

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 WALTER A. ROTHGERY, :

4 Petitioner :

5 v. : No. 07-440

6 GILLESPIE COUNTY, TEXAS. :

7 - - - - - x

8 Washington, D.C.

9 Monday, March 17, 2008

10

11 The above-entitled matter came on for oral  
12 argument before the Supreme Court of the United States  
13 at 11:06 a.m.

14 APPEARANCES:

15 DANIELLE SPINELLI, ESQ., Washington, D.C.; on behalf  
16 of the Petitioner.

17 GREGORY S. COLEMAN, ESQ., Austin, Tex.; on behalf of  
18 the Respondent.

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P R O C E E D I N G S

(11:06 a.m.)

CHIEF JUSTICE ROBERTS: We will now hear argument in Case 07-440, Rothgery v. Gillespie County, Texas.

Ms. Spinelli.

ORAL ARGUMENT OF DANIELLE SPINELLI

ON BEHALF OF THE PETITIONER

MS. SPINELLI: Mr. Chief Justice, and may it please the Court:

In Brewer and Jackson, this Court held that an initial appearance before a magistrate like the one here marked the commencement of a criminal prosecution under the Sixth Amendment. This case demonstrates why that holding makes eminent sense.

Rothgery was arrested on the erroneous belief that he was a felon in possession of a firearm. As required by the Texas Code, he was brought before a magistrate, who informed him of the felony accusation against him and required him to post bail or remain in jail to ensure that he answered that accusation.

At that point, Rothgery acquired specific rights under Texas law as the accused in a felony case, including the right to have the prosecution against him dismissed if an indictment or information were not filed

1 within a set period and the right to contest the  
2 accusation against him prior to indictment in an  
3 examining trial before the magistrate. At that point,  
4 Rothgery was no longer merely a suspect, but an accused  
5 within the meaning of the Sixth Amendment.

6 CHIEF JUSTICE ROBERTS: Counsel, how can  
7 this -- how can this be part of an adversary proceeding  
8 when there's no other adversary on the field? The  
9 prosecution's not present. They don't even know  
10 anything about this.

11 MS. SPINELLI: Mr. Chief Justice, this Court  
12 held in Jackson that the question whether a particular  
13 --

14 CHIEF JUSTICE ROBERTS: Well, in Jackson of  
15 course the charges had already been filed by the  
16 prosecutor, so there was an adversary on the field.

17 MS. SPINELLI: What I was going to say was  
18 that there is a clear distinction which is set forth in  
19 this Court's opinion in Jackson between the question  
20 whether a particular proceeding initiates a criminal  
21 prosecution and whether that proceeding itself is  
22 adversarial in the sense that it requires the presence  
23 of defense counsel.

24 And, as to the first question, whether a  
25 particular proceeding initiates a criminal prosecution,

1 this Court's cases have not held that prosecutorial  
2 involvement is a relevant factor, and that --

3 CHIEF JUSTICE ROBERTS: Well, I suppose -- I  
4 suppose you could you have an adversarial proceeding  
5 without the prosecutor present, but it would depend on  
6 the nature of the proceeding. And here the magistrate  
7 simply advises the individual of the charges against  
8 him, repeats the Miranda warnings, advises him that he  
9 can have counsel if bail is denied or if he can't make  
10 bail. What about that is adversarial?

11 MS. SPINELLI: That's correct, Mr. Chief  
12 Justice, and we don't contend that it is adversarial.

13 In Jackson, this Court made clear that a  
14 proceeding need not itself be adversarial in the sense  
15 that would require defense counsel to be present to  
16 counter the adversary presentation of the prosecutor in  
17 order for that proceeding to initiate a criminal  
18 prosecution. Rather, it held that the initial  
19 appearance itself, regardless of those other factors,  
20 marked the commencement of a prosecution.

21 And it's worth noting that in Jackson,  
22 substantially the same arguments that Respondent raises  
23 here were made by the State there. The State there  
24 contended this initial appearance is merely an  
25 administrative, ministerial proceeding.

1 CHIEF JUSTICE ROBERTS: Well, I guess I'll  
2 get back to the point I raised earlier, that in Jackson  
3 charges had already been filed by a prosecutor. The  
4 prosecutor was aware of this proceeding. I think that's  
5 a fairly significant distinction.

6 MS. SPINELLI: Well, the Court in Jackson  
7 placed no weight on that distinction. That wasn't  
8 something that was mentioned in Jackson. And what  
9 happened in Jackson was that warrants were obtained, the  
10 defendants were arrested, and they were brought before a  
11 magistrate for this initial proceeding. There is no  
12 indication that the prosecutor was present at that  
13 initial proceeding. The Jackson Court -- the Jackson  
14 Court put no weight on that factor. And none of this  
15 Court's cases have ever stated that there is a  
16 requirement that a prosecutor be involved. And that  
17 makes sense, because the consequences of the initial  
18 appearance for the defendant are precisely the same  
19 whether or not a prosecutor is involved.

20 JUSTICE KENNEDY: But what we're looking for  
21 here, at least one of the things we might look for in  
22 this case, is a specific rule to give to the States so  
23 the State knows when counsel has to be appointed.

24 In this case suppose the magistrate, the man  
25 behind the little window, said: We're going to give you

1 a ticket; keep in touch with us; don't change your  
2 address until you notify us; you're free on your own  
3 recognizance. Would counsel have been required there?

4 MS. SPINELLI: Had there been no way in  
5 which the defendant was bound to reappear and answer the  
6 charges, then we would not have the situation that we  
7 have, and it would seem less likely that that would  
8 initiate a criminal proceeding. The factors that we  
9 have here that make it clear that a prosecution was  
10 initiated, just as it was in Jackson on identical facts  
11 --

12 JUSTICE GINSBURG: Ms. Spinelli, there's  
13 something confusing about your presentation on this,  
14 because you say that at this initial appearance that's  
15 called a magistration, you are not contending that there  
16 was a right to counsel at that very proceeding.

17 MS. SPINELLI: That's correct, Justice  
18 Ginsburg.

19 JUSTICE GINSBURG: So when, at what point in  
20 time, did this right to counsel attach? If it didn't  
21 attach during that magistration proceeding, when did it  
22 attach?

23 MS. SPINELLI: Well, first I should say I  
24 believe that that question goes to Respondent's  
25 alternative argument for affirmance. The only question

1 that was addressed by the Fifth Circuit and the only  
2 question presented in the petition was the question  
3 whether a criminal prosecution commenced at Rothgery's  
4 magistration. And we are certainly not asking this  
5 Court to direct the entry of judgment in our favor, but  
6 merely --

7 JUSTICE GINSBURG: But you are taking the  
8 position that there was a right to counsel that attached  
9 in this case. And I'm asking you at what point in time  
10 that right attached.

11 MS. SPINELLI: We believe that -- well, this  
12 Court's cases have made clear that the right to counsel  
13 attaches at the time a criminal prosecution commences.  
14 Now, the question whether counsel must then be appointed  
15 immediately upon attachment is a separate question.

16 JUSTICE ALITO: What does "attachment" mean?

17 MS. SPINELLI: What "attachment" means under  
18 this Court's cases is that since a criminal prosecution  
19 has now begun, the explicit guarantees of the Sixth  
20 Amendment are applicable, the State no longer -- the  
21 State cannot interfere after that point with the  
22 attorney-client relationship. At that point the  
23 defendant has the right to counsel to serve as an  
24 intermediary --

25 JUSTICE ALITO: Well if Mr. Roth -- if your



1 client had shown up at the magistration with an  
2 attorney, could the State of Texas have said, no, your  
3 attorney may not be present during the magistration?

4 MS. SPINELLI: No, I don't believe so,  
5 because --

6 JUSTICE ALITO: Well, does that mean that  
7 the right attached prior to the magistration?

8 MS. SPINELLI: We believe that the right  
9 attached at the magistration.

10 JUSTICE ALITO: At the beginning, at the  
11 end?

12 MS. SPINELLI: Upon the magistration.

13 JUSTICE ALITO: What does that mean?

14 MS. SPINELLI: So perhaps -- so at the  
15 end -- I suppose I would say at the end, once --

16 JUSTICE ALITO: Then why could Texas have  
17 said your attorney -- why could Texas have not said,  
18 although you came here with an attorney, your attorney  
19 may not be present because you don't have a Sixth  
20 Amendment right to counsel at the magistration? Your  
21 right hasn't attached yet. It won't attach until the  
22 end.

23 MS. SPINELLI: Well, I believe that it would  
24 attach at the time that the magistrate informed the  
25 defendant of the accusation against him, at which point

1 he became a defendant in a criminal case and his right  
2 to counsel attached.

3 Now, to get back to Justice Ginsburg's  
4 question, whether -- whether counsel is required to be  
5 appointed immediately upon attachment is a separate  
6 issue, which is the subject of Respondent's alternative  
7 ground for affirmance. We are merely asking this Court  
8 to resolve the threshold question, which is the  
9 threshold question in every right-to-counsel case: Did a  
10 criminal prosecution commence at Rothgery's  
11 magistration?

12 CHIEF JUSTICE ROBERTS: The two are kind of  
13 related. If in fact there's not a right to counsel upon  
14 the magistration, but, as you said earlier to Justice  
15 Alito, it attaches at the end of the magistration, it  
16 seems to me like you're asking for counsel to be an  
17 investigator rather than to participate in the trial  
18 proceedings.

19 MS. SPINELLI: No, I don't believe so, Your  
20 Honor. This Court has said that a defendant does not  
21 have a right for a lawyer to act as a pre-charge private  
22 investigator. But our contention is that Rothgery was  
23 charged at his magistration. At that point he became an  
24 accused, which is demonstrated by the structure of the  
25 Texas Code itself.

1 JUSTICE KENNEDY: How is that different from  
2 a traffic ticket?

3 MS. SPINELLI: It's very different from a  
4 traffic ticket, Justice Kennedy, because in that  
5 situation -- I think that situation would be analogous  
6 to a warrantless arrest, which, as we know, does not  
7 commence adversary judicial proceedings. Here, we have  
8 an arrest. We have a person who has been held for a  
9 period of time --

10 JUSTICE KENNEDY: So it's the warrant that  
11 makes the difference?

12 MS. SPINELLI: No, I don't believe so. I  
13 believe it's the magistration that makes the difference.

14 JUSTICE SCALIA: Or the incarceration.  
15 Would your case be different if after the magistration  
16 the -- your client was free to go? The court said, you  
17 know, this is what you've been arrested for and charged  
18 with by the policeman who brought you in; we'll -- you  
19 know, good-bye. Whereas in this case, he was required  
20 to make bail. Suppose he hadn't been required to make  
21 bail, supposing he was free to go?

22 MS. SPINELLI: If he had not been required  
23 to make bail or make any other binding promise to  
24 appear, which is the function of bail, to ensure that  
25 the defendant will answer the accusation --

1 JUSTICE SCALIA: Right.

2 MS. SPINELLI: -- then we would be lacking  
3 that piece of evidence that he had been accused. There  
4 still would remain other evidence under Texas law that  
5 he was, in fact, an accused at that time.

6 JUSTICE SCALIA: So Texas -- assuming we  
7 agree with that, Texas made one of two possible  
8 constitutional violations. Either it was  
9 unconstitutional for Texas to require him to make bail,  
10 or it was unconstitutional for Texas not to provide him  
11 with an attorney. Why should -- why should we find that  
12 the latter was the problem rather than the former?

13 MS. SPINELLI: Well, there is certainly  
14 nothing unconstitutional about requiring bail, as we  
15 know.

16 JUSTICE SCALIA: Well, there certainly is if  
17 you're not charged. I think it's a very strong point in  
18 your favor that he was required to make bail, because I  
19 don't think you can hold somebody without charging him,  
20 just say, you know --

21 MS. SPINELLI: Well, we -- I mean, we --

22 JUSTICE SCALIA: The fact -- the fact that  
23 he was held suggests that he was charged with something.

24 MS. SPINELLI: We agree, Justice Scalia. In  
25 fact, the Texas Code expressly recognizes that the

1 function of bail is to ensure that the --

2 JUSTICE SCALIA: Sure.

3 MS. SPINELLI: -- accused will answer the  
4 accusation against him.

5 JUSTICE SCALIA: So maybe, maybe Texas was  
6 wrong about that, that it shouldn't have required bail.  
7 Maybe that was what was unconstitutional, rather than  
8 its failure to provide counsel.

9 MS. SPINELLI: Well, what occurred here,  
10 however, was that Texas did require Mr. Rothgery to post  
11 bail. And in addition, the magistration gave rise to  
12 certain specific rights, which only accrue to  
13 defendants in criminal prosecutions.

14 JUSTICE KENNEDY: Are you saying that bail is  
15 required -- that a magistrate is required whenever bail  
16 is set -- pardon me, that an attorney is required  
17 whenever bail is set?

18 MS. SPINELLI: No, we're not contending that  
19 an attorney was required.

20 JUSTICE KENNEDY: It seems that your rule  
21 isn't clear -- I want to know, what do we tell Texas it  
22 has to do in all these cases? What do we tell  
23 jurisdictions they have to do with traffic tickets?  
24 Does it make a difference that you're held in custody or  
25 not held in custody? I don't understand the rule you

1 want us to adopt.

2 MS. SPINELLI: I think the rule -- we're  
3 actually not asking the Court to adopt any new rule  
4 today, but simply to reaffirm the rule it has already  
5 announced in Brewer and Jackson, which is that an  
6 initial appearance before a magistrate, which is a  
7 proceeding that is common across jurisdictions and has a  
8 common significance across jurisdictions, a proceeding  
9 at which a magistrate informs the defendant officially  
10 of the accusation against him and of his rights as a  
11 criminal defendant --

12 JUSTICE ALITO: But when do you say counsel  
13 has to be appointed? Is it before the magistration? Is  
14 it at the end, immediately upon the end of it?

15 MS. SPINELLI: No, we believe --

16 JUSTICE ALITO: What if -- what if an  
17 attorney had been appointed here ten days after the  
18 magistration?

19 MS. SPINELLI: Our contention is that an  
20 attorney was required to be appointed promptly after  
21 Rothgery renewed his request for an attorney following  
22 the magistration.

23 JUSTICE SOUTER: Okay, so the --

24 MS. SPINELLI: And this Court --

25 JUSTICE SOUTER: What -- at the -- the point

1 of the magistration is that is the point at which a  
2 reasonable time starts running within which Texas must  
3 afford -- appoint counsel. Isn't that your basic point?

4 MS. SPINELLI: Correct, Justice Souter.

5 JUSTICE SOUTER: Okay.

6 MS. SPINELLI: That's our contention.

7 JUSTICE SOUTER: So there's no claim that  
8 there was anything invalid about the magistration  
9 proceeding --

10 MS. SPINELLI: Not at all.

11 JUSTICE SOUTER: -- itself because there was  
12 no counsel there.

13 MS. SPINELLI: No, not at all.

14 JUSTICE SOUTER: There's no claim -- for  
15 example, had there been a probable-cause hearing, that  
16 the attorney would have been required to participate in  
17 the probable-cause hearing under Gerstein.

18 MS. SPINELLI: No.

19 JUSTICE SOUTER: There has simply got to be  
20 one appointed within a reasonable time after the  
21 magistration. That's -- that's your argument?

22 MS. SPINELLI: That's correct.

23 JUSTICE BREYER: Is there any law on that?

24 Is there -- suppose there's an indictment and the  
25 defendant finds out about it; he's never arrested;

1 nothing further happens; weeks pass. Now, is there any  
2 law that tells me -- it's an indictment, that's clear --  
3 and is there any law that tells me, when he requests a  
4 counsel be appointed, when they have to do it?

5 MS. SPINELLI: Justice Breyer, this Court  
6 has not been faced with the question --

7 JUSTICE BREYER: So the answer is no.

8 MS. SPINELLI: Right.

9 JUSTICE BREYER: What happens -- what  
10 happens if -- the part that's worrying me and I don't  
11 know how people handle it -- a riot. A big sit-in. A  
12 big demonstration, 500 people arrested, they are brought  
13 down to the station, bail is posted the next day, the  
14 U.S. attorney or the D.A. thinks: I'm going to indict  
15 the ringleaders, and the rest -- you know, the rest we  
16 are just going to let go; they will forfeit their bond.  
17 How is that handled? How is it handled under your rule?  
18 How is that handled generally? How should it be  
19 handled?

20 MS. SPINELLI: How is it handled with  
21 respect to the persons who were indicted?

22 JUSTICE BREYER: No. No. That's easy.

23 MS. SPINELLI: Or how is it --

24 JUSTICE BREYER: I mean -- I'm talking about  
25 the people who nobody ever intends to prosecute. What's



1 going to happen, as I think happens quite often, they  
2 are brought to the station, they are arrested, they are  
3 released on bond, and then everybody forgets about it.

4 MS. SPINELLI: If they are brought --

5 JUSTICE BREYER: Or they're -- or the D.A.  
6 says, you know, forfeit -- like a traffic ticket or  
7 something -- forfeit your bond. And I want to know how  
8 that's handled under your rule, how is it handled now,  
9 how is it handled in -- discuss it, please.

10 MS. SPINELLI: If a person is arrested,  
11 brought to the station house, and then released prior to  
12 the initial appearance, which is actually a --

13 JUSTICE BREYER: Well, you see what I'm  
14 doing. I'm trying to make it comparable. What happens  
15 there is that these 500 people brought down to the  
16 station, they are required to put up bail; they are  
17 given a warning because people might question them; they  
18 are given a warning; they are then released. And  
19 nothing further is heard. Maybe three months later,  
20 they come in and they agree that they'll forfeit their  
21 bond.

22 Now, that's what I'm wondering. That must  
23 happen, because I think there are lots of  
24 demonstrations; they occur sometimes. I suspect it  
25 happens. How is it handled, if you know?

1           MS. SPINELLI: It happens quite frequently,  
2 Justice Breyer, that persons are arrested, brought to  
3 the station house, and then released by the police  
4 without undergoing an initial appearance. And in that  
5 circumstance, we don't contend that a prosecution would  
6 have begun.

7           CHIEF JUSTICE ROBERTS: Why not, if they  
8 initiate charges against them? You're saying, in  
9 Justice Breyer's hypothetical, you're charged with, for  
10 example, trespassing or conducting a demonstration on  
11 the court grounds, and that's a crime. You're charged  
12 with that, but we are not going to hold you, so, you  
13 know, come back in a month.

14           MS. SPINELLI: Well, it -- it might depend  
15 on the manner in which the charges are conveyed or  
16 filed. If all that happens is that the police tell you,  
17 you know, we believe you've committed a crime, certainly  
18 that doesn't commence a prosecution. If there is a  
19 formal -- you know, as happens in misdemeanor  
20 prosecutions, if there is a formal complaint filed which  
21 can be the basis for a conviction in a misdemeanor case,  
22 then it may be that, by analogy to an indictment in a  
23 felony case, a prosecution would commence at that point.

24           JUSTICE KENNEDY: What about my traffic  
25 ticket?

1 MS. SPINELLI: I don't believe --

2 JUSTICE KENNEDY: I've never had one so I  
3 don't know what they say.

4 (Laughter.)

5 JUSTICE KENNEDY: Other members of the Court  
6 can advise me about that.

7 MS. SPINELLI: I believe -- I believe a  
8 ticket or a citation of that nature would not commence  
9 adversary judicial proceedings because it's analogous to  
10 a warrantless arrest.

11 JUSTICE SCALIA: Why doesn't it solve your  
12 -- the problem that you're obviously wrestling with, if  
13 -- if we simply said there is a right to counsel, but it  
14 doesn't attach until there's a significant stage of the  
15 prosecution which then follows? I mean, if you have  
16 some proceeding afterwards, yes, then you do need a  
17 lawyer, but the mere fact that you've been brought to  
18 the courthouse and made bail and let go does not require  
19 500 counsel to be provided. Only -- only when there is  
20 some later proceeding, which is an essential part of the  
21 prosecution, must you have counsel.

22 MS. SPINELLI: Well --

23 JUSTICE SCALIA: Why wouldn't that solve the  
24 problem?

25 MS. SPINELLI: First of all, we agree that a

1 prosecution commences upon a first appearance before a  
2 judge --

3 JUSTICE SCALIA: That's fine, but --

4 MS. SPINELLI: Not merely --

5 JUSTICE SCALIA: But you only need counsel  
6 at significant phases.

7 MS. SPINELLI: Oh, right. And we are not  
8 contending that counsel must be present at that initial  
9 appearance itself.

10 JUSTICE SCALIA: Right.

11 MS. SPINELLI: So just to be clear about  
12 that. But to address your question, which, again, I  
13 believe goes to Respondent's alternative ground for  
14 affirmance, rather --

15 JUSTICE SCALIA: No, but it's so wrapped up  
16 with how we decide this case. I mean, if I think that  
17 counsel has to be appointed right away for -- for  
18 Justice Breyer's 500 demonstrators, I'm going to give a  
19 different answer to the first question. But if I know  
20 that counsel doesn't have to be appointed until the  
21 prosecution proceeds to some significant phase where an  
22 attorney would be -- would be really helpful, then --  
23 then I can -- I can be quite more sympathetic to your --  
24 to your argument.

25 MS. SPINELLI: Well, were the Court to reach

1 that alternative argument, which is that -- despite the  
2 fact that a criminal prosecution had commenced, and  
3 Rothgery was an accused, by hypothesis he nevertheless  
4 was not entitled to the assistance of counsel for his  
5 defense because no critical stage had been reached -- we  
6 would say, first of all, assuming that Respondent is  
7 correct, that the right to counsel lies dormant  
8 following its attachment on the commencement of a  
9 criminal prosecution until some subsequent critical  
10 stage is reached, if we assume that that is correct,  
11 there was such a stage here because Mr. Rothgery was  
12 faced with the decision whether or not to invoke his  
13 right to an examining trial.

14 JUSTICE GINSBURG: But that was at the  
15 magistration, and you -- you have said that there was no  
16 right to counsel at the magistration.

17 MS. SPINELLI: That's correct, Justice  
18 Ginsburg, but his decision regarding the examining trial  
19 was not one that needed to be made at the magistration.  
20 Rather, this was a right that he possessed to contest  
21 the accusation against him under Texas law, which could  
22 only be exercised prior to indictment. And, indeed, it  
23 was a --

24 JUSTICE GINSBURG: Any time prior -- any  
25 time prior to indictment?

1 MS. SPINELLI: Correct. And, indeed --

2 JUSTICE GINSBURG: So you're saying that  
3 that is the critical stage that he needed to have  
4 counsel's advice about.

5 MS. SPINELLI: To the extent that it's  
6 necessary to have a critical stage, then we believe that  
7 is a critical stage.

8 JUSTICE SCALIA: And that stage would arise  
9 immediately as soon as the magistration was completed,  
10 right?

11 MS. SPINELLI: His right --

12 JUSTICE SCALIA: He'd have to have counsel  
13 appointed immediately --

14 MS. SPINELLI: Well --

15 JUSTICE SCALIA: -- to advise him whether to  
16 ask for this hearing or not.

17 MS. SPINELLI: Not necessarily immediately,  
18 but within some reasonable time after his request, and  
19 after he had demonstrated --

20 CHIEF JUSTICE ROBERTS: Before he said no, I  
21 don't want an examining trial. As soon as he says that,  
22 then he can't have one, and you're saying he should have  
23 had a lawyer before he said that?

24 MS. SPINELLI: Well, I mean, had he said --  
25 had he waived his right to an examining trial, which he

1 didn't do, then, you know, under -- then we would not  
2 have this argument.

3 CHIEF JUSTICE ROBERTS: But he could do it;  
4 anyone else could do it. And you would say that once he  
5 does that, he's made it into a critical proceeding, and  
6 so you have to have counsel before he gives up that  
7 right?

8 MS. SPINELLI: Yes. We're contending that  
9 in felony cases -- this is only an issue in felony cases  
10 -- because Texas has provided this right, which is  
11 precisely for defendants in Rothgery's situation, who  
12 are innocent but --

13 CHIEF JUSTICE ROBERTS: Well, then -- but  
14 then you are saying that he has a right to counsel at  
15 the magistration, because that's when the magistrate  
16 says: Look, you have an examining trial coming up, and  
17 you can waive your right to that.

18 MS. SPINELLI: No. That's actually not  
19 correct, Mr. Chief Justice.

20 CHIEF JUSTICE ROBERTS: What does he say  
21 about the examining --

22 MS. SPINELLI: At a magistration --

23 CHIEF JUSTICE ROBERTS: What does he say  
24 about an examining --

25 MS. SPINELLI: Precisely what he said and

1 what appears on the warning form is: In a felony case,  
2 you have a right to an examining trial. There is no  
3 provision at the magistration for the defendant to  
4 either invoke or waive that right. And there's no  
5 indication that any further explanation of that right is  
6 given.

7 JUSTICE SCALIA: Do you know any other case  
8 in which we've held that it's a critical stage of the  
9 proceeding where nothing has happened, but something  
10 could have happened if the defendant had asked for it?

11 MS. SPINELLI: Well, we're not contending  
12 that.

13 JUSTICE SCALIA: I don't -- I find it hard  
14 to describe that as a critical stage of the proceeding.

15 MS. SPINELLI: We're not contending that,  
16 Justice Scalia. Our contention is that the examining  
17 trial, this Court has already held in Coleman, is a  
18 critical stage.

19 JUSTICE SCALIA: When the trial occurs, it  
20 is a critical stage.

21 MS. SPINELLI: Correct. Correct.

22 JUSTICE SCALIA: I have no doubt.

23 MS. SPINELLI: And --

24 JUSTICE SCALIA: But you're claiming that  
25 his decision of whether to ask for that or not is a



1 critical stage. And I just don't know any precedent for  
2 saying that something that hasn't happened is a critical  
3 stage.

4 MS. SPINELLI: I think the strongest  
5 precedent for that is Estelle versus Smith, in which  
6 this Court held that counsel -- counsel's assistance is  
7 needed not only to conduct and prepare for critical  
8 stages, but also to assist a defendant in deciding  
9 whether to undergo them.

10 And more broadly, this Court has repeatedly  
11 stated that one of the core purposes of the right to  
12 counsel is to ensure that the defendant understands and  
13 is able to invoke all of his rights. And in this case,  
14 this was the right that he possessed that could have  
15 enabled him to demonstrate his innocence prior to being  
16 indicted, rearrested, and incarcerated. And he lost  
17 that right because he didn't have counsel's help.

18 With the Court's permission, I'll reserve  
19 the balance of my time.

20 JUSTICE KENNEDY: I know your white light is  
21 on, but just -- you -- when we were talking about traffic  
22 tickets, you said, well, that was a warrantless arrest.  
23 This was a warrantless arrest.

24 MS. SPINELLI: This was a warrantless  
25 arrest, but following that --

1 JUSTICE KENNEDY: So then that doesn't  
2 answer --

3 MS. SPINELLI: But there was more, because  
4 following that, there was -- the magistration occurred,  
5 at which time the police officer filed an affidavit  
6 setting forth the basis of the charges. The magistrate  
7 found probable cause, and the magistrate officially  
8 informed Rothgery of the accusation against him. And  
9 that's why -- that's why -- while in Kirby, this Court  
10 held this a warrantless arrest does not commence  
11 adversary judicial proceedings, in Jackson, on exactly  
12 these facts, the Court held that it does.

13 CHIEF JUSTICE ROBERTS: Well, not exactly  
14 these facts, because in Jackson the prosecutor had  
15 already filed charges.

16 MS. SPINELLI: Charges were filed in Jackson  
17 in exactly the same sense that charges were filed here.  
18 A document which contained basically simply a factual  
19 statement of what had occurred --

20 CHIEF JUSTICE ROBERTS: But the prosecutor  
21 wasn't involved here. The prosecutor was involved in  
22 Jackson.

23 MS. SPINELLI: That's correct, but we don't  
24 believe that should make any difference because the  
25 effect on the defendant of this proceeding is precisely

1 the same, whether or not a prosecutor is involved. And  
2 that's true in general and it's true under Texas law.  
3 Either way he's faced with a need to negotiate criminal  
4 law in order to contest the charges against him. He has  
5 a right to do so under Texas law, and he has a right to  
6 have the prosecution against him dismissed if an  
7 indictment isn't filed within a set period. All of  
8 which we believe demonstrate that he was accused and  
9 that a prosecution had commenced.

10 May I reserve the balance of my time?

11 CHIEF JUSTICE ROBERTS: Yes. Thank you,  
12 counsel.

13 Mr. Coleman.

14 ORAL ARGUMENT OF GREGORY S. COLEMAN

15 ON BEHALF OF THE RESPONDENT

16 MR. COLEMAN: Good morning, Mr. Chief  
17 Justice, and may it please the Court:

18 The magistration that follows every Texas  
19 arrest does not begin a criminal prosecution under the  
20 Sixth Amendment. When Rothgery was magistrated, no  
21 formal charges had been filed against him; no one  
22 attempted to elicit incriminating information from him;  
23 no witnesses were presented --

24 JUSTICE KENNEDY: Then how could they hold  
25 them in jail?

1           MR. COLEMAN: It is not uncommon -- in fact,  
2 it's universal practice that when one is arrested on a  
3 -- without a warrant, it is normally because a police  
4 officer sees an individual in the commission of a crime.  
5 It's not uncommon to go and to arrest that person, to  
6 cease the crime that is taking place and perhaps to  
7 prevent other crimes from taking place, and to present  
8 them. Gerstein makes clear that this happens all of the  
9 time.

10           JUSTICE BREYER: What happens in Texas?

11           JUSTICE KENNEDY: But this was -- he was  
12 held after he saw the magistrate. Suppose he had been  
13 held for three months and you couldn't make bail, we  
14 don't need counsel?

15           MR. COLEMAN: Texas statute allows for  
16 counsel under that situation. But this is an issue that  
17 is addressed primarily by the Fourth Amendment.

18           JUSTICE KENNEDY: I am asking what the  
19 constitutional rule is.

20           MR. COLEMAN: The Fourth --

21           JUSTICE KENNEDY: We have here a proceeding  
22 before a magistrate; this results in custody. And my  
23 question is, suppose this were weeks, would counsel be  
24 required to be appointed?

25           MR. COLEMAN: No, Your Honor. The Fourth --

1 JUSTICE SCALIA: What authority do you have  
2 to hold somebody who's not been charged? I mean I don't  
3 understand that. You say he hasn't been charged, but  
4 we're going to hold you in jail. That's very strange.

5 MR. COLEMAN: We believe that this is an  
6 issue that was addressed by the Court in Gerstein and  
7 McLaughlin, that the Fourth Amendment prevents  
8 unreasonable seizures and the Sixth Amendment speedy  
9 trial rights kick in. And so there is a limit on what  
10 type of a seizure that can you have.

11 And the Fourth Amendment does prevent that,  
12 as do other rights, as the Court recognized in Gouveia.  
13 But the liberty interest that is at stake there, as the  
14 Court said in Gouveia, is not one that implicates the  
15 Sixth Amendment right to counsel. If there are other --

16 JUSTICE SOUTER: You, in effect, are saying,  
17 in answer to Justice Kennedy's question, that an  
18 individual can be brought into court, held in jail for  
19 three weeks without charge, and no right to counsel  
20 applies? I think that's your answer, but I want to make  
21 sure. I'll be candid to say I'm surprised. But if  
22 that's your position, I want to make sure I understand  
23 it.

24 MR. COLEMAN: Gerstein says that there must  
25 be --

1 JUSTICE SOUTER: I want to know what your  
2 answer is here. Get to authority later, but I want to  
3 know whether your position is that an individual may be  
4 brought by a police officer before a magistrate, charged  
5 with no crime, required to post bail, and if he doesn't  
6 post bail, be held for three weeks without charge.

7 MR. COLEMAN: That could not happen in  
8 Texas.

9 JUSTICE SOUTER: I'm not asking whether it  
10 could happen; I'm asking whether it would be  
11 constitutional without appointing counsel.

12 MR. COLEMAN: It would be -- not be a  
13 violation of the Sixth Amendment right to counsel.

14 JUSTICE STEVENS: Can't you answer that yes  
15 or no?

16 CHIEF JUSTICE ROBERTS: But it would be a  
17 violation of some liberty interest besides the Sixth  
18 Amendment.

19 MR. COLEMAN: It might well be a violation  
20 of the Fourth Amendment or other Sixth Amendment --

21 JUSTICE SOUTER: No counsel right -- no  
22 counsel right would attach?

23 No counsel right would attach?

24 MR. COLEMAN: That's correct.

25 JUSTICE SCALIA: I think it's a problem even

1 if you appoint counsel. You say you can keep people  
2 without charging them so long as you give them counsel?

3 MR. COLEMAN: It happens all the time,  
4 Justice Scalia, where people are appointed counsel but,  
5 for whatever reason, do not make bail and --

6 JUSTICE SOUTER: No, but no charges filed? In  
7 other words, if the lawyer comes in and says, you know,  
8 my client is sitting in jail, you've had him there for  
9 three days now, and no complaint has been filed against  
10 him, we don't know why he is being held -- your answer  
11 -- the -- it's a constitutional answer to say, well, you  
12 know, that's for us to know and you to find out?

13 (Laughter.)

14 MR. COLEMAN: I think Gerstein would prevent  
15 that, Justice Souter.

16 CHIEF JUSTICE ROBERTS: I mean, the answer  
17 -- your answer is that the Sixth Amendment is concerned  
18 with the fair trial, not the detention of individuals,  
19 and he has other constitutional rights that would be  
20 implicated, but his right to a fair trial is not one of  
21 them.

22 MR. COLEMAN: That's absolutely true here.

23 JUSTICE BREYER: What is the law here in  
24 Texas in respect to this particular magistration  
25 proceeding? I noticed what happened is that the

1 magistrate tells the person arrested, he says precisely:  
2 "I find probable cause to believe" that you -- "that  
3 there was probable cause to arrest you." That's what  
4 they say, right? It said: "I have determined that  
5 probable cause existed for the arrest of the individual  
6 accused therein."

7 All right. Now, what happens -- and I think  
8 it would be helpful to know the answer to this -- in  
9 what might be a rare instance, but the truth of the  
10 matter is there was probable cause to arrest that  
11 individual when he was arrested, but there isn't now.  
12 So because he came in -- you know, he said here's 14  
13 cousins, I was somewhere else at the time, they all  
14 agree. I mean, everybody agrees on a certain fact that  
15 means there isn't now. And what I'm driving at is does  
16 the magistrate here -- is he required, does he have the  
17 power to commit someone, even though he honestly  
18 believes there is no longer probable cause, in which  
19 case he is making the decision, the magistrate, not the  
20 policeman?

21 MR. COLEMAN: I don't know the answer to the  
22 constitutional significance of the different --

23 JUSTICE BREYER: I could -- I can think  
24 there would be tremendous constitutional significance  
25 and it would make a difference if all that's really



1 happening is a policeman is arresting someone, in which  
2 case we might have liberty interests and others at  
3 issue. Or what's happening in this proceeding is that  
4 the magistrate is deciding that there is probable cause  
5 to hold him, in which case it's more like -- not  
6 completely like -- but more like what happens in an  
7 indictment or an arraignment, et cetera.

8 MR. COLEMAN: What is stated on the form --  
9 certainly I can't say what was going through the  
10 magistrate's mind.

11 JUSTICE BREYER: No, no. But I want to know  
12 what's Texas law, if you know it, in respect to that  
13 question?

14 MR. COLEMAN: Texas law, I believe, is that  
15 you -- that you find that there is probable cause to  
16 make the arrest.

17 JUSTICE BREYER: So we have a magistrate who  
18 has to find that there is -- no, to make the arrest or  
19 to hold him now? Do you see what I'm doing?

20 MR. COLEMAN: I do see what you're doing.

21 JUSTICE BREYER: Do you see why I'm doing  
22 it? So, what's the answer, if you know?

23 MR. COLEMAN: I don't think that there is a  
24 difference in this case. I think that certainly the  
25 magistrate --

1 JUSTICE BREYER: No, I know there may not  
2 be, but what about in general.

3 MR. COLEMAN: Magistrates have a great  
4 amount of discretion, and I think if a magistrate was  
5 convinced that probable cause existed at the time of  
6 arrest and not now, it's quite likely the magistrate  
7 would find --

8 JUSTICE BREYER: Okay. That's what I would  
9 think. In which case we have before us bringing this  
10 person before a State official who himself has the power  
11 to decide if there is probable cause to hold him, and he  
12 is saying, yes, there is probable cause to hold him.  
13 That's -- that's what's happening; is that right?

14 MR. COLEMAN: I believe so. That's exactly  
15 what the Court required in Gerstein, Your Honor. I would  
16 like to --

17 JUSTICE BREYER: Thank you.

18 JUSTICE STEVENS: Mr. Coleman, may I just  
19 ask this kind of simple question. If a prosecutor had  
20 participated in the magistration, then under Texas law  
21 would the right to counsel have arisen?

22 MR. COLEMAN: No, Justice Stevens.

23 JUSTICE STEVENS: Whether the prosecutor  
24 participates is not relevant?

25 MR. COLEMAN: There is no role for a

1 prosecutor at magistration under article 15.17 of the  
2 Texas Code of Criminal Procedure.

3 CHIEF JUSTICE ROBERTS: Couldn't he  
4 point out -- I mean, if this is a probable cause  
5 determination and he knows a particular fact, couldn't  
6 he say: Well, magistrate, you should know this, and the  
7 magistrate will say, well, I didn't know that, so  
8 there's no probable cause?

9 MR. COLEMAN: That's possible.

10 And I would like to amend my answer to you,  
11 Justice Stevens. It's not at all uncommon -- once an  
12 arrest takes place and an officer can go and present a  
13 case to the county or district attorney, it's not  
14 uncommon at all for charges then to be filed in the --  
15 depending on what the crime is, in the district court or  
16 county court, and for the magistration then to be moved  
17 over and to take place in an official court. And so at  
18 that time, it could very well be.

19 And we would say -- we would say likely at  
20 that point that, yes, that formal criminal judicial  
21 proceedings had initiated, and it's not uncommon. But  
22 in this circumstance --

23 JUSTICE STEVENS: What about the very  
24 proceeding you had in this case? Supposing instead of a  
25 detective bringing in the affidavit, a prosecutor

1 did it, had the detective's affidavit, and the  
2 prosecutor said: This is a case we intend to pursue  
3 more seriously. That's all he says to the judge. Would  
4 have that been sufficient?

5 MR. COLEMAN: No, Justice Stevens.

6 JUSTICE STEVENS: It would not?

7 MR. COLEMAN: An expression of subjective --

8 JUSTICE STEVENS: I got the impression from  
9 the briefs that the absence or presence of the  
10 prosecutor made a difference. But you're telling me I'm  
11 wrong on that?

12 MR. COLEMAN: Under the circumstances where  
13 no formal charges have been brought, a statement by a  
14 prosecutor that they are looking at it or that they  
15 intend to bring some is not itself the initiation of  
16 formal adversary judicial proceedings.

17 JUSTICE SCALIA: Mr. Coleman, what happens  
18 in other jurisdictions? I probably ought to know this,  
19 but I don't. Maybe you do. When you don't have a  
20 procedure called magistration, but someone is taken  
21 before a magistrate and with the prosecutor present, is  
22 the indictment at that point drawn up, or doesn't the --  
23 doesn't the prosecutor have some time to decide what the  
24 indictment ought to contain? What -- what happens at  
25 that point?

1           MR. COLEMAN: An indictment does usually  
2 take a little bit more time because it has to be taken  
3 and presented to a grand jury.

4           JUSTICE SCALIA: So what happens in the  
5 interim? Is he -- is he charged in the interim, or is  
6 he just held because he is going to be charged, which is  
7 what's going on here.

8           MR. COLEMAN: He is not charged during that  
9 interim. But you can have --

10          JUSTICE SOUTER: You mean no complaint needs  
11 to be filed by the police? If the magistrate says,  
12 what's this guy doing here, don't the police normally  
13 have a complaint, in this case a -- what was it, a  
14 possession of a gun by a felon, say, you know, we're  
15 filing this complaint that charges him with possessing a  
16 gun with a felony record? And wasn't there such a  
17 complaint displayed here?

18          MR. COLEMAN: No, Justice Souter. Texas  
19 statutes do allow for the filing of a complaint in some  
20 circumstances. It's not frequently used. But that's a  
21 complaint that has to be filed in the district court or  
22 in the justice of the peace court.

23          JUSTICE GINSBURG: What was filed by the  
24 police? What was filed by the police --

25          MR. COLEMAN: Nothing was filed.

1 JUSTICE GINSBURG: -- to justify holding  
2 this person? You can't just say the police brought  
3 someone in and they get locked up in jail. The police  
4 had to present something --

5 MR. COLEMAN: Yes.

6 JUSTICE GINSBURG: -- to show probable cause  
7 and it was the burden of the State in the presence of  
8 the police officer to prove probable cause. So that had  
9 to be based on something. What was it based on?

10 MR. COLEMAN: It was based on the officer's  
11 affidavit of probable cause, which was presented at the  
12 little glass window to the magistrate and --

13 JUSTICE GINSBURG: And then -- and then the  
14 defendant was told or was given Miranda warnings. What  
15 was said to him precisely about right to counsel in the  
16 warnings that the magistrate gave him?

17 MR. COLEMAN: Well, the warnings go through.  
18 They are very similar to Miranda warnings. He is told  
19 that he has a right to counsel under Texas statute for  
20 this. He is -- he is warned, as Ms. Spinelli said,  
21 about examining trial. There is a list of things --

22 JUSTICE GINSBURG: Yes. But if he is  
23 told -- the defendant is listening to this. And,  
24 magistrate, you just told me I have a right to counsel.  
25 Okay, I would like counsel. And then the magistrate

1 says, no you're not entitled to counsel?

2 MR. COLEMAN: I don't think that's what  
3 would happen. I think if he had insisted on counsel  
4 being present for the bail portion of the 1517  
5 magistration, I believe that they would have gotten  
6 somebody to come and --

7 JUSTICE SOUTER: Would they have been  
8 obligated to get somebody to come?

9 MR. COLEMAN: Under Texas statute they  
10 would.

11 JUSTICE SOUTER: Under the Sixth Amendment?

12 MR. COLEMAN: No.

13 JUSTICE SOUTER: No.

14 JUSTICE ALITO: Suppose Texas law provided  
15 that there had to be an examining trial within a certain  
16 period of time after the magistration unless there was  
17 an intervening indictment. Then would you not agree  
18 that under those circumstances the defendant would have  
19 been entitled to the appointment of counsel shortly  
20 after the magistration, at least in order to prepare for  
21 the examining trial?

22 MR. COLEMAN: We completely agree that if  
23 that were the case, Coleman -- this Court's decisions  
24 make absolutely clear he would have been entitled to  
25 counsel for an examining trial and would have been -- we

1 would have been obligated and would have appointed  
2 counsel at a reasonable time before that examining trial  
3 so that preparations could take place.

4 JUSTICE ALITO: Why would the situation be  
5 different simply because Texas law doesn't require the  
6 examining trial, but gives the defendant the option of  
7 demanding one?

8 MR. COLEMAN: Because there is no prejudice  
9 to your fair-trial rights from not choosing to have an  
10 examining trial. We are unaware of any case that has  
11 said that there is a Sixth Amendment right to consult  
12 with counsel before deciding whether to ask for an  
13 examining trial. And in fact, in Texas they are very  
14 rare because in the very unusual circumstances where  
15 somebody asks for one, more often than not the  
16 prosecutor will simply hurry up and do an indictment.  
17 And so there will be no examining trial that takes  
18 place. And that's a put-up-or-shut-up procedure, but  
19 it's not something that prejudices your fair-trial  
20 rights if no examining trial actually takes place.

21 JUSTICE KENNEDY: If we said that when a  
22 defendant is ordered held in custody, that there is then  
23 a right of counsel, would we be contradicting any of our  
24 precedents as opposed, say, to extending them?

25 MR. COLEMAN: I certainly do believe that



1 the Court would. I believe that a decision that the  
2 right attaches, that there is an initiation of formal  
3 judicial proceedings at the magistration, would  
4 contradict not only Kirby, but also Gerstein and  
5 Gouveia.

6 JUSTICE KENNEDY: Well -- no. But my  
7 assumption was assuming that the defendant is remanded  
8 to custody. I added that.

9 MR. COLEMAN: It's not clear to me that that  
10 makes a constitutional difference in our circumstances.

11 JUSTICE BREYER: Suppose you were to say  
12 that where the State arrests an individual, brings him  
13 before a neutral official and intends and does impose a  
14 significant restraint on his liberty for the purpose of  
15 bringing that individual to trial, there is a  
16 presumption that that -- forget the presumption. If  
17 that happens for the purpose, the primary purpose,  
18 primary purpose of bringing the individual to trial, at  
19 that point the Sixth Amendment right attaches.

20 Now, the State would not have to give him a  
21 lawyer if there was some other purpose primary, for  
22 example, as in Gouveia, keeping the prisons safe.

23 For example, it's quite clear under the  
24 circumstances, there are 14 people accused, they  
25 couldn't have all have done it, they want to investigate

1 further. Or maybe there are other examples. But, for  
2 the primary purpose, then the right attaches.

3 So you pick up Gerstein and add to Gerstein  
4 that additional requirement. What about that? What  
5 harm would that cause? What inconvenience would it  
6 cause, what difficulties, et cetera?

7 MR. COLEMAN: I -- I think the primary issue  
8 with that, Justice Breyer, is that it contradicts what  
9 the Court said in Gouveia. The Court went through a  
10 lengthy exegesis in Gouveia about what interests in  
11 particular are protected and talked about this, this  
12 expression of a concern about our liberty interests; and  
13 that the purpose issue was not something that the Court  
14 addressed there.

15 It simply said that our Fourth Amendment  
16 precedents go to the liberty interests. Our Sixth  
17 Amendment speedy-trial and other precedents go to the  
18 liberty interests.

19 The right to counsel is not specifically a  
20 liberty-interest protection. It is something, as Chief  
21 Justice Roberts mentioned a few minutes ago, as we set  
22 out in our brief, something that protects your right to  
23 a fair trial. And there are -- there are proceedings  
24 that take place along the way that the Court has held  
25 are critical stages, and we need and want counsel to be

1 present for them, and so we have so dictated. But  
2 getting behind --

3 JUSTICE GINSBURG: I thought you -- I  
4 thought you recognized that if he had opted to have this  
5 examining trial to determine whether there really was  
6 probable cause, that he would be entitled to counsel at  
7 that examining trial. And, yet, that's detached from  
8 the fair trial. The whole purpose of it is that they  
9 will never get to trial.

10 MR. COLEMAN: No. I -- I disagree with  
11 that. Coleman itself says that the reason we're  
12 requiring counsel for a preliminary hearing or an  
13 examining trial, as we call it in Texas, is precisely  
14 because there will be witnesses, there will be arguments  
15 made; and you could waive defenses if not made there;  
16 that this is very important. So we're going to define  
17 even, this examining trial or preliminary hearing, even  
18 though it comes before an indictment, we're going to  
19 define that as an event of attachment solely because  
20 your right to a fair trial could very much be prejudiced  
21 there.

22 And that -- that doesn't exist in this case,  
23 and that certainly the failure to ask for a examining  
24 trial does not prejudice your right to a fair trial.

25 Justice Breyer, you asked a hypothetical

1 that I would like -- I would like to address because it  
2 is something that happens all the time, and I think  
3 should inform the Court's decision here. And, that is,  
4 it is not uncommon, and some statistics that I have seen  
5 suggest that it may happen in half of the cases, where  
6 an individual is arrested, magistrated, released, and no  
7 charges are ever brought. So the bulk of your 500  
8 protesters are never brought.

9 Under Mr. Rothgery's view of the Sixth  
10 Amendment, the county -- you know, let's say somebody is  
11 protesting whitetail deer hunting in Gillespie County.  
12 The county would be required to appoint counsel for all  
13 of those individuals even though --

14 JUSTICE STEVENS: Only if they ask for them.  
15 Only if they ask for the lawyer.

16 MR. COLEMAN: If they ask for them.

17 JUSTICE BREYER: That's why I wondered --

18 JUSTICE SOUTER: And that would be subject,  
19 wouldn't it, to sort of a condition subsequent, because  
20 if it turned out -- I mean we -- no counsel is required  
21 if there's no incarceration. So that even if the right  
22 had attached, if it turned out later that there was no  
23 incarceration or even attempt to incarcerate, then that  
24 would relate back, and there wouldn't be a Sixth  
25 Amendment violation. Isn't that right? Wouldn't that

1 be the answer to the -- a partial answer?

2 MR. COLEMAN: If -- if the Court were to  
3 make a rule that depended solely on incarceration, that  
4 is true. I don't understand Mr. Rothgery to be making  
5 that argument because he was released on bond.

6 JUSTICE BREYER: And you couldn't -- you  
7 couldn't because of the fact that bail -- if you're  
8 going to insist on bail, that in effect is  
9 incarceration. But the reason I asked the question,  
10 which I would ask you the same, is there are a lot of  
11 States, we're told, that do have counsel attach in  
12 circumstances similar to this.

13 So they must have some way of dealing with  
14 the problem that I raised if it's really a problem. And  
15 I want to -- and that's -- and I want to -- if we're  
16 going into this, I think I need to know how this is  
17 dealt with.

18 MR. COLEMAN: That amicus brief attempts to  
19 suggest that Texas's statute is very different from  
20 statutes that exist in other cases -- in other States,  
21 and that's simply not true, Your Honor.

22 I do not understand what happens in each of  
23 those -- in each of those States, but I have at least  
24 seen decisions in some of those States that suggest that  
25 they don't act that much differently than we do, and

1 that -- that they do apply a critical-stage-type  
2 analysis in evaluating --

3 JUSTICE BREYER: See, you would have  
4 given him a counsel. I mean, in fact, if he had wanted  
5 one, Texas would give him one. So Texas must have -- it  
6 must not be a problem. The problem, I just --

7 MR. COLEMAN: You mean at the magistration?

8 JUSTICE BREYER: Yes.

9 MR. COLEMAN: If he would have asked for  
10 one, he would have gotten one.

11 JUSTICE BREYER: So the problem I raise  
12 can't be a real problem.

13 JUSTICE STEVENS: May I ask this about Texas  
14 procedure. Supposing after the magistration he wanted  
15 to have the charges dismissed. Could he have hired a  
16 lawyer to come in and ask the judge to dismiss the  
17 charges?

18 MR. COLEMAN: Absolutely not, Justice  
19 Stevens. There were no charges pending. This -- this  
20 magistration that occurs in the jail is simply --

21 JUSTICE STEVENS: Or say he wanted to file a  
22 letter saying I want to get a release from bond and said  
23 he wanted to terminate his custody. Is any procedure  
24 whatsoever available to a defendant to say: I want to  
25 get this monkey off my back after this bond premium?

1                   MR. COLEMAN: A release from bond, it would  
2 have theoretically been possible, yes.

3                   JUSTICE STEVENS: And could he have a lawyer  
4 appear before the court to ask for that?

5                   MR. COLEMAN: I don't --

6                   JUSTICE STEVENS: Could the judge say: You  
7 got to appear yourself?

8                   MR. COLEMAN: I don't think the judge would  
9 have said: You have to appear yourself. I think he  
10 could have personally come forth --

11                   JUSTICE STEVENS: If the prosecutor said:  
12 You are not entitled to a lawyer, wouldn't the judge  
13 have said: You're crazy; of course, he is entitled to a  
14 lawyer to come in for this proceeding?

15                   MR. COLEMAN: That's an issue that  
16 doesn't come up because judges don't exclude --

17                   JUSTICE STEVENS: Well, maybe it doesn't come  
18 up, but we are talking about theoretical problems here,  
19 and the question is whether he would he have had a right  
20 to a lawyer asking him to get released from bond. Twenty  
21 minutes after the first proceeding ended his father hired  
22 a lawyer and brought him in. Would the lawyer have been  
23 allowed to appear?

24                   MR. COLEMAN: The difference between the  
25 Sixth Amendment strict requirements and practicalities

1 is a significant one. I don't think the Sixth Amendment  
2 would necessarily have required it. The -- I am aware  
3 --

4 JUSTICE STEVENS: Even though he is paying  
5 for his own lawyer?

6 MR. COLEMAN: It is the same as every other  
7 --

8 JUSTICE STEVENS: That's your answer?

9 MR. COLEMAN: -- situation.

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

14 MR. COLEMAN: He would have -- he would have  
15 the same rights as anybody else, whether retained or --

16 JUSTICE STEVENS: It would not include the  
17 right to be represented by counsel if I understand you  
18 correctly.

19 MR. COLEMAN: It would not be a Sixth  
20 Amendment right to counsel. There could be a right if  
21 you otherwise have a lawyer; that the State cannot  
22 exclude that lawyer from participating on your behalf.  
23 But it would not be an "attachment," an "appointment"  
24 issue, where you are entitled to appointment of counsel  
25 to do that.



1 JUSTICE GINSBURG: Suppose that he is out on  
2 bail, but he has a suspicion that this alleged felony --  
3 that that wasn't cricket because it was expunged. So he  
4 says to the judge: Judge, I want to contest my being  
5 held to some kind of criminal process because there is  
6 no basis for the charge.

7 So he is out on bail. He has no lawyer, but  
8 he wants to contest the State's right to hold him at  
9 all, and he asks for a lawyer to help him do that.

10 MR. COLEMAN: I think if -- if he were to  
11 ask somebody, he would be told that you can ask for an  
12 examining trial. If you ask for that, we will appoint  
13 you a lawyer; and you will have your examining trial  
14 unless the State decides to indict before we actually  
15 get to it.

16 JUSTICE ALITO: Why is the --

17 JUSTICE SOUTER: Now -- no, please.

18 JUSTICE ALITO: Why is the question of  
19 whether the right attaches, which seems to mean  
20 different things in different situations, a separate  
21 question from what I would think would be the question  
22 here: Whether he had the right to have counsel  
23 appointed for him.

24 Why isn't that the question, and  
25 "attachment" is simply a label that is used to express

1 one of the conditions for having the right to appointed  
2 counsel?

3 MR. COLEMAN: I have given this great  
4 thought, Justice Alito. In my mind, the only doctrinal  
5 difference it really makes is the situation that this  
6 Court has described in Michigan v. Jackson, which I have  
7 previously addressed in the Cobb case which I argued.

8 But in most other circumstances we think  
9 that the analysis is essentially the same, because the  
10 Court has never said that there isn't a right -- there  
11 is a right to have the assistance of counsel without  
12 having a critical stage.

13 In fact, I believe Justice Brennan -- if you  
14 will allow me 15 seconds -- Justice Brennan's decision  
15 in Maine v. Moulton said: "Recognizing that the right  
16 to the assistance of counsel is shaped by the need for  
17 the assistance of counsel, we have found that the right  
18 attaches at earlier, "critical" stages in the criminal  
19 justice process where the results might well settle the  
20 accused's fate and reduce the trial, itself, to a mere  
21 formality." So --

22 JUSTICE GINSBURG: Is it then episodic?  
23 That is, if the right is turned on when there is a  
24 critical event, and then the critical event is over, and  
25 no more right to counsel until the next critical event?

1 It's not -- you have no right to counsel in between  
2 those critical events?

3 MR. COLEMAN: Once -- once a case gets  
4 going, I don't believe this Court has ever been  
5 presented with a case where there has been attachment,  
6 there have been some critical stages, and then the State  
7 has decided to deny access. And we don't think that the  
8 Court would like --

9 JUSTICE GINSBURG: So you only need this one  
10 critical stage, and then you get appointed counsel at  
11 that stage, and that counsel will continue thereafter.  
12 You don't have to --

13 MR. COLEMAN: That is the usual course of  
14 things.

15 JUSTICE KENNEDY: Can you give me -- can you  
16 give me some idea, some empirical assessment, or tell  
17 me where I could go to find out, as we sit here, how  
18 many people are being held in custody after a  
19 probable-cause determination and do not have counsel  
20 appointed for them and do not have the right to have  
21 counsel appointed to them until some other critical  
22 phase takes place?

23 MR. COLEMAN: In Texas, because the Fair  
24 Defense Act permits the appointment of counsel for those  
25 who are held in custody, all persons who request counsel

1 are appointed counsel within one business day in the  
2 large counties and within one -- within three business  
3 days in the smaller counties. So that --

4 JUSTICE KENNEDY: Well, then -- then there  
5 was just a misapplication of the statute here when this  
6 man was held for three days, and then he requested  
7 counsel?

8 MR. COLEMAN: No. Section 1.051(j)  
9 authorizes the counties to -- to not appoint  
10 counsel when an individual is released on bail, and to  
11 await -- to await the first critical stage or the  
12 initiation of adversary judicial proceedings; whichever  
13 occurs first, it says. And so once this gentleman was  
14 indicted, that would disappear; and he would be entitled  
15 to counsel, as he was appointed counsel immediately upon  
16 indictment.

17 JUSTICE KENNEDY: Well, I'm talking about  
18 the first phase before there was an indictment, just the  
19 probable-cause hearing. You say even then there is --  
20 under this Texas statute there is a right to have  
21 counsel in one day?

22 MR. COLEMAN: The Texas statute authorizes  
23 appointment. Gillespie County is a smaller county, so  
24 it's three business days, Your Honor. Upon --

25 JUSTICE STEVENS: Then I am not sure why we

1 are having this discussion.

2 MR. COLEMAN: Well, because Mr. Rothgery was  
3 released on bail, and so the county was authorized not  
4 to appoint counsel.

5 JUSTICE SOUTER: If Mr. Rothgery had,  
6 immediately upon being admitted to bail, said: I want a  
7 -- I was going to say a probable-cause hearing. You  
8 have a different term for it.

9 MR. COLEMAN: The "examining trial."

10 JUSTICE SOUTER: "Examining trial."

11 MR. COLEMAN: Right.

12 JUSTICE SOUTER: At that point, under Texas  
13 law, the right to counsel within one or three business  
14 days would have attached?

15 MR. COLEMAN: Once -- once an examining  
16 trial is scheduled, I'm not sure that one or two  
17 days, but requests -- I think that's what would have  
18 happened. The Constitution requires appointment of  
19 counsel for an examining trial a reasonable time before  
20 the examining trial to allow for preparation.

21 JUSTICE SOUTER: Now, at the -- may I? At  
22 the examining trial, is there a charge filed?

23 MR. COLEMAN: No. The examining trial,  
24 itself --

25 JUSTICE SOUTER: What are they finding

1 probable cause for if they don't know what the charge  
2 is?

3 MR. COLEMAN: This Court in Coleman said  
4 that the examining trial, because of the potential harm  
5 to a fair trial in the future, would define it as a --  
6 critical stage.

7 JUSTICE SOUTER: No, but I realize if the --  
8 if somebody has got to demonstrate probable cause, the  
9 probable cause has got to be probable cause to hold  
10 someone to answer for a particular charge. So why  
11 hasn't there, as a matter of definition, got to be a  
12 charge, even on your reasoning, by the time the  
13 examining trial is held?

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

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

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

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

25 MR. COLEMAN: If -- if that were the law,

1 Gerstein would have to be reversed.

2 JUSTICE SOUTER: Well, I'm just asking what  
3 you do. Is that the case? Is no charge filed? Then,  
4 at the end of the probable-cause hearing you say: Well,  
5 we -- the judge says: Well, you've got probable cause  
6 to hold this person for possessing a gun after having  
7 been convicted of a felony, but there doesn't happen to  
8 be any charge to that effect here. Is that the state of  
9 the law, in fact?

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

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
14 Ms. Spinelli, you have three minutes.

15 REBUTTAL ARGUMENT OF DANIELLE SPINELLI  
16 ON BEHALF OF THE PETITIONER

17 JUSTICE KENNEDY: It seems to me that our  
18 precedents do say, Gerstein versus Pugh, that the  
19 probable-cause hearing is not an adversary proceeding  
20 where counsel is required; and then if we are going to  
21 give you relief, we have to go beyond what Gerstein says.

22 MS. SPINELLI: I don't believe so, Justice  
23 Kennedy. It's correct that Gerstein says that the  
24 probable-cause determination made under Gerstein is not,  
25 itself, a critical stage, and we are not contending

1 otherwise.

2           The Gerstein determination is something  
3 separate from the initial appearance that occurred here.  
4 A Gerstein determination is made for the purpose of  
5 determining whether there was probable cause for an  
6 arrest. It can be made ex parte. It's essentially the  
7 equivalent of what happens prior to arrest when a  
8 magistrate decides whether there is probable cause to  
9 issue a warrant.

10           What happened here, by contrast, was after  
11 arrest and after the police had decided to hold  
12 Mr. Rothgery, he was brought before a magistrate. He  
13 was officially informed of the accusation against him,  
14 and at that time he acquired the right to contest the  
15 accusation against him in an examining trial, which we  
16 believe shows that he was accused within the meaning of  
17 the Sixth Amendment, and a prosecution had begun.

18           And we are not contending that that initial  
19 proceeding was, itself, a critical stage where counsel  
20 was required; and it's not necessary to contend that in  
21 order to prevail on the point that that was when a  
22 prosecution commenced, which is the only question that  
23 we believe is properly before this Court and the only  
24 one we are asking it to resolve.

25           CHIEF JUSTICE ROBERTS: So Texas would be



1 better off if they didn't have a magistration proceeding  
2 at all, if they didn't have a proceeding to alert the  
3 individual of the charges against him; they did not have  
4 a proceeding to read him his rights; they did not have a  
5 determination of probable cause. They would be better  
6 off if they didn't do any of that?

7 MS. SPINELLI: Well, I mean I think you are  
8 suggesting, Mr. Chief Justice, that reaffirming the rule  
9 adopted in Jackson would create, you know, a perverse  
10 incentive for States to do away with this proceeding. I  
11 don't believe that that's the case because, as Justice  
12 Breyer observed, 45 jurisdictions already follow the  
13 rule of appointing counsel at, or immediately following,  
14 the initial appearance, which the -- any CDL brief lays  
15 out and which neither Respondent nor its State amici  
16 have contested.

17 CHIEF JUSTICE ROBERTS: Well, what's in it  
18 for the State to provide this additional layer?  
19 Because, of course, the person gets Miranda warnings  
20 when he is arrested. And so why -- why should the State  
21 do this?

22 MS. SPINELLI: The initial appearance serves  
23 a specific, substantive purpose which I think is well  
24 described in the Seventh Circuit's decision in Armstrong  
25 cited on page 15 of our reply brief, which is this is

1 the proceeding at which the defendant is informed: You  
2 are now a criminal defendant. This is the accusation  
3 against you, and these are your rights as a defendant in  
4 a criminal proceeding.

5 And for that reason, as the Armstrong  
6 decision says, it is commonly recognized across  
7 jurisdictions as the inception of a formal prosecution,  
8 and we believe that's the rule that this Court has  
9 already laid out in Brewer and Jackson and should  
10 reaffirm today.

11 CHIEF JUSTICE ROBERTS: Why don't you take  
12 an extra minute? We have eaten up your rebuttal time.

13 MS. SPINELLI: Of course, absolutely. I  
14 mean, just to respond to one other question that arose  
15 during the course of Respondent's argument, I think it  
16 is important to understand that in Texas, as in other  
17 jurisdictions, there are two phases in a felony  
18 prosecution.

19 There is an initial phase that commences in  
20 a magistrate court where a document setting out the  
21 charges will be filed either by the police or by a  
22 prosecutor, and the magistrate at that point has  
23 jurisdiction over that criminal case. It is only later  
24 that an indictment or information will be filed in the  
25 general trial court with jurisdiction to enter final

1 judgment.

2 But this Court has repeatedly rejected the  
3 notion that a prosecution begins only in that second  
4 phase. It rejected it expressly in Moore. It rejected  
5 it in Coleman, in Brewer, in Jackson, and in statements  
6 in Kirby and McNeil. So that cannot be the rule.

7 CHIEF JUSTICE ROBERTS: Thank you, counsel.

8 MS. SPINELLI: Thank you.

9 CHIEF JUSTICE ROBERTS: The case is  
10 submitted.

11 (Whereupon, at 12:09 p.m., the case in the  
12 above-entitled matter was submitted.)

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