignment, and he had been ordered to remain in custody.[50] The primary issue in *Brewer* was the admissibility of incriminating statements made during an interrogation after the defendant invoked his right to counsel.[51] Instead of focusing its inquiry on the Fifth Amendment privilege against self-incrimination, the Court held that the defendant had been deprived of his Sixth Amendment right to counsel because "once adversary proceedings have commenced against an individual, he has a right to legal representation when the government interrogates him."[52] Later, in *Michigan v. Jackson*, the Court reemphasized that the right to counsel attaches at an arraignment as "[t]he arraignment signals 'the initiation of adversary judicial proceedings.'"[53]

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47. *Id.* at 689.

48. *See id.* at 685–86 (describing the victim's testimony at Kirby's trial, including his cross-examination regarding the identification).

49. United States v. Gouveia, 467 U.S. 180, 187–89 (1984) (discussing the language in *Kirby* and its consistency with the Constitution). *Gouveia* held that a group of prison inmates who had been placed in administrative detention following the murder of another inmate but not yet indicted had not been deprived of their right to counsel during their detention. *Id.* at 182.

50. Brewer v. Williams, 430 U.S. 387, 398–99 (1977).

51. *Id.* at 391–93.

52. *Id.* at 397–98, 401.

53. Michigan v. Jackson, 475 U.S. 625, 629 (1986) (citing *Gouveia*, 467 U.S. at 180, 187–88). A year after the *Rothgery* opinion was issued, *Montejo v. Louisiana* expressly overruled *Jackson*. Montejo v. Louisiana, 556 U.S. 778, 797 (2009). However, *Jackson* was overruled with respect to the assertion of the Sixth Amendment right to counsel *after* the right to counsel has attached. *Id. Montejo* does not contest that Jackson's right to counsel attached at his arraignment. *See id.* at 795 ("[I]t is hard to see why it would not also suffice to protect

Importantly for *Rothgery*, neither *Brewer* nor *Jackson* mentioned a prosecutor's involvement as a relevant factor in determining whether the government had initiated adversarial judicial proceedings. Although they did not necessarily alter the attachment rule from *Kirby* and *Gouveia*, *Brewer* and *Jackson* are cited in *Rothgery* as controlling for the attachment principle.[54]

### 2. Counsel Required for Any "Critical Stage" After Attachment[55]

Following *Powell*, several opinions extrapolated its language denoting a "critical period"[56] into a justification for requiring presence of counsel at any "critical stage" of the proceedings. Significantly, *United States v. Wade* defined the critical stage inquiry as one that calls upon the courts "to analyze whether potential substantial prejudice to [the] defendant's rights" may result and the possibility that a lawyer could assuage that prejudice, with "prejudice" resulting from anything that might interfere with "the defendant's basic right to a fair trial."[57] In

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that same choice [to speak with police outside the presence of a lawyer] after arraignment, when the Sixth Amendment rights have attached.").

54. Rothgery v. Gillespie County, 554 U.S. 191, 199 (2008) ("Texas's article 15.17 hearing is an initial appearance: Rothgery was taken before a magistrate, informed of the formal accusation against him, and sent to jail until he posted bail. *Brewer* and *Jackson* control." (citation and footnote omitted)).

55. For a general overview of common pretrial hearings, see *How Courts Work*, AM. BAR ASS'N (Sept. 9, 2019), https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/pretrial_appearances [https://perma.cc/J8UZ-HQK5].

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

57. United States v. Wade, 388 U.S. 218, 227 (1967). The full quote reads as follows:

> In sum, the principle of *Powell v. Alabama* and succeeding cases requires that we scrutinize *any* pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself. It calls upon us to analyze whether potential substantial prejudice to defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice.

*Id. Wade* utilized this definition to hold that a post-indictment lineup was a critical stage requiring the assistance of counsel because there was grave potential for prejudice, which could be somewhat averted by the assistance of counsel.

*Wade*, the Court found that the defendant suffered prejudice when the government conducted a pretrial lineup without his attorney present because the attorney would have helped assure that Wade could meaningfully confront the identifying witness at trial.[58] It would seem that this standard is somewhat clear: if a defendant may be prejudiced by the proceeding, they should be entitled to the assistance of counsel to help diminish that prejudice. Several cases have used the *Wade* language to find that the defendant was deprived of their constitutional right.[59] However, determining what proceedings may "prejudice" a defendant can be a complicated inquiry.

In *United States v. Ash*, the Court considered whether counsel was required at a post-indictment photo lineup for the purpose of witness identification.[60] *Ash* ultimately held that the photo lineup did not present the same inherent risk of prejudice as the in-person lineup from *Wade*, primarily relying on the comparison of *Wade*'s in-person lineup to a "trial-like confrontation."[61] The Court depended heavily on history and common law tradition, finding that the "historical background suggests that the core purpose of the counsel guarantee was to assure '[a]ssistance' at trial, when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor."[62] However, the Court noted it had previously recognized the guarantee as extending to certain proceedings outside the formal

*Id.* at 236–37. *Wade* was argued jointly with *Gilbert v. California*, which upheld the principle established in *Wade*, but was ultimately remanded for clarification for other reasons. Gilbert v. California, 388 U.S. 263, 265, 272 (1967).

58. *Wade*, 388 U.S. at 236–37.

59. *See, e.g.*, Coleman v. Alabama, 399 U.S. 1, 9 (1970) (using the *Wade* standard to determine that a counsel is required at a preliminary hearing in Alabama because "the guiding hand of counsel at the preliminary hearing is essential to protect the indigent accused against an erroneous or improper prosecution"); Moore v. Illinois, 434 U.S. 220, 231 (1977) (relying on *Wade* and *Gilbert* to hold that the petitioner had a right to counsel at a preliminary hearing at which the alleged victim was called upon to identify the defendant).

60. United States v. Ash, 413 U.S. 300, 321 (1973) ("We hold, then, that the Sixth Amendment does not grant the right to counsel at photographic displays conducted by the Government for the purpose of allowing a witness to attempt an identification of the offender.").

61. *See id.* at 311–17 (discussing the *Wade* opinion and the similarity of the proceeding at question in that case to a "trial-like confrontation requiring counsel" while noting that Court must place limits on that language that would otherwise result "in drastic expansion of the right to counsel").

62. *Id.* at 306–10.

trial.[63] Both *Wade* and *Ash* are commonly cited as defining what makes a stage of proceedings "critical."[64]

During the early 1970s, the Court handed down two more important rulings specifically related to pretrial hearings, although neither would be significant in the later *Rothgery* decision. In *Coleman v. Alabama*, the Court held that an optional proceeding to establish probable cause and subsequently determine bail, during which the prosecutor could call witnesses, was a critical stage.[65] Significantly, in discussing reasons why counsel is essential to protecting a defendant's rights, the Court noted that "counsel can [] be influential . . . on *such matters as the necessity for an early psychiatric examination or bail*,"[66] both of which may occur at an initial appearance.[67] While neither the determination of need for a psychiatric examination nor the setting of bail were dispositive in finding that the hearing was a critical stage, each was a noteworthy factor.[68] However, the *Coleman* sentiment on preliminary hearings does not necessarily extend to all pretrial proceedings. Five years later, in *Gerstein v. Pugh*, the Court held that "[b]ecause of its limited function and

63. *Id.*

64. *See, e.g.*, Rothgery v. Gillespie County, 554 U.S. 191, 212 n.16 (2008) (citing *Wade* and *Ash* for definitions of "critical stage"). The *Rothgery* Court also cited *Massiah v. United States* in the same footnote. *Id. Massiah* is not discussed above because it addresses both Fifth and Sixth Amendment violations occurring after the defendant had retained counsel, rather than dealing with the point at which the defendant was entitled to appointed counsel in a court proceeding. *See* Massiah v. United States, 377 U.S. 201, 206 (1964) ("We hold that the petitioner was denied the basic protections of [the Sixth Amendment] guarantee when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel.").

65. Coleman v. Alabama, 399 U.S. 1, 8–9 (1970) ("Plainly the guiding hand of counsel at the preliminary hearing is essential to protect the indigent accused against an erroneous or improper prosecution.").

66. *Id.* at 9 (emphasis added).

67. *See How Courts Work*, *supra* note 55 (listing the setting of bail as a common part of a defendant's initial appearance on both misdemeanor and felony charges); *see, e.g.*, N.C. GEN. STAT. § 15A-1002(a) (2022) ("The question of the capacity of the defendant to proceed may be raised *at any time on motion* by the prosecutor, the defendant, the defense counsel, or the court." (emphasis added)); *see also* Pamela R. Metzger & Janet C. Hoeffel, *Criminal (Dis)appearance*, 88 GEO. WASH. L. REV. 392, 406 (2020) ("Generally, the amount and conditions of bail are determined—or modified—at initial appearance." (footnote omitted)).

68. *Coleman*, 399 U.S. at 9.

its nonadversary character, the probable cause determination is not a 'critical stage' in the prosecution that would require appointed counsel."[69]

While neither *Coleman* nor *Gerstein* changes our fundamental understanding of what qualifies as a critical stage from *Wade* and *Ash*, these cases provide additional insight into the critical stage inquiry and have played a part in arguments for representation as early as possible in criminal proceedings.[70]

### B. THE *ROTHGERY* DECISION

In *Rothgery*, an 8-1 majority held that the Sixth Amendment right to counsel attaches once the government has signaled a commitment to prosecute and, once attachment occurs, the defendant is entitled to counsel "within a *reasonable time* after attachment to allow for adequate representation at any *critical stage* before trial."[71] Due to a clerical error, Walter Rothgery was arrested on the charge of felon in possession of a firearm even though he had never been convicted of a felony.[72] Rothgery made multiple requests for an attorney at his subsequent "article 15.17" hearing, which was also his initial appearance in court.[73] Six months later, a grand jury indicted Rothgery and police rearrested him on the same charge, held this time for three weeks

69. Gerstein v. Pugh, 420 U.S. 103, 122 (1975).

70. *See, e.g.*, Farrow v. Lipetzky, 637 F. App'x 986, 988 (9th Cir. 2016) ("Nor did the preliminary bail determination made at the initial appearance render that hearing a critical stage." (citing *Gerstein*, 420 U.S. at 120–23)); Caliste v. Cantrell, 329 F. Supp. 3d 296, 314 (E.D. La. 2018) (citing *Coleman* for the holding "that a preliminary bail hearing is a 'critical stage . . . at which the accused is . . . entitled to [counsel]'" (alteration in original)); *see also* Michael Mrozinski & Claire Buetow, *Access to Counsel at First Appearance: A Key Component of Pretrial Justice*, NAT'L LEGAL AID & DEF. ASS'N 11 (Feb. 2020), https://www.nlada.org/sites/default/files/NLADA%20CAFA.pdf [https://perma.cc/M43G-G4R2] ("Another obstacle [in arguing for appointed counsel to represent indigent defendants at first appearances] is the U.S. Supreme Court's decision in *Gerstein v. Pugh* (1975), where the Court held that a post-arrest probable cause determination was not a critical stage." (footnote omitted)).

71. Rothgery v. Gillespie County, 554 U.S. 191, 210–11, 212 (2008) (emphasis added).

72. *Id.* at 195.

73. *Id.* at 196. A Texas "article 15.17" hearing is one that combines the probable cause determination, the setting of bail, and formally informing the accused of the accusation against them. *Id.* at 195.

when he could not afford to post bail.[74] After Rothgery was finally appointed counsel, his attorney promptly worked with the prosecutor to have his charges dismissed.[75] Rothgery brought suit under 42 U.S.C. § 1983, claiming that if he had been provided a lawyer within a reasonable time after his first hearing, he would not have been subjected to rearrest and three weeks of jail time six months after his initial arrest.[76] After he lost at both the U.S. district and circuit court levels, the Supreme Court granted certiorari.[77]

1. Oral Arguments

In making her case to the Court, Rothgery's appellate attorney, Danielle Spinelli, started by citing *Brewer* and *Jackson* as controlling precedent in this case, signaling the point of attachment for the right to counsel.[78] When pressed by Chief Justice Roberts about the lack of a prosecutor's involvement in the article 15.17 hearing, Spinelli emphasized how *Jackson* discussed the circumstances of the proceeding it held to signal attachment rather than mentioning the presence of a prosecutor.[79] Shortly after this line of questioning, the following exchange took place:

> Justice Ginsburg: Ms. Spinelli, there's something confusing about your presentation of this, because you say that at this initial appearance that's called a magistration, you are not contending that there was a right to counsel at that very proceeding.
>
> Ms. Spinelli: That's correct, Justice Ginsburg.[80]

Evidently, the Court anticipated that Rothgery would be arguing for a broader rule, one that would have entitled him to have

74. *Id.* at 196.

75. *Id.* at 196–97.

76. *Id.* at 197.

77. *Id.* at 197–98.

78. Transcript of Oral Argument at 3, Rothgery v. Gillespie County, 554 U.S. 191 (2008) (No. 07-440) ("In *Brewer* and *Jackson*, this Court held that an initial appearance before a magistrate like the one here marks the commencement of a criminal prosecution under the Sixth Amendment. This case demonstrates why that holding makes eminent sense.").

79. *Id.* at 4–6.

80. *Id.* at 7. The Justices and counsel for both sides used the term "magistration" to refer to the article 15.17 hearing during oral arguments.

counsel present at his initial hearing.[81] Rather, Spinelli emphasized throughout her argument that the right to counsel attached at Rothgery's initial hearing before the magistrate, notwithstanding the presence of a prosecutor, and had counsel been appointed within a reasonable time frame after that initial hearing, Rothgery would have never been subject to rearrest.[82] This is made clear in the following back and forth:

> Justice Souter: What is the -- so the point of the magistration is that [this] is the point at which a reasonable time starts running within which Texas must afford -- appoint counsel, isn't that your basic point?
>
> Ms. Spinelli: Correct, Justice Souter.
>
> Justice Souter: Okay.
>
> Ms. Spinelli: That's our contention.
>
> Justice Souter: So there's no claim that there was anything invalid about the magistration proceeding --
>
> Ms. Spinelli: Not at all.
>
> Justice Souter: -- itself because there was no counsel there.
>
> Ms. Spinelli: No, not at all.
>
> Justice Souter: There's no claim -- for example, had there been a probable cause hearing, that the attorney would have been required to participate in the probable cause hearing under --
>
> Ms. Spinelli: No.
>
> Justice Souter: There has simply got to be one appointed within a reasonable time after the magistration. That's -- that's your argument?
>
> Ms. Spinelli: That's correct.[83]

While Spinelli did not argue that the article 15.17 hearing was a critical stage, she made clear that the later indictment was in fact a critical stage.[84] While arguing that the injustice Rothgery faced upon rearrest could have been avoided had counsel been appointed in "some reasonable time after his request," Spinelli never suggested a time frame that would be considered "reasonable."[85]

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81. *See* Colbert, *supra* note 18, at 373–74 ("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 whether Rothgery was entitled to his lawyer's presence at the initial bail hearing.").

82. *See generally* Transcript of Oral Argument, *supra* note 78, at 9–15 (recounting Spinelli's main points).

83. *Id.* at 14–15.

84. *Id.* at 21–22.

85. *Id.* at 22.

Representing Gillespie County, Gregory Coleman argued there had been no Sixth Amendment violation because the article 15.17 hearing did not signal the government's commitment to prosecute and thus the right to counsel had not yet attached.[86] Coleman emphasized in his argument that even if Rothgery had been held in custody for three weeks following the article 15.17 hearing, it would not have been a violation of the Sixth Amendment, but he conceded that it may violate Fourth Amendment protections against unreasonable seizure.[87] Coleman endured many questions from the Justices about the state court procedures, which took up a significant portion of the time allotted for Coleman's argument.[88] Ultimately, Coleman's arguments would not become part of the majority opinion.

2. Opinion

The majority's opinion revealed how much the Justices had been influenced by Spinelli's arguments. Writing for the majority, Justice Souter framed the matter as a question of whether a prosecutor must be present at the initial hearing for the Sixth Amendment right to counsel to attach.[89] The Court first cited *Brewer* and *Jackson* for the proposition "that the right to counsel attaches at the initial appearance before a judicial officer," defining the initial appearance as one "at which 'the magistrate informs the defendant of the charge in the complaint, and of var-

86. *Id.* at 27 ("The magistration that follows every Texas arrest does not begin a criminal prosecution under the Sixth Amendment. When Rothgery was magistrated, no formal charges had been filed against him . . . ."). While the defendant's argument is less consequential to the overall decision, it is briefly summarized here for completeness.

87. *Id.* at 29–30 (noting the exchange between Justices Scalia and Souter and Coleman in which Coleman asserts that being held in custody for three weeks without being charged would not be a violation of the right to counsel).

88. *See* Colbert, *supra* note 18, at 379 ("Several Justices admitted unfamiliarity with state court right to counsel practices . . . . [And they] expressed collective surprise with the State's criminal procedure that regarded in-custody defendants like Rothgery as still being under investigation . . . ."); *e.g.*, Transcript of Oral Argument, *supra* note 78, at 49–55 (going over questions posed by multiple Justices about state court procedures).

89. Rothgery v. Gillespie County, 554 U.S. 191, 194–95 (2008) ("The question here is whether attachment of the right [to counsel] also requires that a public prosecutor (as distinct from a police officer) be aware of that initial proceeding or involved in its conduct. We hold that it does not.").

ious rights in further proceedings,' and 'determine[s] the conditions for pretrial release.'"[90] The Court discussed the hearings in *Brewer* and *Jackson*, noting that both were preindictment arraignments, similar to the article 15.17 hearing.[91] Thus, the Court believed that at this point "the State's relationship with the defendant has become solidly adversarial" within the meaning of Sixth Amendment attachment.[92]

While noting that the vast majority of states appoint counsel at or soon after a defendant's initial appearance anyway, the Court went on to consider whether states not following this practice are justified in doing so.[93] After clearing up that prosecutor involvement does not make the initial appearance distinguishable from *Brewer* and *Jackson*,[94] the Court rejected the County's brief arguments that *Gouveia* compelled a result in its favor and that the test should be whether the State had "objectively committed itself to prosecute," where "[p]rosecutorial involvement is merely one form of evidence of such commitment."[95] Using the petitioner's line of reasoning, the Court announced its holding that "once attachment occurs" defendants are entitled to counsel "within a reasonable time after attachment" "during any 'critical stage,'" defined as one that "shows the need for counsel's presence."[96] Without ruling on whether Rothgery was prejudiced by the delay in appointment of counsel, the Court remanded the case back to the Fifth Circuit.[97]

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90. *Id.* at 199 (quoting WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE 135 (3d ed. 2007)).

91. *Id.* at 199–202.

92. *Id.* at 202.

93. *Id.* at 204–08 (noting that forty-three states, the District of Columbia, and the federal government appoint counsel at or soon after the initial appearance).

94. *Id.* at 206 ("Neither *Brewer* nor *Jackson* said a word about the prosecutor's involvement as a relevant fact, much less a controlling one.").

95. *Id.* at 208–11.

96. *Id.* at 212.

97. *Id.* at 213. For further discussion on the *Rothgery* opinion and how the Justices' concerns during oral arguments came through in the opinion, see Colbert, *supra* note 18, at 364–73 (recapping the *Rothgery* decision in a section entitled "The Decision").

3. Dissent[98]

The dissent's overall contention was that Rothgery's Sixth Amendment right to counsel was not implicated by the proceedings because the right did not attach at his article 15.17 hearing.[99] As an avid originalist, Justice Thomas found it significant that the Sixth Amendment uses the phrase "[i]n all *criminal prosecutions*"[100] as opposed to either stating "criminal proceedings" or "criminal cases" because Blackstone's Commentaries specifically parses out the terms, defining "prosecution" as "instituting a criminal suit" via a "formal charging document," such as an indictment.[101] Since the majority did not adhere to this rigid definition, he found their approach to Sixth Amendment jurisprudence flawed.[102] Comparing the article 15.17 hearing to

98. Although Justice Thomas was the lone dissenter in *Rothgery*, with the changing ideological composition of SCOTUS, the dissents Justice Thomas has written over the years are now being realized in majority holdings. *See generally* Kimberly Strawbridge Robinson, *Clarence Thomas Waited 30 Years for Court That Thinks Like Him*, BLOOMBERG L. (Oct. 22, 2021), https://news.bloomberglaw.com/us-law-week/clarence-thomas-waited-30-years-for-court-that-thinks-like-him [https://perma.cc/42JZ-5QMJ] ("Thomas, 73, who isn't shy about dissenting alone when he thinks the court got it wrong, may see some of those dissents transformed into majorities on a court where ascendant conservatives now hold a 6-3 majority."). It is also notable that Justices Roberts and Scalia seemed somewhat convinced by Justice Thomas's argument. *See Rothgery*, 554 U.S. at 213 (Roberts, J., concurring) ("Justice Thomas's analysis of the present issue is compelling . . . ."). With these viewpoints at play, it is important to consider what may become law in the coming years. Justice Alito also wrote a concurring opinion in the case, joined by Chief Justice Roberts and Justice Scalia, disagreeing with the "reasonable time" requirement imposed by the majority, but agreeing that the majority was correct in finding that the right to counsel attached at the article 15.17 hearing. *See id.* at 216 (Alito, J., concurring) ("It does not follow, however, and I do not understand the Court to hold, that the county had an obligation to appoint an attorney to represent petitioner within some specified period after his magistration.").

99. *Rothgery*, 554 U.S. at 235–36 (Thomas, J., dissenting) ("In sum, neither the original meaning of the Sixth Amendment right to counsel nor our precedents interpreting the scope of that right supports the Court's holding that the right attaches at an initial appearance before a magistrate.").

100. U.S. CONST. amend. VI.

101. *Rothgery*, 554 U.S. at 221 (Thomas, J., dissenting).

102. *See id.* at 219 ("Given the Court's repeated insistence that the right to counsel is textually limited to 'criminal prosecutions,' one would expect the Court's jurisprudence in this area to be grounded in an understanding of what those words meant when the Sixth Amendment was adopted. Inexplicably, however, neither today's decision nor any of the other numerous decisions in which

*Kirby*'s list of "adversary judicial criminal proceedings," Justice Thomas determined that the hearing does not fall into one of *Kirby*'s example categories.[103] He also argued that the Court incorrectly cited *Brewer* and *Jackson* as controlling with regard to the attachment issue, stating that the attachment issue was secondary in both cases.[104] In concluding the dissent, Justice Thomas stated that Rothgery's lack of representation for the six months following his article 15.17 hearing would not have prejudiced him at any later trial, which is the core guarantee of the Sixth Amendment, and that his liberty interest in being required to post bail is not protected by the Sixth Amendment.[105]

*Rothgery* synthesized prior case law into a three-part rule (defendants must be appointed counsel within a *reasonable time* after *attachment* for any *critical stage* that follows), but it did not provide more guidance for the "critical stage" inquiry, most notably leaving open the question of whether an initial appearance qualifies as a critical stage. With an understanding of *Rothgery* and preceding case law, Part II will discuss post-*Rothgery* decisions and statutes relating to the right to counsel.

## II. POST-*ROTHGERY* UNDERSTANDING OF THE RIGHT TO COUNSEL

*Rothgery* is the most recent seminal case laying out the Supreme Court's approach to the Sixth Amendment.[106] The holding can be broken down into three prongs: (1) the right to counsel *attaches* once the government commits itself to prosecute, and (2) after the right attaches, counsel must be appointed within a *reasonable time* (3) to represent defendants at any *critical*

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the Court has construed the right to counsel has attempted to discern the original meaning of 'criminal prosecutio[n].'" (alteration in original)).

103. *Id.* at 226–28.

104. *Id.* at 228–29.

105. *Id.* at 235.

106. *See, e.g.*, Randy J. Sutton, *Construction and Application of Sixth Amendment Right to Counsel—Supreme Court Cases*, 33 A.L.R. Fed. 2d 1 §§ 4, 10 (2009) (discussing *Rothgery* as the most current case for defining when the right to counsel attaches and right to counsel at a probable cause hearing, which is often the initial appearance); *Leading Cases*, *supra* note 6, at 306 ("Ever since the Supreme Court's decision in *Kirby v. Illinois*, the 'attachment' of the Sixth Amendment right to counsel has turned on the commencement of adversary judicial proceedings. . . . *Rothgery* provides a great deal of doctrinal clarity and has very real practical effects." (footnote omitted)).

*stage*.[107] The first prong mostly reaffirms prior case law.[108] The second prong adds a new requirement ("reasonable time"),[109] with what appears to be an easily justiciable standard, while the third prong modifies the meaning of when the presence of counsel is required by employing a phrase ("critical stage") that is familiar to Sixth Amendment jurisprudence.[110] However, these prongs are not as simple as they may seem.

With this in mind, this Part discusses varying judicial interpretations addressing whether the Sixth Amendment requires the presence of counsel and then examines right-to-counsel statutes. The appointment of counsel at early hearings remains critical to effective representation.[111] Thus, any decision not requiring appointed counsel during an initial appearance[112] can prejudice the defendant, which is the precise harm the Sixth Amendment seeks to prevent.[113]

### A. LOWER COURT INTERPRETATIONS OF THE RIGHT TO COUNSEL[114]

Since *Rothgery*, courts have tried to interpret its meaning, with differing results.[115] Opinions expanding Sixth Amendment protections in wake of *Rothgery* are few and far between. Though courts generally find that *Rothgery* necessitates a finding that the right to counsel attaches at the initial appearance, they are

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107. *Rothgery*, 554 U.S. at 212.

108. *See supra* Part I.A.1.

109. *See supra* notes 16–17 and accompanying text.

110. *See supra* Part I.A.2.

111. *See supra* notes 13–15 and accompanying text.

112. The phrases "initial" or "first appearance" will vary in meaning across state systems, but this Note uses the terms simplistically to refer to a defendant's first appearance in a courtroom on their charge. The initial appearance can often include a formal reading of the charges, explanation of the rights, and setting of bail. *See How Courts Work*, *supra* note 55 (describing what may occur at an initial appearance).

113. *See* United States v. Wade, 388 U.S. 218, 226 (1967) ("It is central to [the Sixth Amendment] principle that in addition to counsel's presence at trial, the accused is guaranteed that he 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." (footnotes omitted)).

114. Part II.A analyzes cases from U.S. appellate and district courts, as well as state supreme courts.

115. *See infra* Part II.A.1.

divided in determining whether an initial appearance itself constitutes a "critical stage."[116] Courts have also had conflicting outcomes in deciding which pretrial proceedings are "critical stages."[117] Another issue that occasionally arises is what qualifies as a "reasonable time" to appoint counsel from the moment the right attaches.[118] Without clear guidance, courts are left to their own interpretive devices to work out *Rothgery*'s ambiguities.

1. Initial Appearance as a "Critical Stage"

Depending on the charging jurisdiction, a defendant may or may not be entitled to counsel at their initial appearance. Only a few circuit courts have issued rulings relevant to interpreting initial appearances in light of *Rothgery*, and those decisions have universally found the initial appearance is *not* a critical stage. When the Fifth and Tenth Circuits considered the question, both readily found, without much explanation, that a defendant's initial appearance in federal court "did not amount to a critical stage in the proceedings."[119] The Ninth Circuit also examined the issue and specifically noted that the right to counsel attached at the defendant's initial appearance, but ultimately came to the same conclusion that based "[o]n the facts alleged in the complaint, the initial appearance was not a critical stage."[120] Unlike the Fifth and Tenth Circuits, the Ninth Circuit provided more explanation, reasoning that the absence of an attorney did not prejudice the defendant because "the hearing did not 'test[] the merits of the accused's case'; 'skilled counsel' was not necessary to 'help[] the accused understand' the proceedings; and there

116. *See infra* Part II.A.1; *see also* Mrozinski & Buetow, *supra* note 70, at 13 ("Because the Supreme Court . . . did not require states to guarantee counsel at first appearance, states have taken varying approaches to interpreting *Rothgery*.").

117. *See infra* Part II.A.2.

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

119. United States v. Lopez, 426 F. App'x 260, 262 (5th Cir. 2011); Roeder v. Schnurr, No. 22-3152, 2022 WL 17665073, at *3 (10th Cir. Dec. 14, 2022) (noting that "a pretrial arraignment can be critical where certain rights can be waived or lost," but since "no rights were waived or lost" at the hearing in question, it did not qualify as a critical stage); *see also* United States v. Portillo, 969 F.3d 144, 160–61 (5th Cir. 2020) (citing *Lopez* in holding that the initial appearance "bears none of the markings of a critical stage").

120. Farrow v. Lipetzky, 637 F. App'x 986, 988 (9th Cir. 2016).

was no risk that an uncounseled defendant would permanently forfeit 'significant rights.'"[121]

Similarly, nearly all district court opinions have been consistent with circuit court rulings in declining to require the presence of counsel at an initial appearance.[122] Although the setting of bail can often be outcome-determinative for a defendant's case,[123] federal courts in Oklahoma and Utah have not been convinced that bail hearings necessitate the assistance of an attorney.[124] Other courts have misinterpreted *Rothgery* entirely, stating that the Supreme Court held definitively that the initial appearance is not a critical stage,[125] when in reality the Court

121. *Id.* (alteration in original) (quoting United States v. Benford, 574 F.3d 1228, 1232 (9th Cir. 2009)).

122. *See, e.g.*, Pickett v. Woods, No. 16-CV-10699, 2016 WL 1615742, at *2 (E.D. Mich. Apr. 22, 2016) (noting that, per *Rothgery*, and in accordance with decisions from other Michigan courts, the "initial arraignment is the time at which the Sixth Amendment right to counsel attaches, but it is not a 'critical stage' requiring [appointed] counsel"); Bronner v. Marsh, No. 20-CV-2656, 2021 WL 2366949, at *8 (E.D. Pa. Mar. 19, 2021), *report and recommendation adopted*, No. 20-CV-2656, 2021 WL 2351679 (E.D. Pa. June 9, 2021) (holding that the defendant's preliminary arraignment, his first appearance in court, was the point of attachment rather than a critical stage, without clarifying what occurred at that hearing); *see also* Ross v. Blount, No. 2:19-CV-11076, 2019 U.S. Dist. Ct. Motions LEXIS 414240, at *47 (E.D. Mich. June 19, 2019) ("[N]o court examining Michigan's criminal procedures has adopted [the] position here – that such 'attachment' also necessarily constitutes a 'critical stage' at which defendants are entitled to the assistance of counsel."); H.C. v. Chudzik, No. 5:22-CV-01588, 2023 U.S. Dist. LEXIS 56072, at *33 (E.D. Pa. Mar. 31, 2023) ("[T]his Court finds the three cases - *Bronner*, *Cronin*, and *Padilla* - persuasive and in line with the rule set forth in *Rothgery*. . . . [I]n Pennsylvania, the first critical stage post-attachment is the preliminary hearing. Therefore, [p]laintiffs are unable to state a claim that their Sixth Amendment right to counsel was violated when they were not appointed counsel for their preliminary arraignments.").

123. *See infra* Part III.A.1 (discussing the setting of bail).

124. *See* Cooper v. Jones, No. CIV-10-75-R, 2010 WL 3960592, at *1 (W.D. Okla. Oct. 8, 2010) (holding that the defendant was not entitled to counsel at his initial appearance because he did not show "the need for counsel's presence," even though his bond was set at one million dollars at that uncounseled hearing); Medina v. Allen, No. 4:21-CV-00102, 2023 U.S. Dist. LEXIS 58623, at *24–25 (D. Utah Mar. 30, 2023) (stating that "the right to counsel does not attach at the initial bail determination" because the plaintiffs did not sufficiently demonstrate how the setting of bail, which occurs outside the presence of the defendant in Utah, constitutes a "critical stage").

125. *See, e.g.*, United States v. Bour, No. 2:13-CR-36, 2020 WL 7353775, at *12 (N.D. Ind. Dec. 15, 2020) (holding that the defendant's initial appearance

left that question open.[126] While federal courts across the country are generally reluctant to expand Sixth Amendment guarantees to the initial appearance, one Louisiana court concluded that "[t]here is no question that the issue of pretrial detention is an issue of significant consequence for the accused" and hence a bail hearing *is* a critical stage.[127] Although the court did not cite *Rothgery*, it emphasized the defendant's significant liberty interest in the preliminary bail hearing to find that the hearing qualified for Sixth Amendment protections.[128]

Several federal district courts have addressed the article 15.17 hearing specifically, examining the question not answered in *Rothgery* of whether the hearing itself qualifies as a critical stage.[129] Federal courts across Texas have almost universally found that the article 15.17 hearing is not a critical stage.[130] However, like the Louisiana opinion, one Texas decision stands alone in holding that "when an Article 15.17 hearing includes an initial bail determination, it is a 'critical stage' in the criminal proceedings," with the caveat that the stage is likely not critical

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where he was informed of the charges against him, advised of his right to counsel, and had bail and conditions of release set was not a critical stage because "*Rothgery* made [] clear" that an initial appearance signals attachment "but it is not a critical stage requiring counsel").

126. *See* Rothgery v. Gillespie County, 554 U.S. 191, 211–12 (2008) (discussing the distinction between the attachment and critical stage inquiries and declining to decide whether the initial appearance is a critical stage itself).

127. Caliste v. Cantrell, 329 F. Supp. 3d 296, 313–14 (E.D. La. 2018) (quoting Coleman v. Alabama, 399 U.S. 1, 10 (1970)).

128. *Id.* at 314 ("Considering the already established vital importance of pretrial liberty, assistance of counsel is of the utmost value at a bail hearing.").

129. *See supra* note 73 and accompanying text.

130. *See, e.g.*, Evans v. Stephens, No. 4:13-CV-301-A, 2015 WL 66524, at *17 (N.D. Tex. Jan. 5, 2015) (affirming the state court's finding that the right to counsel attached at the article 15.17 hearing, but the hearing was not a critical stage even when bail was set); Kennedy v. Bexar County, No. SA-16-CA-262-XR, 2016 U.S. Dist. LEXIS 56175, at *4–5 (W.D. Tex. Apr. 27, 2016) (stating that the article 15.17 hearing signaled attachment but was not a critical stage, without further justification); Ransdell v. Lumpkin, No. SA-21-CA-0010-XR, 2021 WL 4392084, at *4 (W.D. Tex. Sept. 23, 2021) ("[W]hile an Article 15.17 hearing 'plainly signals attachment,' it is not a 'critical stage' of the state criminal proceeding at which an attorney's presence is mandatory. Indeed, contrary to Petitioner's assertions, nothing in *Rothgery* requires the appointment of an attorney prior to an Article 15.17 hearing or the physical presence of one during the article 15.17 hearing." (quoting *Rothgery*, 554 U.S. at 213)).

if bail is not set.[131] This holding implies that Rothgery himself was constitutionally entitled to counsel at his initial article 15.17 hearing, during which the court set his bail at $5,000.[132] Although this holding is significant, its significance is somewhat limited by a more recent decision within the same district that found the article 15.17 hearing was *not* a critical stage even when bail was set, without referencing the earlier opinion.[133] In the absence of an appellate ruling, the question of whether the Texas article 15.17 initial appearance constitutes a "critical stage" remains unsettled.

A few state courts have broached the topic as well. For varying reasons, state supreme courts in Alabama,[134] Minnesota,[135] and Indiana[136] have ruled against defendants seeking post-conviction relief on the basis they were uncounseled at their initial appearance. Conversely and on point with the standout federal decisions in Louisiana and Texas, the Supreme Court of Con-

131. Booth v. Galveston County, No. 3:18-CV-00104, 2019 WL 3714455, at *16 (S.D. Tex. Aug. 7, 2019), *report and recommendation adopted as modified*, 2019 WL 4305457 (S.D. Tex. Sept. 11, 2019).

132. *Cf.* Rothgery v. Gillespie County, 554 U.S. 191, 196 (2008) ("[At the article 15.17 hearing,] [t]he magistrate informed Rothgery of the accusation, set his bail at $5,000, and committed him to jail . . . .").

133. Alexander v. Lumpkin, No. H-20-825, 2022 WL 4280739, at *10–11 (S.D. Tex. Aug. 24, 2022); *see also* Regalado v. Edinburg, No. 7:22-CV-228, 2023 U.S. Dist. LEXIS 38602, at *38 (S.D. Tex. Feb. 1, 2023), *report and recommendation adopted*, 2023 U.S. Dist. LEXIS 37475 (Mar. 7, 2023) (failing to consider whether the article 15.17 truly qualifies as a "critical stage" because the *pro se* plaintiff "failed to state facts alleging a colorable claim under the Sixth Amendment").

134. *See Ex parte* Cooper, 43 So.3d 547, 548–49 (Ala. 2009) (overruling precedent after *Rothgery* to hold that an initial appearance triggered attachment of the right to counsel, but still finding the appearance itself was not a critical stage).

135. *See* State v. Zaldivar-Proenza, 957 N.W.2d 93 (Minn. 2021) (finding that a defendant's initial appearance where the judge granted the state's discovery motion to examine and photograph the defendant's body was not a critical stage requiring the assistance of counsel because if a defendant can take curative actions after the proceeding, such as filing a suppression motion, then their "right to a fair trial has not been jeopardized," citing *Wade* as a "general rule of thumb" for that principle).

136. *See* Hopper v. State, 957 N.E.2d 613, 616–17 (Ind. 2011) (holding that "[a]n initial hearing conducted under Indiana's statutory scheme is not a critical stage of the criminal proceeding requiring the presence of counsel," even though the defendant pled guilty at that hearing without an attorney after the state offered him a plea deal to forgo his right to counsel).

necticut cited *Rothgery* extensively in finding that an arraignment, which was the defendant's first appearance in court, was a critical stage because bond was set at the hearing.[137] Some state courts have declined to rule that an initial appearance constitutes a critical stage under the Sixth Amendment, but have nonetheless found that appointed counsel is required at the first appearance under more protective state law.[138]

2. Other "Critical Stages"

While post-*Rothgery* "critical stage" opinions have primarily dealt with the initial appearance, some courts have utilized *Rothgery* in resolving disputes about other types of hearings. However, these decisions still leave the status of every instance of a particular hearing up for debate. For example, a pretrial status conference in a courtroom under the appellate jurisdiction of the Ninth Circuit would likely, though not always, be in compliance with the Constitution if it proceeded without defense counsel.[139] Using its own familiar critical stage analysis, the Ninth Circuit reasoned that "[n]othing significant occurred at the pretrial status conference" because "there was no 'loss of significant rights,'" "legal confrontation," or test of "the merits of the accused's case," but also noted the holding did not mean "a status

137. Gonzalez v. Comm'r of Corr., 68 A.3d 624, 634–37 (Conn. 2017) ("[T]he petitioner had a [S]ixth [A]mendment right to effective assistance of counsel at the arraignment stage in which proceedings pertaining to the setting of bond and credit for presentence confinement occurred because it is clear that potential substantial prejudice to the petitioner's right to liberty inhered to the arraignment proceedings . . . .").

138. *See, e.g.*, DeWolfe v. Richmond, 76 A.3d 962, 976 n.19 (Md. 2013) ("We held in [*Fenner*] that a Rule 4-213(c) initial appearance in the Circuit Court is not a critical stage of the criminal proceeding for purposes of the Sixth Amendment. We did not address, however, the applicability of the Public Defender Act to that proceeding, which, we reaffirm today, sweeps more broadly than does the Sixth Amendment protection." (citation omitted)); State v. Taylor, 49 N.E.3d 1019, 1024–25 (Ind. 2016) (holding that the right to counsel attaches upon arrest under Indiana law and hence provides greater protection than the federal Constitution).

139. United States v. Benford, 574 F.3d 1228, 1231 (9th Cir. 2009) (holding that a pretrial status conference was not a critical stage). With Benford's attorney running late to a scheduled pretrial status conference, the court elected to proceed without him. *Id.* at 1230. The court confirmed the trial date set for the following week, without Benford's attorney present to request a continuance. *Id.*

conference never can be a critical stage."[140] On the other hand, defendants in Wisconsin would *likely* be entitled to counsel at a lineup subsequent to a probable cause determination, but without an appellate ruling that outcome cannot be certain.[141]

State courts tend to apply the Sixth Amendment more generously. The Sixth Amendment awards representation to defendants at a New York arraignment[142] while entitling California defendants to counsel for pretrial prosecutorial appeals of a suppression order.[143] However, the Sixth Amendment does not protect defendants in Pennsylvania during the time immediately following a preliminary arraignment, even on a charge as serious as first-degree murder, because the court reasoned that doing so "would extend the [Supreme] Court's Sixth Amendment jurisprudence beyond reason or recognition."[144] Some state courts have found certain post-trial proceedings are critical stages[145] and, similar to state court rulings on the initial appearance as a critical stage, have found greater protection under state law.[146]

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140. *Id.* at 1232–33 (quoting Hovey v. Ayers, 458 F.3d 892, 901 (9th Cir. 2007)).

141. United States v. West, No. 08-CR-157, 2009 WL 5217976, at *7–10 (E.D. Wis. Mar. 3, 2009), *report and recommendation adopted*, 2009 WL 3605219 (E.D. Wis. Aug. 19, 2009) (discussing *Rothgery* at length in holding that the defendant's right to counsel attached at his probable cause determination and thus, consistent with *Wade*, the subsequent lineup was a critical stage requiring appointed counsel).

142. Hurrell-Harring v. State, 930 N.E.2d 217, 223, 227 (N.Y. 2010) (considering the guarantees of the Sixth Amendment and holding that the arraignment qualifies as a critical stage).

143. Gardner v. App. Div. of San Bernardino Cnty., 436 P.3d 946, 950–51 (Cal. 2019) (finding this type of hearing qualifies as a critical stage).

144. State v. Padilla, 80 A.3d 1238, 1253 (Pa. 2013) (emphasizing that the court had "absolutely no inclination to extend the legal definition of the term 'critical stage' to encompass the entirety of the ten-day period following a preliminary arraignment on a first-degree murder charge").

145. *See, e.g.*, State v. Schleiger, 21 N.E.3d 1033, 1037 (Ohio 2014) (holding that a resentencing hearing is a critical stage). *But cf.* Dir. of Dep't of Corr. v. Kozich, 779 S.E.2d 555, 561–63 (Va. 2015) (holding there is no right to counsel at a hearing for a motion to reconsider sentence after entry of final judgment).

146. *See, e.g.*, State v. Warren, No. 2021-0161, 2022 WL 4546019, at *7 (N.H. Sept. 29, 2022) (holding that the hearing on the motion to reinstate the complaint was a critical stage under state law); State *ex rel.* P.M.P., 975 A.2d 441, 447–48 (N.J. 2009) ("We find no need to tackle [the] constitutional question because we are convinced that the Legislature has provided a statutory remedy. . . . We conclude that under [the] circumstances, the significant level of involvement by the Prosecutor's Office and the judicially approved arrest warrant

However, most state courts that have tackled the question of whether an attorney is required at misdemeanor pretrial hearings have found these types of hearings are not critical stages, and thus there is no right to counsel.[147]

3. "Reasonable Time" to Appoint Counsel

The far less analyzed part of the *Rothgery* decision is what may be a "reasonable time" to appoint counsel after attachment to avoid a Sixth Amendment violation. In nearly every case, courts have found counsel was appointed within a "reasonable time," even inferring that a delay of only a few days is *per se* reasonable.[148] Courts have found that delays as long one month,[149] forty days,[150] fifty-five days,[151] and even two months[152]

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satisfied the 'critical stage in the proceeding' necessary to trigger defendant's statutory right to counsel under [New Jersey law].").

147. Brandon L. Garrett, *Models of Bail Reform*, 74 FLA. L. REV. 879, 895 (2022) ("Despite *Rothgery v. Gillespie County*'s ruling that a defendant is entitled to counsel at all critical stages of a case, most states treat that ruling as insufficiently addressing the question and hold that an attorney is not required or provided in misdemeanor pretrial hearings.").

148. *See, e.g.*, Broadnax v. Davis, No. 3:15-CV-1758-N, 2019 WL 3302840, at *37 n.54 (N.D. Tex. July 23, 2019) ("Nothing in *Rothgery* suggests that a Texas county is constitutionally obligated to furnish appointed counsel to an indigent defendant within a shorter time period (about two working days) after the defendant is arraigned . . . ."); Roeder v. Schnurr, No. 20-3275, 2022 WL 3139025, at *10 (D. Kan. Aug. 5, 2022) ("The record also reflects that Petitioner was appointed counsel within a reasonable time—one day—of his right to counsel attaching.").

149. Bolivar v. Davis, No. 1:18-CV-139, 2019 WL 7593279, at *13 (S.D. Tex. Oct. 23, 2019) (upholding one-month delay as not unreasonable).

150. Grogen v. Gautreaux, No. 12-0039, 2012 WL 12947995, at *3 (M.D. La. July 11, 2012) ("[I]n the absence of any assertion of prejudice resulting from the alleged delay, this [c]ourt concludes that the alleged 40-day delay in the appointment of counsel was not so unreasonable as to result in a Sixth Amendment violation.").

151. Dominick v. Stone, No. 19-0503, 2019 WL 2932817, at *4 (W.D. La. June 14, 2019) ("Even assuming an unreasonable delay in appointing counsel, alone, can violate the Sixth Amendment, Plaintiff's alleged 55-day delay was reasonable.").

152. Hawkins v. Montague County, No. 7:10-CV-19-O, 2010 WL 4514641, at *12 (N.D. Tex. Nov. 1, 2010) ("Th[is] [c]ourt finds that the approximate two-month delay in receiving court-appointed counsel fails to rise to the level of a constitutional violation based on the Sixth Amendment."). As an aside, the district judge later granted a motion for reconsideration on this order, but the motion was in regards to an unrelated part of the order. *See* Hawkins v. Montague County, No. 7:10-CV-19-O, 2011 WL 13229004 (N.D. Tex. Feb. 28, 2011).

are reasonable under *Rothgery*, typically without significant analysis. Even decisions hinting that a delay *could* be unreasonable have not ultimately rested on that principle.[153]

One federal court in the Northern District of California attempted to define a standard for evaluating the reasonableness of a delay in receiving appointed counsel. In *Farrow v. Lipetzky*, the court wrote a substantial discussion of the "reasonable time requirement," beginning its opinion by citing *Chambers v. Maroney*[154] and *Wade*[155] for the proposition that a violation of the requirement may not necessarily warrant a reversal of conviction. After recounting the lack of guidance on the requirement from *Rothgery* itself and stating it is "not aware of any decision articulating a standard by which to examine whether a delay in appointing counsel is reasonable within the meaning of *Rothgery*," the court created its own test for determining the reasonableness of a delay: "the reasonableness of a delay in appointing counsel after attachment depends on the totality of the circumstances, including the time needed to prepare for an upcoming critical stage—but not limited to that factor."[156] Later, the same court declined to adopt "a *per se* rule as to how much time after attachment is presumptively reasonable" and, using its own totality-of-the-circumstances test, found that neither of the plaintiffs' delays of four and twelve days in receiving appointed counsel were sufficient to find the delays "constitutionally unreasonable."[157] At the time of this Note, the *Farrow* test has

153. *See, e.g.*, McCarty v. State, 371 P.3d 1002, 1006 (Nev. 2016) ("Although it is arguable that the eight-day delay in the appointment of counsel was unreasonable . . . the defendant may waive the Sixth Amendment right to counsel . . . .").

154. Farrow v. Lipetzky, No. 12-CV-06495, 2017 WL 1540637, at *14 (N.D. Cal. Apr. 28, 2017) (reasoning that *Chambers*, where the Supreme Court held that there is no "*per se* rule requiring reversal of every conviction following tardy appointment of counsel," implies that a violation of the reasonable time requirement may not automatically entitle a defendant to reversal of their conviction (quoting Chambers v. Maroney, 399 U.S. 42, 53–54 (1970))).

155. *Id.* ("Although the evidentiary context of *Wade* is not precisely analogous to the case at hand, *Wade* nevertheless indicates that Sixth Amendment violations based on failure to provide appointed counsel at times when a defendant is entitled to counsel do not *necessarily* invalidate a conviction.").

156. *Id.* at *15.

157. Farrow v. Contra Costa County, No. 12-CV-06495, 2019 WL 78839, at *27–33 (N.D. Cal. Jan. 2, 2019), *aff'd*, 799 F. App'x 520 (9th Cir. 2020). In declining to adopt the per se rule suggested by the plaintiffs, the court extensively

not been utilized by any other court and no other court had developed its own test for evaluating the reasonable time requirement.

Although Sixth Amendment case law is ever expanding, this Section has provided an overview of how courts have interpreted the constitutional right post-*Rothgery*. Most significantly, many federal courts have taken *Rothgery* to mean that the initial appearance is *not* a critical stage, when in reality the Court left that question open. Further, since *Rothgery* did not resolve the "critical stage" issue once and for all, determining which post-attachment hearings qualify as critical stages requires judges to decide if the hearing could have resulted in prejudice to the defendant, without much more to guide their decision-making. The following Section will consider how states have approached the right to counsel and the effectiveness of right to counsel statutes in protecting defendants' rights.

### B. CODIFYING THE RIGHT TO COUNSEL

State statutes typically do not offer much more protection than the courts.[158] From 2008 to 2009, Professor Douglas Colbert surveyed public defenders about the state's *practice* of providing counsel to indigent defendants at initial appearances,[159] which does not necessarily translate to what is *required* under state law. His study found that only ten states routinely guaranteed the right to counsel at the initial bail hearing, presumably the

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referenced expert reports submitted by each party on the reasonableness of delay in appointing counsel. *See id.* at *27–29.

158. *See generally Pretrial Right to Counsel*, NAT'L CONF. OF STATE LEGISLATURES (Sept. 30, 2016), https://www.ncsl.org/research/civil-and-criminal-justice/pretrial-right-to-counsel.aspx [https://perma.cc/Z32G-93YZ] (documenting constitutional and statutory provisions for the right to counsel in each state).

159. *See* Colbert, *supra* note 18, at 384–85 ("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." (footnote omitted)).

first court appearance.[160] Six of those states,[161] as well as D.C.,[162] have statutory language seemingly guaranteeing that right. However, four states indicated as always providing counsel at an initial appearance, California,[163] Maine,[164] Massachusetts,[165]

160. *Id.* at 389 (listing the ten states guaranteeing counsel at an initial bail hearing: California, Connecticut, Delaware, Florida, Hawaii, Maine, Massachusetts, North Dakota, Vermont, and Wisconsin, as well as the District of Columbia).

161. *See, e.g.*, CONN. GEN. STAT. § 54-46a(b) (2022) ("The accused person shall have the right to counsel [at the preliminary hearing] . . . ."); DEL. R. CRIM P. SUPER. CT. 44(a) ("Every defendant who is unable to obtain counsel shall be entitled to have counsel assigned, pursuant to 11 Del. C. § 5103, to represent that defendant at every stage of the proceedings from initial appearance . . . through appeal . . . ."); FLA. R. CRIM. P. 3.130(a) ("The state attorney or an assistant state attorney and public defender or an assistant public defender must attend the first appearance proceeding . . . ."); HAW. REV. STAT. § 802-5(a) (2022) ("[T]he judge shall appoint counsel to represent the person at all stages of the proceedings, including appeal, if any." (emphasis added)); N.D. R. CRIM. P. 44(a) (guaranteeing indigent defendants counsel "at every stage of the proceeding from initial appearance through appeal"); VT. STAT. ANN. tit. 13, § 5233(a) (2022) ("A needy person who is entitled to be represented by an attorney . . . is entitled: (1) to be counseled and defended at all stages of the matter beginning with the earliest time when a person providing the person's own counsel would be entitled to be represented by an attorney and including revocation of probation or parole . . . .").

162. D.C. SUPER. CT. R. CRIM. P. 44(a) ("A defendant who is unable to obtain counsel is entitled to have counsel appointed to represent the defendant at every stage of the proceeding from initial appearance through appeal, unless the defendant waives this right.").

163. *See* CAL. PENAL CODE § 987(a), (b) (West 2022) (noting what rights a defendant must be informed of at their initial arraignment if they appear without counsel).

164. *See* ME. STAT. tit. 15, § 810 (2022) ("Before arraignment, competent defense counsel shall be assigned by the Superior or District Court . . . ."). In Maine, class D and E felonies combine the initial appearance with the arraignment while felonies of class C or higher do not. *See The Right to Counsel in Maine: Evaluation of Services Provided by the Maine Commission of Indigent Legal Services*, SIXTH AMEND. CTR. 57 (Apr. 2019) [hereinafter *The Right to Counsel in Maine*], https://themainemonitor.org/wp-content/uploads/2019/11/Sixth-Amendment-Report-Maine.pdf [https://perma.cc/7D2Z-ZNCY] (discussing the institution of prosecution and arraignment for criminal defendants in Maine).

165. *See* MASS. SUP. JUD. CT. R. 3:10(2) (providing rules for how a judge should conduct a proceeding where the party is entitled to the services of the public defender but is not represented at the hearing).

and Wisconsin,[166] do not guarantee counsel for all or most defendants under state law, but rather under public defender practice.[167] One additional state, Maryland, has since implemented legislation requiring indigent defendants to be represented by counsel at their initial appearance.[168] The study found that twelve states guarantee representation at the initial bail hearing in the majority of local jurisdictions[169] and eighteen more in a minority of local jurisdictions.[170] The remaining ten states "systemically refuse[d] to guarantee representation to indigent

166. *See* WIS. STAT. § 970.02 (2023) (noting a judge's duties at a defendant's initial appearance, including informing the defendant of their right to counsel but not stating that counsel is required to appear with the defendant at the initial hearing).

167. *See, e.g.*, *Public Defender*, CAL. STATE ASS'N OF CNTYS., https://www.counties.org/county-office/public-defender [https://perma.cc/NY9W-LUPL] ("The Public Defender's Office is responsible for providing legal defense (*at all stages of the proceedings*) for any person who is not financially able to employ counsel . . . ." (emphasis added)); *The Right to Counsel in Maine*, *supra* note 164, at 41 ("Throughout Maine, prosecutors and defense attorneys are always in attendance for [the first appearance].").

168. *See* MD. R. 4-213.1(2) (2022) ("Unless the defendant waives [their right to counsel] . . . , if the defendant is indigent . . . the defendant shall be represented by the Public Defender if the initial appearance is before a judge . . . ."); *see also District Court of Maryland Appointed Attorneys Program*, MD. CTS., https://www.courts.state.md.us/district/appointedattorneys [https://perma.cc/PE4N-R544] ("The District Court of Maryland Appointed Attorneys Program helps provide attorney representation to indigent criminal defendants during initial appearances. . . . The program was created in May 2014 in response to a ruling issued by the Maryland Court of Appeals that held that indigent criminal defendants have a state constitutional right to appointed counsel during initial appearances before a judicial officer.").

169. Colbert, *supra* note 18, at 400–04 (listing the twelve "majority hybrid" states where indigent defendants are more likely than not to be granted representation at their bail determination: Idaho, Kentucky, Louisiana, Minnesota, Montana, New York, Ohio, Oregon, Rhode Island, Utah, Virginia, and Washington).

170. *Id.* at 405–10 (listing the eighteen "minority hybrid" states where indigent defendants are more likely than not to be denied representation at their bail determination: Alaska, Arizona, Arkansas, Colorado, Georgia, Illinois, Indiana, Iowa, Missouri, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, Pennsylvania, South Dakota, West Virginia, and Wyoming).

defendants at their initial bail hearing."[171] In states denying representation, defendants waited anywhere from two to sixty days before receiving appointed counsel following a bail hearing.[172]

Interestingly, some of the states listed as not necessarily guaranteeing counsel at an initial appearance have statutory language implying the opposite.[173] The plain text of the states' statutes indicates appointed counsel is required for indigent defendants at every hearing, but the study reports that this is not public defender practice, and the relevant state laws have not changed since the study's publication.[174] There is at least one state in every category noted by the study in which the state

171. *Id.* at 395–96 ("Indigent defendants in Alabama, Kansas, Maryland, Michigan, Mississippi, New Hampshire, Oklahoma, South Carolina, Tennessee, and Texas appear alone and represent themselves at the initial bail hearing before a judicial officer." (footnotes omitted)). Note that Maryland now requires public defenders to appear with indigent defendants at initial appearances. *See supra* note 168 and accompanying text.

172. *Id.* at 400 ("[P]eople 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.").

173. *See infra* note 174.

174. *See, e.g.*, KY. REV. STAT. ANN. § 31.110 (West 2022) ("A needy person who is entitled to be represented by an attorney under subsection (1) of this section is entitled: (a) To be counseled and defended at all stages of the matter beginning with the earliest time when a person providing his or her own counsel would be entitled to be represented by an attorney and including revocation of probation or parole . . . ."); NEV. REV. STAT. § 178.397 (2022) ("Every defendant accused of a misdemeanor for which jail time may be imposed, a gross misdemeanor or a felony and who is financially unable to obtain counsel is entitled to have counsel assigned to represent the defendant at every stage of the proceedings from the defendant's initial appearance before a magistrate or the court through appeal, unless the defendant waives such appointment."); PA. R. CRIM. P. 122 ("Counsel shall be appointed . . . in all court cases, prior to the preliminary hearing to all defendants who are without financial resources or who are otherwise unable to employ counsel . . . ."); TENN. R. CRIM. P. 44(a) ("Every indigent defendant is entitled to have assigned counsel in all matters necessary to the defense and *at every stage of the proceedings*, unless the defendant waives counsel." (emphasis added)); WASH. SUPER. CT. CRIM. R. 3.1(b)(2)(A) ("A lawyer shall be provided at every stage of the proceedings, including sentencing, appeal, and postconviction review."); W. VA. R. CRIM. P. 44(a) ("Every defendant who is unable to obtain counsel shall be entitled to have counsel assigned to represent him or her at every stage of the proceedings from initial appearance before the magistrate or the court through appeal, unless the defendant waives such appointment."); WYO. R. CRIM. P. 44(a)(1) ("The right [to counsel for indigent defendants] extends from the first appearance in the court through appeal.").

statute is modeled after the federal rule,[175] stating that "[a] defendant who is unable to obtain counsel is entitled to have counsel appointed to represent the defendant *at every stage of the proceeding* from initial appearance through appeal" unless waived.[176] The language of the federal rule suggests that counsel would be guaranteed to indigent defendants at an initial appearance, but, like some of the states using the same or a similar rule, that may not be the practice adopted in all federal courtrooms.[177] Hence, actual public defender practice and judicial requirements may be significantly more consequential to the precise moment at which defendants receive appointed counsel than the language of any relevant statute.

Aside from mostly preexisting state statute language, there is one notable example of a legislative change directly in response to *Rothgery*. Colorado law previously allowed prosecutors to conduct plea negotiations with misdemeanor defendants prior to the defendant speaking to an attorney.[178] The statute was criticized in the wake of *Rothgery*, prompting Colorado's Criminal Defense Bar and the Criminal Justice Reform Coalition to file suit in federal court claiming the provision violated the Sixth

175. *Compare* NEV. REV. STAT. § 178.397 (2022), TENN. R. CRIM. P. 44(a), W. VA. R. CRIM. P. 44(a), *and* WYO. R. CRIM. P. 44(a)(1), *with* FED. R. CRIM. P. 44(a).

176. FED. R. CRIM. P. 44(a) (emphasis added).

177. *See Initial Hearing / Arraignment*, U.S. DEP'T OF JUST., https://www.justice.gov/usao/justice-101/initial-hearing [https://perma.cc/LC6M-B39W] ("At [the initial hearing], the defendant learns more about his rights and the charges against him, *arrangements are made for him to have an attorney*, and the judge decides if the defendant will be held in prison or released until the trial." (emphasis added)).

178. COLO. REV. STAT. § 16-7-301(4) (2013) (repealed 2014) ("In misdemeanors, petty offenses, or offenses under title 42, C.R.S., the prosecuting attorney is obligated to tell the defendant any offer that can be made based on the facts as known by the prosecuting attorney at that time. . . . The application for appointment of counsel and payment of the application fee shall be deferred until after the prosecuting attorney has spoken with the defendant as provided in this subsection (4).").

Amendment.[179] In 2013, the Colorado legislature repealed the statute without instruction from the courts.[180]

Examining post-*Rothgery* decisions and current statutes shows that a defendant's right to appointed counsel varies by what courtroom they appear in. A defendant charged in Texas will not have the same rights as a defendant charged with the same crime in Connecticut, based on differing interpretations of the same constitutional text. The next Part considers both the ramifications of the division, focusing on the first appearance, and how a mandate for representation could work in practice.

## III. PROBLEMS WITH CURRENT LAW AND CONSIDERATIONS FOR THE FUTURE

As posited, current Sixth Amendment jurisprudence is not as clear-cut as it may seem. Courts have offered theories of attachment and what qualifies as a "critical stage" that are incongruous with each other[181] and, with the exception of one U.S. district court, have not offered a solution to the "reasonable time" question left open by the *Rothgery* Court.[182] A critical examination of the issues arising both prior to and in the wake of *Rothgery* reveals the consequences of lingering ambiguities when interpreting the Sixth Amendment. Further, while enacting a system that provides representation at every initial appearance seems daunting, it is more than possible.

### A. CONSEQUENCES OF FORCED PRO SE REPRESENTATION AT THE FIRST APPEARANCE

Over fifty years ago, the Supreme Court stated that "[i]t is central to [the constitutional] principle that in addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution."[183] Just three years later, the Court held that a preliminary

179. Felisa Cardona, *Suit Argues All Defendants Deserve Counsel from the Start*, DENVER POST (Dec. 8, 2010), https://www.denverpost.com/2010/12/08/suit-argues-all-defendants-deserve-counsel-from-the-start [https://perma.cc/F6M9-2NGD] (discussing the Colorado statute and the impact of *Rothgery* on the decision to file suit challenging its constitutionality).

180. 2013 Colo. Sess. Laws 1622 (repealing COLO. REV. STAT. § 16-7-301(4) (2013)).

181. *See supra* Part II.A.1–2 (discussing the "critical stage" requirement).

182. *See supra* Part II.A.3 (discussing the "reasonable time" requirement).

183. United States v. Wade, 388 U.S. 218, 226 (1967).

hearing qualified as a critical stage of the proceedings.[184] But since these opinions, both written by Justice Brennan, Supreme Court interpretations of what constitutes a "critical stage" have not been quite so broad,[185] and those narrower interpretations have been mirrored in lower court decisions.[186] *Kirby* created further complications by introducing the attachment principle, adding a prerequisite to when the right to counsel activates and when appointed counsel is actually required to appear with and on behalf of indigent defendants.[187] Without more expansive rulings, criminal defendants are not nearly as protected as Justice Brennan and others may have envisioned.

1. Setting Bail

One of most criticized aspects of Sixth Amendment case law is its failure to provide representation for all defendants during bail hearings, which usually occur during the first appearance.[188] The Supreme Court has never resolved the question of whether a bail hearing qualifies as a critical stage,[189] but has noted an individual's compelling liberty interest in pretrial release.[190] Proponents of expanding the right to counsel have long argued that attorneys are both essential and effective advocates

184. Coleman v. Alabama, 399 U.S. 1, 9 (1970).

185. *See, e.g.*, Gerstein v. Pugh, 420 U.S. 103, 122 (1975) (holding a probable cause determination is not a critical stage); Rothgery v. Gillespie County, 554 U.S. 191, 212 (2008) ("Texas's article 15.17 hearing plainly signals attachment, even if it is not itself a critical stage." (footnote omitted)).

186. *See supra* Part II.A.1 (highlighting post-*Rothgery* cases ruling on the initial appearance as a "critical stage," of which the majority have ruled that the initial appearance does not constitute a critical stage).

187. *See* Kirby v. Illinois, 406 U.S. 682, 688 (1972) ("[A] person's Sixth and Fourteenth Amendment right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against him.").

188. *See supra* note 67 (citing sources confirming that bail is typically set an initial appearance).

189. KAMISAR ET AL., *supra* note 2, at 85 ("The Supreme Court has yet to decide whether a bail review hearing is a 'critical stage' in a criminal prosecution.").

190. United States v. Salerno, 481 U.S. 739, 750 (1987) ("On the other side of the scale, of course, is the individual's strong interest in liberty. We do not minimize the importance and fundamental nature of this right.").

for defendants appearing at their bail hearing,[191] especially considering rates of success when defendants are represented versus when they are not.[192]

As put by one court in finding that a bail hearing is a critical stage, "the issue of pretrial detention is an issue of significant consequence for the accused."[193] As of 2021, 71% of the U.S. jail population had not been convicted of any crime, a number that has been steadily rising since at least 2011.[194] Many or even most of these individuals are unable to afford bail,[195] which may have been set at their initial appearance without the benefit of representation, even if they are entitled to appointed counsel later in the process.[196] Outcomes are even bleaker for minority and low

191. *See* Jenny E. Carroll, *The Due Process of Bail*, 55 WAKE FOREST L. REV. 757 (2020) (examining the pretrial process, including pretrial detention, and exploring what process is due to criminal defendants during the pretrial process). *See generally* Douglas L. Colbert, *Thirty-Five Years After* Gideon*: The Illusory Right to Counsel at Bail Proceedings*, 1998 U. ILL. L. REV. 1, 13–21 (discussing the importance of an initial bail hearing); Sandra Guerra Thompson, *Do Prosecutors Really Matter?: A Proposal to Ban One-Sided Bail Hearings*, 44 HOFSTRA L. REV. 1161, 1162 (2016) (arguing that prosecutors should be "ethically barred from participating [in bail hearings] unless defense counsel is also present"); Charlie Gerstein, *Plea Bargaining and the Right to Counsel at Bail Hearings*, 111 MICH. L. REV. 1513, 1528–29 (2013) ("Counsel at a bail hearing is effective at protecting a defendant's rights and—given the possibility for constitutional violations at a bail hearing—counsel is necessary to protect those rights.").

192. *See* Colbert, *supra* note 13 ("By semester's end, my students' advocacy resulted in pretrial release for two-thirds of their clients. Most had prior nonviolent convictions and bench warrants. Yet judges listened when the lawyers provided reliable background information.").

193. Caliste v. Cantrell, 329 F. Supp. 3d 296, 314 (E.D. La. 2018); *see also* Alissa Pollitz Worden et al., *Early Intervention by Counsel: A Multi-Site Evaluation of the Presence of Counsel at Defendants' First Appearances in Court*, NAT'L CRIM. JUST. REFERENCE SERV. (Apr. 2020), https://www.ojp.gov/pdffiles1/nij/grants/254620.pdf [https://perma.cc/75L8-P8HW] (detailing the results of a study on the impact of providing counsel at first appearances in some New York counties).

194. Zhen Zeng, *Jail Inmates in 2021 – Statistical Tables*, U.S. DEP'T OF JUST. 11 tbl.6 (Dec. 2022), https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/ji21st.pdf [https://perma.cc/9QQS-EML9].

195. *See $elling Off Our Freedom: How Insurance Corporations Have Taken Over Our Bail System*, COLOR OF CHANGE & ACLU 6 (May 2017), https://www.aclu.org/sites/default/files/field_document/059_bail_report_2_1.pdf [https://perma.cc/HRN2-SEC7] ("Many are stuck behind bars for weeks, months, or even years because they and their families cannot afford to pay bail.").

196. *See supra* notes 169–71 (noting states that do not necessarily guarantee appointed counsel for indigent defendants at initial bail determinations).

income defendants; in one 1990 study, Black male defendants had bail set 35% higher than white male defendants with all other factors being held equal.[197] And of course, indigent defendants are less likely to have the ability to pay bail and, consequently, more likely to be incarcerated while their case progresses.[198]

Pretrial detention can have devastating consequences for the accused, even for those charged with relatively minor crimes.[199] Take *Rothgery*, for example. Following Rothgery's rearrest, he was unable to afford his $15,000 bail and remained in custody for three weeks.[200] Rothgery had been unable to find employment in the months since his initial arrest as a result of his erroneous pending charge, and, without sufficient funds, he and his wife lost their housing.[201] Rothgery had finally procured employment and housing when he was rearrested, causing him to lose those opportunities.[202] To add to the significant hardship placed on Rothgery's living and financial situations, three days after his rearrest, Rothgery was transferred to the county prison three hours away, meaning his wife could not visit him regularly during his time in custody.[203]

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197. Ian Ayres & Joel Waldfogel, *A Market Test for Race Discrimination in Bail Setting*, 46 STAN. L. REV. 987, 992 (1994); *see also Don't I Need a Lawyer? Pretrial Justice and the Right to Counsel at First Judicial Bail Hearing*, NAT'L RIGHT TO COUNS. COMM. 29 (Mar. 2015) [hereinafter *Don't I Need a Lawyer?*], https://www.prisonpolicy.org/scans/theconstitutionproject/rtc_dinal_3.18.15.pdf [https://perma.cc/N7NP-5VNT] ("Further, in drug offenses, African American and Latino defendants are 96% and 150% more likely, respectively, to be incarcerated before trial than white defendants. In property crime arrests, African American and Latino defendants are 50% and 61% more likely, respectively, to remain in jail than their white counterparts.").

198. *Don't I Need a Lawyer?*, *supra* note 197 (describing the impact of uncounseled bail hearings for those that rely on public defender representation).

199. *See, e.g.*, Gideon*'s Broken Promise: America's Continuing Quest for Equal Justice*, AM. BAR ASS'N 23 (Dec. 2004) [hereinafter Gideon*'s Broken Promise*] ("[In Georgia] a defendant . . . was arrested for loitering and spent thirteen months in jail without seeing a lawyer or judge—or even being formally charged—before local civil rights advocates ultimately secured his release. In Mississippi, a woman arrested for stealing $200 from a casino slot machine spent eight months in jail because she was unable to afford bail. Eventually, without receiving any effective legal representation, the woman pled guilty to time served simply to get out of jail." (footnotes omitted)).

200. Rothgery v. Gillespie County, 554 U.S. 191, 196 (2008).

201. Colbert, *supra* note 18, at 350–51.

202. *Id.*

203. *Id.* at 351.

The type of hardship Rothgery experienced is not uncommon—even a few days of pretrial detention can have devastating impacts, including "increasing the likelihood that people will be found guilty, harming their housing stability and employment status and, ultimately, increasing the chances that they will be convicted on new charges in the future."[204] Pretrial detention leads to worse outcomes for individuals unable to secure their release versus those who can.[205]

2. Preparing for Trial

When defendants do not have the aid of counsel soon after they are charged, "witnesses may be lost, memories of witnesses may fade, and physical evidence useful to the defense may disappear."[206] While counsel must be appointed within a "reasonable time," the *Rothgery* Court declined to clarify what a "reasonable time" may be.[207] The *Coleman* Court provided specific reasons for finding that the preliminary hearing in that case was a critical stage, which are similarly applicable to initial appearances.[208] Except for the opportunity to cross-examine witnesses, counsel representing clients at a first appearance can generally

204. Léon Digard & Elizabeth Swavola, *Justice Denied: The Harmful and Lasting Effects of Pretrial Detention*, VERA INST. OF JUST. 4 (Apr. 2019), https://www.vera.org/downloads/publications/Justice-Denied-Evidence-Brief.pdf [https://perma.cc/WXW5-MH47].

205. *See id.* at 1 (summarizing the harms of pretrial detention).

206. JUSTICE DENIED, *supra* note 14, at 86. *But cf.* Digard & Swavola, *supra* note 204, at 5 ("Additionally, cases tend to move more slowly when people are released pretrial, which can result in diminished evidence and availability of witnesses." (footnote omitted)); s*ee also* Metzger & Hoeffel, *supra* note 67, at 409 ("The days immediately after an arrest can be the most critical to the development of a defense.").

207. Rothgery v. Gillespie County, 554 U.S. 191, 213 (2008).

208. Coleman v. Alabama, 399 U.S. 1, 9 (1970) ("First, the lawyer's skilled examination and cross-examination of witnesses may expose fatal weaknesses in the State's case that may lead the magistrate to refuse to bind the accused over. Second, in any event, the skilled interrogation of witnesses by an experienced lawyer can fashion a vital impeachment tool for use in cross-examination of the State's witnesses at the trial, or preserve testimony favorable to the accused of a witness who does not appear at the trial. Third, trained counsel can more effectively discover the case the State has against his client and make possible the preparation of a proper defense to meet that case at the trial. Fourth, counsel can also be influential at the preliminary hearing in making effective arguments for the accused on such matters as the necessity for an early psychiatric examination or bail.").

"expose fatal weaknesses in the state's case, learn about the allegations in order to prepare 'a proper defense,' and make 'effective arguments' for an early psychiatric examination or release."[209] Preparing an effective defense requires learning about the weaknesses in the state's case and discovering the evidence against a defendant as early in the proceedings as possible, which could lead to dismissal of charges altogether.[210] Further, decisions to release or detain and submit for a psychiatric exam may be some of the most important determinations for the case's trajectory. A psychiatric exam may determine whether a defendant is fit to stand trial[211] and a defendant who is detained is more likely to plead guilty to avoid more time in custody.[212] Even if a defendant does not plead guilty, if they are detained pretrial it hinders their attorney's ability to prepare an adequate defense.[213]

3. Building Trust

Trust is a crucial aspect of any attorney-client relationship.[214] It is essential to build trust with criminal defendants as

209. Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 775 (2017).

210. *E.g.*, Rothgery v. Gillespie County, 554 U.S. 191, 196–97 (2008) (describing how Rothgery's attorney discovered the inaccuracies in the prosecution's case and promptly assembled the appropriate evidence to have his charge dismissed).

211. *See, e.g.*, MINN. R. CRIM. P. 20.01(2) ("[If] [a] defendant is incompetent . . . [they] must not plead, be tried, or be sentenced . . . .").

212. *See* Digard & Swavola, *supra* note 204 ("[A]t least part of the effect of pretrial detention on conviction is due to a greater likelihood that those who are detained will plead guilty—regardless of the strength of their defense, or even if they did not commit the alleged offense.").

213. *See id.* at 5 ("Other explanations for the increased likelihood of conviction include the impact of detention in limiting people's ability to meet with their defense counsel and to assist in preparing a defense case.").

214. *See* Marcus T. Boccaccini et al., *Development and Effects of Client Trust in Criminal Defense Attorneys: Preliminary Examination of the Congruence Model of Trust Development*, 22 BEHAV. SCIS. & L. 197, 198 (2004) ("Although there has been little empirical research examining the practical importance of client trust in criminal defense attorneys, researchers and legal scholars have argued that trusting attorney-client relationships are likely to be beneficial for both attorneys and clients." (citations omitted)); Christopher M. Campbell & Kelsey S. Henderson, *Bridging the Gap Between Clients and Public Defenders: Introducing a Structured Shadow Method to Examine Attorney Communication*, 43 JUST. SYS. J. 26, 27 (2022) ("One key component of an effective attorney–client relationship . . . is communication . . . .").

early in the process as possible, especially given how wary indigent defendants may be to work with public defenders.[215] Speaking with a client face-to-face and explaining to them what is going to happen in the courtroom before the hearing occurs begins the process of building trust, which is particularly important when dealing with clients from communities that have a historic distrust of the criminal justice system and government in general.[216] This interaction not only informs the defendant about what will actually occur at the hearing but also lets them know that the attorney is there to help them.[217] Having that initial meeting and standing beside the defendant early in the process will help develop the attorney-client relationship moving forward.[218]

4. Interacting with Police

Police may take advantage of defendants who have not had the benefit of consulting with counsel by seeking to obtain incriminating statements before the accused has been advised otherwise.[219] In one prominent example, the Supreme Court upheld the admission of Tyrone Patterson's confession after he had been indicted but before he had the opportunity to consult with counsel.[220] Patterson had been questioned prior to his indictment,

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215. *E.g.*, Shannon Elkins, *Cross-Cultural Representation of Native Americans in the Judicial System*, CHALLENGER, Summer 2015, at 21 ("[T]here is a modern distrust directly tied to the criminal justice system that creates a barrier between a defense attorney and a Native American client."); *see* Campbell & Henderson, *supra* note 214, at 26 ("One of the biggest challenges is a lack of trust between the client and their attorney, often depicted in a trope by defendants as the 'public pretender.'" (citations omitted)); *see also* Gideon*'s Broken Promise*, *supra* note 199, at 15–20 (discussing the pitfalls of inadequate legal representation).

216. Telephone Interview with Shannon Elkins, Assistant Fed. Def., Dist. of Minn. (Mar. 15, 2023).

217. *Id.*

218. *Id.*

219. *See* Metzger & Hoeffel, *supra* note 67, at 409 ("Because a detained and indigent defendant is unlikely to enjoy the assistance of counsel, police may seek to capitalize on a defendant's isolation, hoping that a defendant who has not yet seen a judge or met with an attorney will be more willing to confess." (footnotes omitted)).

220. *See* Patterson v. Illinois, 487 U.S. 285, 300 (1988) (upholding Patterson's confession because he "was meticulously informed by authorities of his right to counsel, and of the consequences of any choice not to exercise that right" and still chose to speak to police).

denying involvement, and then after indictment, when Patterson learned which of his associates had also been indicted, Patterson asked why a certain individual had not been indicted because "he did everything."[221] Police then obtained a *Miranda* waiver from Patterson and proceeded to interrogate him immediately after obtaining the waiver and then later in an interview with the prosecutor.[222] The Court reasoned that Patterson "knowingly and intelligently" waived his Sixth Amendment right to counsel because he had been informed that he had a right to speak with an attorney and could have invoked that right at any time, but declined to do so.[223] If Patterson had had the benefit of counsel and not simply of *Miranda* warnings, his attorney would have almost certainly advised him to not speak to police without counsel present.[224] Considering Patterson's confession at trial as evidence, the jury found him guilty, and he was sentenced to twenty-four years in prison.[225] Since *Patterson*, police, armed with a *Miranda* waiver, are able to obtain incriminating statements from a criminal defendant after attachment of their Sixth Amendment right to counsel regardless of any actual contact the defendant may or may not have had with an attorney.[226]

5. Understanding the Courtroom

Defendants may find themselves at the mercy of the court during an initial appearance and compelled to make choices affecting the progression of their case. Although some courts reason that the presence of appointed counsel is not required at an initial appearance because the defendant may not lose "any legal

221. *Id.* at 288.

222. *Id.* at 288–89.

223. *Id.* at 290–91 ("Petitioner, however, at no time sought to exercise his right to have counsel present.").

224. *See id.* at 308 (Stevens, J., dissenting) ("The *Miranda* warnings do not, for example, inform the accused that a lawyer might examine the indictment for legal sufficiency before submitting his or her client to interrogation or that a lawyer is likely to be considerably more skillful at negotiating a plea bargain and that such negotiations may be most fruitful if initiated prior to any interrogation.").

225. *Id.* at 289.

226. *See id.* at 299–300 ("So long as the accused is made aware of the 'dangers and disadvantages of self-representation' during postindictment questioning, by use of the *Miranda* warnings, his waiver of his Sixth Amendment right to counsel at such questioning is 'knowing and intelligent.'").

right by not having an attorney present,"[227] defendants may be forced to make critical decisions without the aid of counsel.[228] While the entry of a guilty plea may qualify as a "critical stage,"[229] many defendants forgo their constitutional right and plead guilty at an initial appearance before receiving appointed counsel when they would otherwise plead not guilty.[230] Whether intentionally or not, judges may even encourage the entry of a guilty plea by telling defendants that they may remain in custody otherwise.[231] No matter how straightforward an initial appearance may seem,[232] it can hold many consequences for the uncounseled accused, including waiver of their rights, trauma

227. State v. Zaldivar-Proenza, 957 N.W.2d 93, 96 (Minn. 2021) (quoting State v. Zaldivar-Proenza, No. 76-CR-18-249, 2020 WL 290442, at *3 (Minn. Ct. App. Apr. 14, 2020)). *Contra* Pamela R. Metzger et al., *Ending Injustice: Solving the Initial Appearance Crisis*, DEASON CRIM. JUST. REFORM CTR. 10 (Sept. 2021), https://www.smu.edu/-/media/Site/Law/Deason-Center/Publications/Public-Defense/Initial-Appearance-Campaign/Ending-Injustice-Solving-The-Initial-Appearance-Crisis-FINAL.pdf [https://perma.cc/DL4F-FPFN] (describing the consequences of Zaldivar-Proenza's uncounseled initial appearance in court).

228. *See generally* Metzger & Hoeffel, *supra* note 67, at 410 ("A judge may interrogate an uncounseled defendant, demanding that he decide at initial appearance whether he wishes to waive his right to a speedy trial, preliminary hearing, or grand jury indictment. Before a defendant even has an attorney, a judge may set hearing or trial dates. Some defendants blurt out uncounseled confessions at their initial appearance or make other incriminating statements. Others waive their right to counsel entirely." (footnotes omitted)).

229. *See* Iowa v. Tovar, 541 U.S. 77, 80–81 (2004) ("The entry of a guilty plea, whether to a misdemeanor or a felony charge, ranks as a 'critical stage' at which the right to counsel adheres.").

230. *See* Metzger et al., *supra* note 227, at 18 (examining pleading guilty without a lawyer as a consequence of the initial appearance crisis).

231. *See id.*; *see also* Gideon*'s Broken Promise*, *supra* note 199, at 25 ("In Rhode Island, a witness filed a disciplinary complaint against a judge who not only offered a defendant a deal of six months in jail for pleading guilty on the spot without a lawyer, but told the defendant that by requesting a lawyer, the defendant likely would receive three years of jail time instead." (footnote omitted)).

232. *See, e.g.*, United States v. Portillo, 969 F.3d 144, 161 (5th Cir. 2020) ("Portillo's initial hearing did not pose the kind of difficult circumstances that 'require[] aid in coping with legal problems or assistance in meeting [a defendant's] adversary.'" (quoting McAfee v. Thaler, 630 F.3d 383, 391 (5th Cir. 2011))).

resulting from increased time in custody, damage to the defense's case, and more.[233]

### B. WHEN DOES GOING WITHOUT COUNSEL BECOME UNREASONABLE?

Besides holding once and for all that the right to counsel attaches at the initial appearance, or at least emphasizing that conclusion in prior case law,[234] *Rothgery*'s newest contribution to Sixth Amendment understanding was the reasonable time requirement.[235] Only one court has tried to devise a test to determine when a delay in appointing counsel may be unreasonable,[236] which means there could be district and circuit splits down the road. A few courts have felt free to say certain delays are not unreasonable, with little to no explanation and no attempt to set standards for deciphering the issue in future cases.[237]

While courts have mostly dismissed the problem up to this point, failure to define what is a "reasonable time" to appoint counsel can have significant repercussions for the accused in the form of inadequate representation leading up to trial. As the Supreme Court has recognized, "to deprive a person of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself."[238] In addition to the right to counsel, the Sixth Amendment also guarantees the defendant's right to a speedy trial,[239] which is typically considered to be the

233. *See generally* Metzger et al., *supra* note 227, at 14–22 (detailing the "[d]ire [c]onsequences for [d]elayed, [d]efective, and [u]ncounseled [i]nitial [a]ppearances").

234. Rothgery v. Gillespie County, 554 U.S. 191, 199 (2008) ("[W]e have twice held that the right to counsel attaches at the initial appearance before a judicial officer . . . ." (first citing Michigan v. Jackson, 475 U.S. 625, 629 (1986); and then citing Brewer v. Williams, 430 U.S. 387, 399 (1977))).

235. *Rothgery*, 554 U.S. at 212.

236. *See supra* Part II.A.3 (discussing *Farrow*).

237. *See supra* notes 148–52 and accompanying text (noting relevant court opinions).

238. Maine v. Moulton, 474 U.S. 159, 170 (1985).

239. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . .").

right to trial within one year.[240] However, most jurisdictions have enacted statutes shortening the length from charge to speedy trial, often substantially.[241] If a defendant is denied appointed counsel for two months,[242] after invoking their speedy trial right and having a trial date set at their initial appearance without representation,[243] there would be no way for an attorney to make up for those two months lost. One common cause of wrongful convictions is inadequate representation,[244] which could only be made worse by uncertain delays in appointment of counsel to defendants with impending trial dates.

Moreover, some defendants may be completely uninformed of their right to counsel even after that right has attached.[245] Without proper knowledge or understanding of their rights, defendants may assume their defense falls entirely on their own

240. *See* Doggett v. United States, 505 U.S. 647, 652 n.1 (1992) ("Depending on the nature of the charges, the lower courts have generally found postaccusation delay 'presumptively prejudicial' at least as it approaches one year." (citations omitted)); *see also* Barker v. Wingo, 407 U.S. 514, 530–32 (1972) (listing four factors to balance in considering whether a defendant's speedy trial right has been violated).

241. *E.g.*, 18 U.S.C. § 3161(c)(1), (h) (guaranteeing a defendant's right to be tried within seventy days of being charged, excluding excusable delays); MINN. R. CRIM. P. 11.09(b) ("A defendant must be tried as soon as possible after entry of a plea other than guilty. On demand of any party after entry of such plea, the trial must start within 60 days unless the court finds good cause for a later trial date."); VA. CODE ANN. § 19.2-243 (2022) (stating that a defendant has a right to trial within five months of preliminary hearing if held in custody and nine months if released pretrial); *see Speedy Trial Rights*, NAT'L CONF. OF STATE LEGISLATURES (Apr. 24, 2021), https://www.ncsl.org/civil-and-criminal-justice/speedy-trial-rights [https://perma.cc/6ZP5-PQJ4] ("Forty states and Washington, D.C., have statutory rights to a speedy trial, which vary from reciting the constitutional right to specifying the exact days or months that can occur before trial.").

242. *See, e.g.*, Hawkins v. Montague County, No. 7:10-CV-19-O, 2010 WL 4514641, at *12 (N.D. Tex. Nov. 1, 2010) (holding that a two-month delay in receiving appointed counsel was not constitutionally unreasonable), *reh'g granted*, 2011 WL 13229004 (N.D. Tex. Feb. 28, 2011).

243. *See* Metzger & Hoeffel, *supra* note 67, at 410 (noting that a judge may demand a defendant invoke or waive their speedy trial right or set a trial date at an initial appearance before receiving appointed counsel).

244. H. Patrick Furman, *Wrongful Convictions and the Accuracy of the Criminal Justice System*, COLO. LAW., Sept. 2003, at 11, 12 (listing "ineffective representation by defense counsel" as a common cause of wrongful convictions).

245. *See* Metzger et al., *supra* note 227, at 9 ("In a five-county study, less than half of the defendants were told about their right to counsel when a judge delivered the advice of rights." (footnote omitted)).

shoulders, unaware that they may need to request a public defender application, or sit in jail for upwards of ten days before being told there is an opportunity to apply for counsel.[246] During the interim, defendants will find themselves "faced with prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law"[247] by way of preparing their own defense, for which they are almost certainly wholly unprepared.[248]

With the substantial and extraordinarily consequential outcomes that can and do result from *Rothgery*'s current rule, the next Section examines pragmatic concerns.

### C. PRACTICAL CONSIDERATIONS OF EXPANDING THE RIGHT TO COUNSEL

Broadening the Sixth Amendment brings with it some potential complications. The most evident of these concerns is how a new rule would affect the already overburdened public defense systems across the country.[249] Although having attorneys present at every hearing would benefit defendants in theory, it is arguable whether a system could work in practice. To work effectively, attorneys would need sufficient time to speak with clients prior to the hearings, as meeting them during or just before the proceeding would likely not sufficiently aid the client.[250] And if appointed counsel appears with every indigent defendant as

246. *See id.* at 11 ("In some courthouses, . . . defendants must request the [public defender] application from their jailers. . . . In Beaufort County, South Carolina, the court makes defendants wait in jail for ten days before giving them a form to apply for appointed counsel." (footnote omitted)).

247. Maine v. Moulton, 474 U.S. 159, 170 (1985).

248. *See* Gideon v. Wainwright, 372 U.S. 335, 345 (1963) ("Without [counsel], though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence." (quoting Powell v. Alabama, 287 U.S. 45, 68–69 (1932)).

249. *See generally* Gideon*'s Broken Promise*, *supra* note 199, at 7–13 (examining the failures of indigent defense systems post-*Gideon*).

250. *Cf. id.* at 20 ("[Montana] clients are often detained pretrial for unnecessarily long periods of time because defense lawyers fail to argue adequately against detention."); Mrozinski & Buetow, *supra* note 70, at 20 ("The presence of counsel at arraignment had significant, positive impact for clients who were in custody and had an interim bond issued at the time of arraignment: the court set bond at the level recommended by defense counsel in 30% of cases and at a level lower than the interim bond in 59% of cases. . . . Public defenders spent an average of 50 minutes with each client in preparation for arraignment hearings and in the hearings themselves." (footnotes omitted)).

early as their first appearance, opponents could argue this disadvantages defendants in another way, mainly by making them wait longer to have that initial hearing. However, public defender offices across the country still manage to effectively represent clients at the first appearance every day. This Section will consider potential pushback and discuss how the system already works in practice.

1. Public Defender Funding[251]

It is no secret that public defenders are overworked and underpaid. Without adequate funding, systems for public defense and other appointed counsel are hard-pressed to operate as effectively as they could or as is necessary,[252] and adding another appearance to a public defender's docket could be seen as putting more weight on an overburdened system. But the proposed rule does not call for a radical expansion of practices that already exist. Rather, the proposal would require counsel at every appearance in the courtroom, mainly targeted to initial appearances while also including other pretrial hearings that some jurisdictions have deemed "not critical" within the meaning of the right to counsel. The public defender would still presumably have the same number of clients and hence their caseload would mostly stay the same. It would also almost certainly mean a reduction in the number of pretrial detainees any given appointed counsel

251. This Note will not dive into the issue of funding for public defense and other appointed counsel in depth but will consider how it intertwines with the proposed rule.

252. *See* Gideon*'s Broken Promise*, *supra* note 199, at 38 ("The lack of funding [for indigent defense services] impacts on virtually every aspect of indigent defense systems."); *see also* Carrie Dvorak Brennan, *The Public Defender System: A Comparative Assessment*, 25 IND. INT'L & COMPAR. L. REV. 237, 243 (2015) ("One of the largest obstacles in providing proper public defense for indigent defendants is funding." (footnote omitted)).

is working with,[253] which would also lead to fewer challenges in working with clients during the pretrial process.[254]

In fact, requiring attorneys to be present with indigent defendants at their initial hearing would very likely reduce costs in other facets of the criminal justice system.[255] However, there is still the issue that actual incarceration costs would be reduced likely without public defense systems receiving any additional

253. *See supra* note 13 and accompanying text (noting the success of law students in arguing for pretrial release); *see also* Lauren Gill, *The Positive Impact of Public Defenders*, ADVANCING PRETRIAL POL'Y & RSCH. (May 2022), https://advancingpretrial.org/story/the-positive-impact-of-public-defenders [https://perma.cc/23PB-PV88] ("Researchers found that people represented by a public defender were less likely to receive a financial release condition and less likely to be detained pretrial—all without increasing failure to appear rates at preliminary hearings.").

254. *See Pre-Trial Detention: Its Use and Misuse in Ten Countries*, INST. FOR CRIME & POL'Y RSCH. 3 (Nov. 2019), https://www.prisonstudies.org/sites/default/files/resources/downloads/pre-trial_detention_briefing_final.pdf [https://perma.cc/P7NT-6K86] ("[I]n prison it is harder to consult a lawyer, challenge detention or prepare for trial – and easier to be pressured into confessing or accepting plea deals."); *see also* Metzger et al., *supra* note 227, at 3 ("A person who is released from jail can maintain their employment and their family and community ties. They can also meet freely with their lawyer and help prepare a defense. The sooner a person is released, the faster they can begin to repair their life.").

255. *See* Colbert, *supra* note 13 (reporting that law students were able to secure pretrial release of defendants at bail hearings in two-thirds of cases); *Local Spending on Jails Tops $25 Billion in Latest Nationwide Data*, PEW RSCH. CTR. (Jan. 29, 2021), https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2021/01/local-spending-on-jails-tops-$25-billion-in-latest-nationwide-data [https://perma.cc/HM32-NYBE] ("The average annual cost of a year in jail was about $34,000 per person in 2017, an increase of 17% from 2007."); *Don't I Need a Lawyer?*, *supra* note 197, at 26–27 ("[A] study [on representing defendants at bail hearings] also found that early representation results in substantial cost savings to taxpayers. In 2000, the Department of Legislative Services of the Maryland General Assembly projected $4.5 million in savings for the city of Baltimore as a result of providing representation at bail hearings." (footnotes omitted)); JUSTICE DENIED, *supra* note 14, at 87 (discussing overall savings when indigent defendants are appointed counsel early in the process, specifically mentioning how Mississippi spent $12,000 to keep a fifty-year old woman in pretrial detention for eleven months for shoplifting $72 of items); Worden et al., *supra* note 193, at 56 (calculating that, on average across three counties, it would cost $152,950 to incarcerate one hundred arrestees pretrial prior to reform measures being put in place); *see also supra* notes 191–92 and accompanying text (noting the effectiveness of attorneys arguing for lower bail and resulting pretrial release rather than incarceration).

funds from the savings.[256] While public defender services are primarily funded through the state,[257] jails, where pretrial defendants are typically housed, are usually funded by local governments.[258] Thus, overall costs savings would require various actors within state and local governments to work together on funding allocation. But if different facets of government did come together, it could result in considerably less expenditures for local jails that accommodate pretrial detainees. And if not, the additional costs would likely be minimal, dependent on the size of the jurisdiction.[259] In any case, as support for public defense rises,[260] hopefully increased funding will follow.[261]

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256. Alissa Pollitz Worden et al., *A Patchwork of Policies: Justice, Due Process, and Public Defense Across American States*, 74 ALB. L. REV. 1423, 1442–43 (2011) (examining the lack of incentives for governments and politicians to advocate for more budgeting for public defense).

257. *See id.* at 1432 (stating that, as of 2005, twenty-four states fully funded public defender systems, six states funded over 75% of public defender services, another six states funded public defense at around 50%, and the remaining fourteen states provided less than 25% of funding).

258. *See* Christian Henrichson et al., *The Price of Jails: Measuring the Taxpayer Cost of Local Incarceration*, VERA INST. OF JUST. 5–6 (May 2015), https://www.vera.org/downloads/publications/price-of-jails.pdf [https://perma.cc/KZX9-WTGC] ("[C]ounty governments fund [] jail and community-based programs . . . .").

259. *See, e.g.*, Mrozinski & Buetow, *supra* note 70, at 20 ("On average . . . the court spent $52.79 per client to provide counsel at first appearance.").

260. *See, e.g.*, Sahil Kapur, *With Public Defenders as Judges, Biden Quietly Makes History on the Courts*, NBC NEWS (Oct. 18, 2021), https://www.nbcnews.com/politics/congress/new-public-defenders-joe-biden-quietly-makes-history-courts-n1281787 [https://perma.cc/F92U-KNLP] (detailing the unprecedented number of former public defenders nominated to federal judgeships under the Biden administration); *Americans' Views on Public Defenders and the Right to Counsel*, BELDEN RUSSONELLO STRATEGISTS 6 (March 2017), https://www.american.edu/spa/jpo/initiatives/right-to-counsel-nc/upload/americans-27-views_11-7-17.pdf [https://perma.cc/KZ2M-KCPV] (reporting that 66% of people favor taxpayer-funded representation for indigent defendants and 85% of people support creating standards for minimum levels of resources for public defense).

261. *Cf.* Samantha Hogan, *Gov. Mills Includes Additional $17 Million for Public Defenders and Contracted Lawyers in Budget Proposal*, CENT. ME. (Jan. 12, 2023), https://www.centralmaine.com/2023/01/12/gov-mills-includes-additional-17-million-for-public-defenders-and-contracted-lawyers-in-budget-proposal [https://perma.cc/4S85-4UGQ] ("Gov. Janet Mills is proposing $17 million in new funding for public defenders and court-appointed defense attorneys . . . . The additional money marks a significant shift in her administration's stance toward public defense and includes $3.6 million to hire 10 public

2. Initial Appearance Delays

Another pertinent issue is possibly causing further delay in initial appearance procedures. State laws already permit uncertain timelines for a defendant to appear for the first time,[262] which could be as long as seven days.[263] And even with laws in place, defendants may sit in jail for periods of time longer than what is allowable under the law due to error or neglect.[264] The longer a defendant remains in custody prior to their initial appearance, before they are informed of their rights, the more likely they are to make incriminating statements to police.[265] Requiring public defenders to meet with defendants for a sufficient amount of time before the initial appearance could cause delays in jurisdictions that do not already have these procedures in place. Nonetheless, the delays are minor compared to what could be at stake for the defendant,[266] and could likely be worked out in time, for instance by using models already in place for representation at the first appearance.[267]

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defenders."); Michael McCutcheon, *After More than Five Years of Litigation, South Carolina County Agrees to Dramatically Increase Funding for Indigent Defense*, DAVIS VANGUARD (Dec. 20, 2022), https://www.davisvanguard.org/2022/12/after-more-than-five-years-of-litigation-south-carolina-county-agrees-to-dramatically-increase-funding-for-indigent-defense [https://perma.cc/Y4XZ-U9VJ] ("The Lexington County Council last week voted to significantly increase the quality and quantity of public defense services . . . .").

262. *See* Metzger et al., *supra* note 227, at 6 ("Thirty-three states have no clear timeline for providing an incarcerated person with an initial appearance. They only require that an initial appearance occur 'without unnecessary delay,' 'as soon as practicable,' or 'within a reasonable time.'" (footnote omitted)).

263. *See* Metzger & Hoeffel, *supra* note 67, at 402 ("Louisiana excludes holidays and weekends. So, in Louisiana, a person arrested on Wednesday, December 19th, could be detained for seven days until Wednesday, December 26th." (footnotes omitted)).

264. *See* Metzger et al., *supra* note 227, at 8 ("Many defendants wait in jail without a court appearance long past the legal deadline, no matter what the law requires. Some of these over-detentions are isolated instances of malpractice or oversight. Others are simply accepted—albeit illegal—patterns of local practice." (footnote omitted)).

265. *See* Metzger & Hoeffel, *supra* note 67, at 400 (pointing out that defendants in custody where the right to counsel has not yet attached are "more susceptible to interrogation by the police").

266. *See supra* Part III.A (discussing the possible negative outcomes for indigent defendants who are unrepresented at their initial appearance).

267. *See* Mrozinski & Buetow, *supra* note 70, at 17–20 (detailing counsel at first appearance, or "CAFA," reform measures taken in New York and Michigan that have had net positive impacts).

One particular complication arises when appointed counsel needs to represent defendants in rural areas that may not be easy for them to get to for every first appearance. While the actual disparity in access to counsel between defendants in rural and urban areas is not clear,[268] there are challenges associated with representing defendants that are unique to more rural jurisdictions. For example, federal public defenders in the U.S. District for Minnesota, based in the Twin Cities, represent defendants from the Red Lake Indian Reservation, an exclusive federal criminal jurisdiction reservation, which is almost five hours from the Federal Defenders Office.[269] Although Minnesota federal defenders have a practice of representing clients at the first appearance, Red Lake defendants often have their first appearance at the local courthouse without the assistance of counsel.[270] It would not be feasible to send a federal defender to Red Lake every time one is needed.[271] However, with the advent of the Zoom-era since the beginning of the COVID-19 pandemic, a public defender's physical presence may not be entirely necessary to meet with and represent rural defendants. Although in-person representation is best, Zoom is the next best alternative when in-person is not possible.[272]

The bottom line is that although providing representation at every first appearance presents some additional challenges, there are workable solutions to the problems presented. Further, those challenges are overcome by the benefits that assistance of counsel at the first appearance affords criminal defendants.

3. Representation in Practice

Implementing new standards across public defender offices has already proven successful. In recent years, some states have moved towards providing counsel at first appearance in court

268. *See* Andrew Davies & Alyssa Clark, Gideon *in the Desert: An Empirical Study of Providing Counsel to Criminal Defendants in Rural Places*, 71 ME. L. REV. 245, 263 (2019) ("[W]e find no clear evidence here of wide disparities [for access to counsel for defendants in rural places] . . . . But we must also bear in mind that the metrics presented here, while illustrative, may not adequately capture access to counsel in its fullness.").

269. Telephone Interview with Shannon Elkins, *supra* note 216.

270. *Id.*

271. *Id.*

272. *Id.*

(CAFA).[273] A notable and successful example of this practice comes from Michigan.[274] Prior to the launch of its CAFA programs, only six percent of Michigan courts required counsel at the bail hearing and arraignment.[275] Implementing the CAFA program in three counties yielded encouraging results, including significant decline in rates of pretrial detention, reducing the number of court hearings overall, lowering bond amounts, increasing client satisfaction, and achieving better plea deals.[276] Results from Michigan should help assuage concerns regarding increased caseload and financial burden.

Other CAFA programs have proven similarly valuable, showing how initiatives can be effective across many different jurisdictions.[277] New York is another state that has particularly benefitted from CAFA. While New York implemented a CAFA program partially by court order rather than by choice, its success prompted the state legislature to increase funding for CAFA statewide.[278] A well-supported study found that the New York counties that introduced CAFA saw a decrease in levels of pretrial detention, lower bail amounts, and charge reductions or dismissals for misdemeanors, among other outcomes.[279] Overall, CAFA programs show not only that providing counsel at first appearances is possible, but that it can drastically improve outcomes for courts and clients alike.

Considering the harms of the current system and prospect of success for a way forward, the next Part advocates for a new understanding of the right to counsel, which would finally clarify its meaning and provide universal protections to all criminal defendants, no matter the charging jurisdiction.

## IV. PATHWAYS TO ACHIEVING BROADER PROTECTIONS

To deal with the disparities in defendants' access to counsel discussed in Part II and the practical consequences examined in

273. Worden et al., *supra* note 193, at i.

274. *See generally* Mrozinski & Buetow, *supra* note 70, at 19–20 (describing efforts in Michigan to provide counsel at first appearance).

275. *Id.* at 19.

276. *See id.* at 19–20 (reporting on results from Michigan CAFA programs).

277. *See id.* at 21–25 (describing preliminary efforts in California, Chicago, New Orleans, and Philadelphia).

278. *See id.* at 17.

279. *See* Worden et al., *supra* note 193, at 20 (disclosing whether CAFA hypotheses were supported by the study).

Part III, this Part proposes a new rule: every hearing in front of an officer of the court qualifies as a "critical stage" of the proceedings requiring the presence of appointed counsel. The rule does away with the attachment and the reasonable time issues while finally clarifying the precise definition of a "critical stage." Even more so than the "bright-line" *Rothgery* rule, it is clear and easy to follow.[280] It will also protect defendants where they may have been previously unprotected.[281]

The effectiveness of updating statutory language to secure counsel at a first appearance is uncertain.[282] And even if states successfully passed legislation expanding access to counsel, it would be a statutory solution rather than a constitutional one. Hence, if a defendant later raised the issue of not having counsel at every stage of the proceedings, the situation may be without a remedy unless the statute specifically provided for it. Similar concerns arise when representation is provided through public defender practice rather than constitutional mandate. Given these concerns, the most effective way to expand access to counsel as early as possible is through new authoritative rulings.[283] This Part will explore the constitutionality of the new rule and different ways to achieve implementation.

280. *Compare Leading Cases*, *supra* note 6, at 310 ("*Rothgery* is doctrinally significant because it clearly and definitively settles the threshold issue in Sixth Amendment right-to-counsel jurisprudence."), *with supra* Part II.A (pointing out differing court decisions handed down since *Rothgery*).

281. *See, e.g.*, United States v. Mendoza-Cecelia, 963 F.2d 1467, 1473–74 (11th Cir. 1992) (refusing to suppress a confession at an initial appearance because "[t]he initial appearance is largely administrative" and not a critical stage of the proceedings), *abrogated on other grounds*, Coleman v. Singletary, 30 F.3d 1420 (11th Cir. 1994).

282. *See supra* notes 174–76 and accompanying text (discussing the similarity of language between some state statutes producing varying outcomes in representation). *But cf. supra* note 168 and accompanying text (describing the change in Maryland law that led to representation in the court at initial appearances).

283. *See, e.g.*, Rothgery v. Gillespie County, 554 U.S. 191, 212 (2008) (announcing a new right to counsel rule that applies across all jurisdictions).

### A. THE CONSTITUTIONAL ARGUMENT

The modern right to counsel has only been a topic of Supreme Court decisions in the last century.[284] The Sixth Amendment reads that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the [a]ssistance of [c]ounsel for his defence."[285] The text makes no distinction between the attachment and actual activation of the right, only stating "the accused *shall enjoy the right*."[286] The *Rothgery* dissent correctly points out that the right only applies to "criminal prosecutions."[287] Looking at the historical meaning of the phrase according to Blackstone, Justice Thomas concluded that the original meaning of the "criminal prosecution" is best summarized as "'instituting a criminal suit' by filing a formal charging document—an indictment, presentment, or information—upon which the defendant was to be tried in a court with power to punish the alleged offense,"[288] which, he asserts, is how we should continue to understand the right to counsel today.[289]

With that definition, coupled with historical case law,[290] Justice Thomas concluded that Rothgery's article 15.17 hearing

284. *See supra* Part I (discussing the evolution of the right to counsel beginning with *Powell*).

285. U.S. CONST. amend. VI.

286. *Id.* (emphasis added).

287. *Rothgery*, 554 U.S. at 219 (Thomas, J., dissenting) ("I think it appropriate to examine what a 'criminal prosecutio[n]' would have been understood to entail by those who adopted the Sixth Amendment.").

288. *Id.* at 221 (citation omitted).

289. *Id.* at 223 ("The foregoing historical summary is strong evidence that the term 'criminal prosecutio[n]' in the Sixth Amendment refers to the commencement of a criminal suit by filing formal charges in a court . . . . And on this understanding of the Sixth Amendment, it is clear that [Rothgery's] initial appearance before the magistrate did not commence a 'criminal prosecutio[n].'"); *see also* Andrea Roth, *The Lost Right to Jury Trial in "All" Criminal Prosecutions*, 72 DUKE L.J. 599, 605 (2022) ("[T]he modern ordinary and legal usage of 'crime' and 'criminal prosecution' includes formally charged offenses in criminal court that are prosecuted by the government and end in a criminal conviction and punishment."). *Contra Criminal Prosecution*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining criminal prosecution as "a criminal proceeding in which an accused person is tried").

290. *Rothgery,* 554 U.S. at 222–23 (Thomas, J., dissenting) (recalling the nineteenth century Supreme Court decisions in *Counselman v. Hitchcock* and *Virginia v. Paul* that support the assertion that a "criminal prosecution" does not commence before the filing of formal charges in a court).

was not protected under the Sixth Amendment as a preindictment proceeding.[291] However, similar to our evolving understanding of the right to counsel,[292] it would be appropriate to consider what a "criminal prosecution" may actually mean today. The *Rothgery* Court confirmed that a prosecutor's involvement in the proceeding is not determinative of whether the stage qualifies as a "criminal prosecution."[293] The Fourteenth Amendment guarantees that no "[s]tate [shall] deprive any person of life, *liberty*, or property, without due process of law."[294] Nonetheless, a criminal defendant may be deprived of their liberty by way of pretrial detention at their initial appearance.[295] While it has never been held that due process requires the presence of an attorney in every stage of a criminal proceeding, the Court has previously expressed congruent sentiment.

In *Gideon*, the Court noted that "certain fundamental rights, safeguarded by the first eight amendments against federal action, were also safeguarded against state action by the due process of law clause of the Fourteenth Amendment, and among them the fundamental right of the accused to the aid of counsel in a criminal prosecution."[296] With the aid of counsel being a "fundamental right," it is imperative to protect defendants appearing against *any* federal or state action, as opposed to limiting the scope of protection according to antiquated definitions of what the Framers may have meant by inserting the phrase "criminal prosecution" or miscellaneous court-imposed definitions of what constitutes a "critical stage." Defendants may find themselves deprived of their liberty even at a hearing that may seem to have "an insubstantial effect on the defendant's trial

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291. *Id.* at 223.

292. *See supra* note 23 and accompanying text (examining the original meaning of the Sixth Amendment right to counsel).

293. *Rothgery*, 554 U.S. at 206 ("Under [the Court of Appeals] standard of prosecutorial awareness, attachment depends not on whether a first appearance has begun adversary judicial proceedings, but on whether the prosecutor had a hand in starting it. That standard is wrong.").

294. U.S. CONST. amend. XIV (emphasis added).

295. *See supra* Part III.A (discussing the consequences of bail and pretrial detention).

296. Gideon v. Wainwright, 372 U.S. 335, 343 (1963) (quoting Grosjean v. Am. Press Co., 297 U.S. 233, 243–44 (1936)).

rights."[297] A defendant's liberty is at risk anytime they are compelled to appear before the court,[298] whether by nature of the court proceeding or a defendant's misunderstanding of what may be best for their legal case. Thus, no defendant should stand up in a courtroom without an attorney standing by their side.

Moreover, the "attachment" principle is a prudential rather than constitutional requirement. Announcing the rule of attachment in *Kirby*, the Court merely noted that it had been "firmly established" in prior cases, none of which specifically discuss attachment.[299] When the Court elevated *Kirby*'s holding to that of a majority opinion in *Gouveia*, it took a similar approach by repeating the statement of the *Kirby* attachment principle and stating that the principle "has been confirmed by this Court in cases subsequent to *Kirby*."[300] The Court claimed both cases utilize the rule of attachment, but did not actually clarify where the rule originates. As a court-created doctrine, the attachment principle can be discarded as easily as it was implemented. Requiring the presence of counsel at all court proceedings aligns with the idea that the "'core purpose' of the counsel guarantee is to assure aid at trial"[301] because whatever is said or done at a hearing could affect the case outcome. And, without attachment, the

297. *Rothgery*, 554 U.S. at 216 (Alito, J., concurring) (citing Gerstein v. Pugh, 420 U.S. 103, 122–23 (1975)); *see, e.g.*, Fenner v. State, 846 A.2d 1020, 1024 (Md. 2004) (recounting the defendant's uncounseled statement at his initial appearance that he did "not deny[] what happened"); United States v. Mendoza-Cecelia, 963 F.2d 1467, 1473–74 (11th Cir. 1992) (refusing to suppress a confession at an initial appearance because "[t]he initial appearance is largely administrative" and not a critical stage of the proceedings), *abrogated on other grounds*, Coleman v. Singletary, 30 F.3d 1420 (11th Cir. 1994).

298. *See generally supra* Part III.A.

299. *See* Kirby v. Illinois, 406 U.S. 682, 688 (1972) ("In a line of constitutional cases in this Court stemming back to the Court's landmark opinion in Powell v. Alabama, . . . it has been firmly established that a person's Sixth and Fourteenth Amendment right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against him." (citation omitted)); *cf.* Gilbert v. California, 388 U.S. 263, 278–79 (1967) (Black, J., concurring) ("[N]othing has been said which justifies linking the right to counsel only to the protection of other Sixth Amendment rights. And there is nothing in the Constitution to justify considering the right to counsel as a second-class, subsidiary right which attaches only when the Court deems other specific rights in jeopardy.").

300. United States v. Gouveia, 467 U.S. 180, 188 (1984).

301. *Id.* at 188–89 (quoting United States v. Ash, 413 U.S. 300, 309 (1973)).

need for a "reasonable time" to appoint counsel following attachment, per *Rothgery*, disappears as well.[302]

### B. IMPLEMENTING THE RULE AT THE FEDERAL LEVEL

Achieving a nationwide change in Sixth Amendment interpretation presents an uphill battle. The Court has said previously that, "[s]ince the ready ability to obtain uncoerced confessions is not an evil but an unmitigated good, society would be the loser."[303] While an individual appearing before the court may be presumed innocent until proven guilty, that does not change preconceived notions of guilt.[304] Hence, the Court may not be poised to broaden protections if it increases the possibility that the government will be inhibited in its prosecution. For example, the Court ordinarily utilizes a balancing approach to determine whether the Fourth Amendment exclusionary rule should apply to a particular case,[305] placing substantial weight on the possibility "that some guilty defendants may go free or receive reduced sentences as a result of favorable plea bargains."[306]

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302. *See Rothgery*, 554 U.S. at 212 ("[C]ounsel must be appointed within a reasonable time *after attachment* . . . ." (emphasis added)).

303. McNeil v. Wisconsin, 501 U.S. 171, 181 (1991); *see also* Arnold H. Loewy, *Why the Supreme Court Will Not Take Pretrial Right to Counsel Seriously*, 45 TEX. TECH L. REV. 267, 275 (2012) ("[T]he Court's failure to take the pretrial right to counsel seriously is predicated on two premises: (1) that as a matter of policy, 'voluntary' confessions are an unmitigated good and (2) that counsel can do no more for an indicted defendant than a mere arrestee." (footnote omitted)).

304. *Cf.* Hamish Stewart, *The Right to Be Presumed Innocent*, 8 CRIM L. & PHIL. 407, 415 (2014) ("[T]he claim that participants in the criminal justice system must subjectively believe in the accused's innocence . . . is false in practice and wrong in principle."); *see also* Metzger et al., *supra* note 227, at 18 (noting situations during an initial appearance where a judge may encourage a defendant to plead guilty, without proper knowledge of their case).

305. *See* United States v. Leon, 468 U.S. 897, 906–08 (1984) ("Whether the exclusionary sanction is appropriately imposed in a particular case . . . must be resolved by weighing the costs and benefits of preventing the use in the prosecution's case in chief . . . . Indiscriminate application of the exclusionary rule, therefore, may well 'generat[e] disrespect for the law and administration of justice.'" (quoting Stone v. Powell, 428 U.S. 465, 491 (1976)).

306. *Leon*, 468 U.S. at 907; *see also* Hudson v. Michigan, 547 U.S. 586, 591 (2006) ("Suppression of evidence, however, has always been our last resort, not our first impulse. The exclusionary rule generates 'substantial social costs,' . . . which sometimes include setting the guilty free and the dangerous at large." (quoting *Leon*, 468 U.S. at 907)); Rakas v. Illinois, 439 U.S. 128, 137 (1978)

Whether consciously or unconsciously, the same mindset could extend here—why provide counsel where previous courts have deemed it unnecessary when it could lead to undeserved freedom for the guilty? Considering the caution with which federal courts tend to treat the right to counsel[307] and the attitude of the current Court toward criminal punishment,[308] a new federal constitutional rule is likely not on the horizon. An attempt to litigate at the highest level could even result in a decision weakening the right to counsel rather than expanding it.[309]

### C. IMPLEMENTING THE RULE AT THE STATE LEVEL

Given the challenges of arguing for a new federal rule, coupled with concerns about the effectiveness of right to counsel statutes,[310] the most realistic way to achieve favorable decisions will likely be through state high courts. Many state constitutions use language that is acutely similar to the federal Constitution in defining the right to counsel.[311] Thus, states could make a more protective ruling under their own constitutional law[312] by citing both relevant federal and state right to counsel cases without serious concern that it will be overturned by a higher federal

("Each time the exclusionary rule is applied it exacts a substantial social cost for the vindication of Fourth Amendment rights.").

307. *See supra* Part II.A (discussing post-*Rothgery* lower court rulings).

308. *See generally* Nicola Lacey & Hanna Pickard, *To Blame or to Forgive? Reconciling Punishment and Forgiveness in Criminal Justice*, 35 OXFORD J. LEGAL STUD. 665, 666 (2015) ("Contemporary penal philosophy has witnessed a resurgence of the retributive tradition, in the modern form usually known as the 'just deserts' or 'justice' model. On this model, punishment is hard treatment visited on the offender in response to, by reason of, and in proportion to his or her 'desert' or blameworthiness.").

309. *See, e.g.*, *supra* Part I.B.3 (summarizing Justice Thomas' *Rothgery* dissent, which suggests criminal defendants have fewer rights than are currently afforded to them).

310. *See supra* Part II.B (analyzing state laws on the right to counsel); *see supra* note 282 (scrutinizing the usefulness of state laws).

311. *Compare* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."), *with* CAL. CONST. art. 1, § 15 ("The defendant in a criminal cause has the right . . . to have the assistance of counsel for the defendant's defense . . . ."), *and* MINN. CONST. art. 1, § 6 ("In all criminal prosecutions the accused shall enjoy the right . . . to have the assistance of counsel in his defense.").

312. *See, e.g.*, *supra* note 138 (noting state high court decisions that decided right to counsel questions under state law).

court.[313] This Section identifies three states from three different regions of the country that could be more receptive to an argument that every court hearing qualifies as a critical stage, for varying reasons.

1. Louisiana

While Louisiana generally provides a public defender at the initial appearance, representation is not guaranteed in every state courtroom.[314] Louisiana's constitution is worded more favorably than the federal Constitution as it guarantees "the assistance of counsel" "[a]t each stage of the proceedings."[315] However, the Louisiana Supreme Court has previously used federal law extensively in right to counsel analysis.[316] Further, there is already a positive decision from a Louisiana federal court requiring counsel to appear with defendants at their bail hearing[317] and, thus far, there has been no state court decision interpreting whether the initial bail hearing qualifies as a "critical stage." While several state courts of appeals decisions have found that the arraignment, which typically occurs after the bail hearing,[318] is not a critical stage,[319] the Louisiana Supreme Court has not

313. There is a risk a state decision could be overturned by the U.S. Supreme Court if it does not include a "plain statement" confirming it does not rely on federal law. *See* Michigan v. Long, 463 U.S. 1032, 1041 (1983) ("If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached.").

314. *See supra* note 169 (listing Louisiana as a "majority hybrid" state).

315. LA. CONST. art. 1, § 13.

316. *See generally* State v. Carter, 664 So.2d 367, 371–74 (La. 1995) (examining Sixth Amendment decisions to analyze a right to counsel question).

317. *See supra* notes 127–28 and accompanying text (describing *Caliste v. Cantrell*).

318. *See Bail Bonds*, ORLEANS PARISH DIST. ATT'Y, https://orleansda.com/assistance/bail-bonds [https://perma.cc/L6V5-762U] ("Bond amounts generally are set by a magistrate judge or commissioner at an initial court appearance within 72 hours of arrest."); *e.g.*, State v. Tarver, 846 So.2d 851, 857 (La. Ct. App. 2003) (noting that the defendant had his bond hearing on August 29, 2001, and his arraignment on November 5, 2001).

319. *See Tarver*, 846 So.2d at 858 (finding that the "arraignment was not a critical stage requiring the presence of counsel" even though the right to counsel had attached); State v. Ceasar, 224 So.3d 1226, 1232 (La. Ct. App. 2017) (citing *Tarver* to hold that the arraignment is not a critical stage); State v. Ford, 217

weighed in. Without extensive "critical stage" case law, particularly as it relates to the early stages of criminal proceedings, Louisiana may be nicely poised for a positive decision extending the right to counsel to cover all court hearings, or at the very least the initial bail hearing.

2. Oregon

Oregon is a majority-hybrid state, meaning that defendants in most, but not all, state courtrooms will be represented by counsel at their first appearance.[320] The right to counsel in Oregon is somewhat similar to the federal right, stating a defendant has the right "to be heard by himself and counsel" "[i]n all criminal prosecutions."[321] Oregon law provides for the appointment of counsel at arraignment,[322] which is typically the first appearance in court,[323] but that is not the practice in every jurisdiction. Last year, Oregon reformed its bail system with the stated goal of "improv[ing] community safety," making it easier for some individuals to be released without bail and more difficult for others.[324] Finding a state constitutional right to counsel at the arraignment would likely provide a more advantageous solution than the current statutory scheme.

Oregon court rulings on the right to counsel are encouraging and indicate that Oregon may be open to finding that there is a constitutional right to counsel in all state court proceedings. The Supreme Court of Oregon issued a promising post-*Rothgery* opinion, holding that a defendant's appearance before a grand jury is a critical stage of the prosecution under state law.[325] In

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So.3d 634, 641 (La. Ct. App. 2017) ("[T]he habitual offender arraignment in the present case should not be considered a critical stage at which counsel was required because no evidence was admitted or a guilty plea entered that could have undermined [d]efendant's constitutional rights.").

320. *See supra* note 169 (listing the majority-hybrid states).

321. OR. CONST. art. 1, § 11.

322. OR. REV. STAT. § 135.040 (2022).

323. OR. REV. STAT. § 135.010 (2022) (stating that arraignments must be held within thirty-six hours after arrest, excluding holidays and weekends).

324. *See* Barney Lerten, *Oregon to End Bail-Based Pretrial Release System Friday, Focus Instead on Arrestee's Danger to Community*, KTVZ (June 29, 2022), https://ktvz.com/news/crime-courts/2022/06/29/oregon-to-end-bail-based-pretrial-release-system-friday-focus-instead-on-arrestees-danger-to-community [https://perma.cc/G4XX-B3DV].

325. State v. Gray, 515 P.3d 348, 357 (Or. 2022).

*State v. Davis*, the Supreme Court of Oregon extensively examined the history of the right to counsel, both federally and in Oregon.[326] While the high court declined to extend the state constitutional right to counsel to apply to all police investigations, it suggested that the right to counsel may attach as early as the moment of arrest.[327] The court also observed that the federal right to counsel was not originally understood to include assistance pre-arraignment, but emphasized the differences between criminal prosecutions then and now by pointing out that "before the Civil War, organized police forces as we know them did not exist, professional prosecutors were rare, criminal investigations of the sort that are familiar today did not occur, and the evidence against a criminal defendant ordinarily was marshalled during the trial itself."[328] Further, an Oregon intermediate court held that an arraignment is a critical stage, regardless of whether a plea is entered, because the defendant must provide their name and hence "acknowledg[e] that one is truly named in a charging instrument," marking the point at which "a defendant 'must take steps or make a choice which is likely to have a substantial effect on the prosecution against him.'"[329]

3. Rhode Island

The constitutional right to counsel in Rhode Island is phrased almost identically to the Sixth Amendment.[330] Defendants are more likely to be represented at their initial appearance than not, but representation is not universal practice.[331] Unlike Louisiana and Oregon, Rhode Island has little case law on right to counsel issues. *Rothgery* has been cited in only two Rhode Island cases and has not been considered at length,[332] while other

326. *See* State v. Davis, 256 P.3d 1075, 1087–95 (Or. 2011).

327. *See id.* at 1095.

328. *Id.* at 1091.

329. State v. Brooks, 456 P.3d 665, 669 (Or. Ct. App. 2019) (quoting State v. Miller, 458 P.2d 1017, 1019 (Or. 1969)), *vacated on other grounds*, 486 P.3d 794 (Or. 2021), *remanded to* 505 P.3d 1046 (Or. Ct. App. 2022).

330. *See* R.I. CONST. art. 1, § 10 ("In all criminal prosecutions, accused persons shall enjoy the right to . . . have the assistance of counsel in their defense . . . .").

331. *See supra* note 169 (listing Rhode Island as a majority-hybrid state).

332. *See* State v. Andrade, 209 A.3d 1185, 1192–93 (R.I. 2019) (holding the Sixth Amendment right to counsel had not yet attached during the defendant's preindictment interrogation); State v. Oliveira, 961 A.2d 299, 310 (R.I. 2008)

decisions addressing the right to counsel have not included substantial or significant "critical stage" analysis. Without much judicial thought given to the topic, Rhode Island could be open to a positive right to counsel ruling. The limited prior decisions have tended to synonymously examine the federal and state constitutional right to counsel,[333] but that does not foreclose the possibility of a decision based on state law alone.

This Part showed not only that an expansion of the right to counsel is supported by the Constitution and similarly worded state constitutions, but also that there is potential for successful litigation. Although the federal judiciary may not be receptive to expanding the right, at least some states are more amendable. Achieving broader protections is more than possible.

(citing *Rothgery* for the proposition that the right to counsel attaches at the initial appearance).

333. *See, e.g.*, State v. Austin, 462 A.2d 359, 366 (R.I. 1983) (referencing both the Sixth Amendment and Rhode Island Constitution when considering the right to counsel); State v. Eddy, 68 A.3d 1089, 1099 (R.I. 2013) (same).

## CONCLUSION

"It is vain to give the accused a day in court, with no opportunity to prepare for it, or to guarantee him counsel without giving the latter any opportunity to acquaint himself with the facts or law of the case."[334]

*Rothgery* did not go nearly far enough in expanding the Sixth Amendment right to counsel. If our judiciary is to ensure adequate protections for all criminal defendants, it must go further. A Supreme Court ruling would by far be the most effective way to ensure a more level playing field, but that ruling could be far off. In the meantime, lower courts, particularly state courts, should reevaluate their interpretation of the Sixth Amendment and related state constitutional provisions. In that way, courts can begin to recognize the importance of appointed counsel while the issue remains on the sidelines for the Supreme Court. And hopefully, the right to counsel promised in *Gideon* can one day become a reality in every courtroom.[335]

334. Powell v. Alabama, 287 U.S. 45, 59 (1932) (quoting Commonwealth v. O'Keefe, 148 A. 73, 74 (Pa. 1929)).

335. *See* Colbert, *supra* note 18, at 428 ("[There is] 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.").