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Dancing the Texas Two-Step: What Does Rothgery v. Gillespie County Mean for the Sixth Amendment Right to Counsel in South Carolina

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**DANCING THE TEXAS TWO-STEP: WHAT DOES
ROTHGERY V. GILLESPIE COUNTY MEAN FOR THE
SIXTH AMENDMENT RIGHT TO COUNSEL IN SOUTH CAROLINA?**

I. INTRODUCTION

This Note examines two cases recently decided by the United States Supreme Court and the South Carolina Supreme Court, respectively, regarding when a defendant's Sixth Amendment right to counsel attaches in a criminal matter. In *Rothgery v. Gillespie County*,¹ the United States Supreme Court held that the right attaches when the defendant first appears in front of a judicial officer and is informed of any formal accusations against him and any liberty restrictions imposed on him.² In *State v. Sterling*,³ the South Carolina Supreme Court held that a defendant's right to counsel was not violated when a court refused to exclude testimony from witnesses who, prior to the defendant's indictment, were represented by the same attorney as the defendant.⁴ The *Sterling* court noted that the right to counsel attaches "upon initiation of adversarial judicial proceedings and at all critical stages of a criminal trial."⁵

The South Carolina Supreme Court's decision in *Sterling* comports with the United States Supreme Court's decision in *Rothgery*, despite the fact that *Rothgery*'s holding that the right to counsel may attach at the inception of the criminal process⁶ overrules South Carolina courts' holdings that the right attaches only after a defendant has been indicted.⁷ Yet, although *Rothgery* gives theoretical guidance and notes several specific state actions that trigger the right to counsel,⁸ it fails to provide courts with clear practical guidance on when exactly the right attaches and what judicial actions are sufficient for attachment to occur.

This Note analyzes the current law regarding when the Sixth Amendment right to counsel attaches in South Carolina and suggests how courts can determine when a defendant's constitutional rights must be protected in accordance with the Sixth Amendment. Part II gives a brief overview of the historically relevant right to counsel cases. Part III provides a detailed analysis of both the *Rothgery* and *Sterling* decisions. Part IV analyzes the impact of these decisions and attempts to provide guidance on when the right to counsel attaches. Part V concludes that *Rothgery* and *Sterling* somewhat refine a previously murky area of Sixth Amendment case law but still leave courts without clear guidelines on exactly when the right to counsel attaches.

1. *Rothgery v. Gillespie County (Rothgery III)*, 128 S. Ct. 2578 (2008).

2. *Id.* at 2581.

3. 377 S.C. 475, 661 S.E.2d 99 (2008).

4. *Id.* at 477–78, 661 S.E.2d at 100.

5. *Id.* at 479, 661 S.E.2d at 101 (citing *Michigan v. Jackson*, 475 U.S. 625, 629 (1986)).

6. *Rothgery III*, 128 S. Ct. at 2589.

7. *See Sterling*, 377 S.C. at 479, 661 S.E.2d at 101 (citing *Jackson*, 475 U.S. at 629); *State v. Council*, 335 S.C. 1, 15, 515 S.E.2d 508, 515 (1999).

8. *Rothgery III*, 128 S. Ct. at 2583–87.

II. EARLY RIGHT TO COUNSEL DECISIONS

The right to counsel is grounded in the Sixth Amendment and has been examined and refined by numerous courts throughout the history of the United States. The United States Constitution guarantees the assistance of counsel to each person accused of a crime.⁹ This right to counsel is ingrained in the American jurisprudential system as well as in the nation's collective psyche. However, as fundamental as the right is in criminal prosecutions, courts have struggled to clearly define its full meaning and have failed to determine definitively when it attaches.

The United States Supreme Court has used numerous cases involving the right to counsel to elaborate on the contours of the right and when an accused may invoke its protections. The hallmark decision is *Gideon v. Wainwright*,¹⁰ which held that the right to counsel is fundamental and attaches in both state and federal criminal proceedings.¹¹ The Court stated that “any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.”¹²

Ten years later, in *Argersinger v. Hamlin*,¹³ the Supreme Court held that without a “knowing and intelligent waiver” by the defendant of his right to counsel, “no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony” unless the defendant had the assistance of counsel at trial.¹⁴ In *Scott v. Illinois*,¹⁵ the Court refined its earlier holding in *Hamlin*, finding that “no indigent criminal defendant [may] be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense.”¹⁶ The Court reaffirmed these principles in *Alabama v. Shelton*,¹⁷ where it concluded that “a suspended sentence that may ‘end up in the actual deprivation of a person’s liberty’ may not be imposed unless the defendant was accorded ‘the guiding hand of counsel’ in the prosecution for the crime charged.”¹⁸ However, despite these numerous attempts by the United States Supreme Court to clarify the Sixth Amendment right to counsel doctrine, there has long been contention and confusion among lower courts over the point at which the right to counsel attaches during the criminal proceeding.

9. U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.”).

10. 372 U.S. 335 (1963).

11. *Id.* at 342.

12. *Id.* at 344.

13. 407 U.S. 25 (1972).

14. *Id.* at 37.

15. 440 U.S. 367 (1979).

16. *Id.* at 374.

17. 535 U.S. 654 (2002).

18. *Id.* at 658 (quoting *Argersinger*, 407 U.S. at 40).

III. RECENT RIGHT TO COUNSEL CASES: *ROTHGERY V. GILLESPIE COUNTY* AND *STATE V. STERLING*

A. Rothgery v. Gillespie County

The United States Supreme Court most recently addressed the Sixth Amendment in *Rothgery v. Gillespie County*, finding that the Sixth Amendment right to counsel attaches “at the first appearance before a judicial officer at which a defendant is told of the formal accusation against him and restrictions are imposed on his liberty,” regardless of prosecutorial awareness or involvement.¹⁹ In *Rothgery*, the Supreme Court refined the threshold at which the right to counsel attaches.²⁰ The issue in *Rothgery* was whether a public prosecutor must also be aware of or involved in the proceeding before the right attaches.²¹ The Court held that the prosecutor’s awareness and involvement were not necessary,²² thus setting the threshold at which the right to counsel may attach earlier than previously afforded.

1. Factual History

On July 15, 2002, Texas police officers arrested Walter Rothgery without a warrant for the unlawful possession of a firearm by a felon.²³ While at the Gillespie County jail for booking, Rothgery “requested, in writing, appointment of counsel, because he could not afford to hire an attorney to defend him.”²⁴ Rothgery appeared before a magistrate the next morning²⁵ at the article 15.17 hearing,²⁶ where the magistrate found that the officer had probable cause to arrest Rothgery,²⁷ informed Rothgery of the accusations against him, and set bond at \$5,000.²⁸ The magistrate

19. *Rothgery III*, 128 S. Ct. 2578, 2581 (2008).

20. *Id.*

21. *Id.*

22. *Id.*

23. *Rothgery v. Gillespie County (Rothgery I)*, 413 F. Supp. 2d 806, 807 (W.D. Tex. 2006), *aff’d*, 491 F.3d 293 (5th Cir. 2007), *rev’d*, 128 S. Ct. 2578 (2008). The basis for the arrest was the officers’ reliance upon a criminal background check that revealed, erroneously, that Rothgery was a convicted felon. *Rothgery III*, 128 S. Ct. at 2581.

24. *Rothgery I*, 413 F. Supp. 2d at 807.

25. *Id.* Texas law requires that persons arrested without a warrant be brought before a magistrate within forty-eight hours of their arrest. TEX. CODE CRIM. PROC. ANN. art. 14.06(a) (Vernon Supp. 2005). The purpose of this hearing is to inform defendants of their rights, including their right to counsel. *Rothgery I*, 413 F. Supp. 2d at 808 n.2. Texas amended the relevant portions of the statute after Rothgery’s arrest, but the amendments “did not materially alter the sections as they existed then.” *Id.*

26. The Supreme Court noted that Texas does not have an official title for such an appearance, but that the proceeding is sometimes referred to as the “article 15.17 hearing” because it “combines the Fourth Amendment’s required probable-cause determination with the setting of bail, and is the point at which the arrestee is formally apprised of the accusation against him.” *Rothgery III*, 128 S. Ct. at 2581–82. Article 15.17 prescribes the procedures the magistrate must follow when the defendant is presented to the court. TEX. CODE CRIM. PROC. ANN. art. 15.17 (Vernon Supp. 2007).

27. *Rothgery I*, 413 F. Supp. 2d at 808.

28. *Id.*

clearly informed Rothgery that no formal charges had been filed against him and that he had the right to appointed counsel if he was unable to afford his own representation.²⁹ The magistrate further informed Rothgery that he would have to remain in jail until the court appointed counsel if he wanted an attorney present when the court set bail.³⁰ Rothgery waived his right to counsel “at that time”³¹ and posted a surety bond.³² Rothgery “continued to inquire about the status of his July 15 request for appointment of counsel”³³ and submitted a second written request for counsel on July 24, 2002.³⁴ Six months later Rothgery was indicted, rearrested, and brought before the same magistrate judge, where Rothgery claimed that the judge “speculated that Rothgery had not been appointed an attorney because he ‘didn’t deserve one.’”³⁵ After he submitted a fourth written request days later, a state district judge “immediately appointed counsel to represent Rothgery.”³⁶ The appointed attorney quickly obtained the records for the alleged underlying felony and found that Rothgery in fact “was not a convicted felon.”³⁷ The Gillespie County district attorney submitted a request that the indictment be dismissed, which the court subsequently granted.³⁸

2. Procedural History of § 1983 Action

Rothgery filed a civil action against Gillespie County under 42 U.S.C. § 1983, alleging that “if the County had provided a lawyer within a reasonable time after the article 15.17 hearing, he would not have been indicted, rearrested, or jailed for three weeks.”³⁹ He claimed that the County’s failure to do this violated his right to counsel under the Sixth and Fourteenth Amendments.⁴⁰ Gillespie County asserted that the Constitution imposed no duty to provide counsel “prior to the initiation of adversary judicial proceedings.”⁴¹ It argued that the article 15.17 hearing was not an

29. *Id.*

30. *Id.* at 808 n.3.

31. *Id.* at 808. The Court noted that the phrase “at that time” was underlined on the “Warning by Magistrate (Setting Bail & Right to Attorney) State of Texas, County of Gillespie” form in order to emphasize the limited nature of the waiver. *Id.* at 808 & n.3.

32. *Rothgery III*, 128 S. Ct. at 2582; *Rothgery I*, 413 F. Supp. 2d at 808.

33. *Rothgery I*, 413 F. Supp. 2d at 808.

34. *Id.* The district court stated that Rothgery had the request notarized and submitted to county employees. *Id.* Although Rothgery did not include proof of such request during summary judgment, the notary log of an administrative assistant to the Gillespie County judges shows that she “notarized a request for appointment of an attorney and an affidavit in support of an application for appointment of an attorney on July 24, 2002, for ‘Walter A. Rothgery.’” *Id.* at 808–09.

35. *Id.* at 809. According to Rothgery’s deposition testimony, as of this hearing no record of his two earlier requests for counsel existed. *Id.* Rothgery also claimed that he submitted a third written request at that time, but no record of this request appeared at the summary judgment proceedings. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Rothgery III*, 128 S. Ct. 2578, 2582–83 (2008).

40. *Rothgery I*, 413 F. Supp. 2d at 809.

41. *Id.* at 810.

adversarial judicial proceeding but rather that “adversary judicial proceedings, sufficient to trigger Rothgery’s Sixth Amendment right to counsel, were not initiated until after Rothgery was indicted and he made his first post-indictment court appearance.”⁴² Rothgery, in contrast, claimed that the State initiated adversary proceedings when the County charged him by criminal complaint.⁴³ The district court granted summary judgment to Gillespie County.⁴⁴ The United States Court of Appeals for the Fifth Circuit affirmed,⁴⁵ holding that the article 15.17 hearing did not trigger the right to counsel⁴⁶ because the State had not committed to prosecuting Rothgery at that time.⁴⁷ The Supreme Court vacated the court of appeals’s decision and remanded the case for further proceedings in accordance with the Supreme Court’s opinion.⁴⁸ The Fifth Circuit then vacated the district court’s judgment and remanded for further proceedings consistent with the Supreme Court’s opinion.⁴⁹ There has been no further documented action since the Fifth Circuit’s remand to the district court.

3. Rothgery’s Rule and Reasoning

Writing for an eight justice majority, Justice Souter began by analyzing whether a public prosecutor must be aware of or involved in the proceeding before the right to counsel attaches⁵⁰ by recalling the limitation on the Sixth Amendment that the right to assistance of counsel “does not attach until a prosecution is commenced.”⁵¹ The Court had previously determined that prosecution commences at “the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.”⁵² The Court noted that this rule is not simply formalistic, but rather, it recognizes the point at which the government commits to prosecuting the accused, the adversity between the government and the defendant is established, and the accused “finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.”⁵³ Thus, the relevant inquiry for the Court was “whether Texas’s article 15.17 hearing marks that point, with the

42. *Id.*

43. *Id.*

44. *Id.* at 817.

45. Rothgery v. Gillespie County (*Rothgery II*), 491 F.3d 293, 301 (5th Cir. 2007), *aff’g Rothgery I*, 413 F. Supp. 2d 806 (W.D. Tex. 2006), *rev’d*, *Rothgery III*, 128 S. Ct. 2578 (2008).

46. *Rothgery III*, 128 S. Ct. at 2583.

47. *Rothgery II*, 491 F.3d at 297.

48. *Rothgery III*, 128 S. Ct. at 2592.

49. Rothgery v. Gillespie County, 537 F.3d 716, 716 (5th Cir. 2008).

50. *Rothgery III*, 128 S. Ct. at 2581.

51. *Id.* at 2583 (quoting *McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991)) (internal quotation marks omitted).

52. *Id.* (quoting *United States v. Gouveia*, 467 U.S. 180, 188 (1984)) (internal quotation marks omitted).

53. *Id.* (quoting *Kirby v. Illinois*, 406 U.S. 682, 689 (1972)) (internal quotation marks omitted).

consequent state obligation to appoint counsel within a reasonable time once a request for assistance is made.”⁵⁴

The Supreme Court found that the court of appeals had “effectively focused not on the start of adversarial judicial proceedings, but on the activities and knowledge of a particular state official who was presumably otherwise occupied. This was error.”⁵⁵ Under prior decisions, the right to counsel attached when the accused first appeared before a judicial officer—the “‘preliminary arraignment’ or ‘arraignment on the complaint.’”⁵⁶ This hearing is traditionally when the magistrate informs the accused of the charge against him, informs him of his rights for the remainder of the proceedings, and establishes requirements for his pretrial release.⁵⁷ Here, the article 15.17 hearing qualified as such an initial appearance because Rothgery went before a magistrate who presented the accusations against him and sent him to jail until he was able to pay his bail.⁵⁸

(a) *Controlling Precedent*

The Court found that three of its prior decisions controlled its holding in *Rothgery*. *Brewer v. Williams*⁵⁹ had involved a defendant who was arraigned, brought before a judge on a prior arrest warrant, and jailed, at which time the defendant then made incriminating statements to police outside the presence of his attorneys that led to his murder indictment.⁶⁰ *Brewer* determined that the State initiated judicial proceedings before the defendant made the incriminating statements because at that point an arrest warrant had been issued and the defendant had been arraigned and placed in jail.⁶¹

In *Michigan v. Jackson*,⁶² the Court had reexamined “whether the right to counsel attaches at the initial appearance”⁶³ and concluded that the first of two arraignments marked the point at which the right attached.⁶⁴ In *Jackson*, the State argued that its procedure for felony arrests required two arraignments and that the second arraignment marked the defendant’s “first opportunity to enter a plea in a court with jurisdiction to render a final decision in a felony case,”⁶⁵ which the State argued would trigger the right to counsel.⁶⁶ The State maintained that, prior to the

54. *Id.*

55. *Id.* at 2583–84.

56. *Id.* at 2584.

57. *Id.*

58. *Id.*

59. 430 U.S. 387 (1977).

60. *Rothgery III*, 128 S. Ct. at 2584 (citing *Brewer*, 430 U.S. at 391, 397–98).

61. *Id.* (citing *Brewer*, 430 U.S. at 399).

62. 475 U.S. 625 (1986).

63. *Rothgery III*, 128 S. Ct. at 2585.

64. *Id.* at 2586.

65. *Id.* at 2585 (quoting Brief for the Petitioner at 25, *Michigan v. Bladel*, 475 U.S. 625 (1985) (No. 84-1539)).

66. *Id.*

second arraignment, the defendant's rights were protected by the Fifth Amendment's right to counsel.⁶⁷ The *Jackson* Court rejected Michigan's distinction between the two arraignments, citing the importance placed on arraignments that was emphasized in the Court's prior decisions.⁶⁸ In accordance with *Brewer*, "by the time a defendant is brought before a judicial officer, is informed of a formally lodged accusation, and has restrictions imposed on his liberty in aid of the prosecution, the State's relationship with the defendant has become solidly adversarial."⁶⁹ The Court clarified that this statement "is just as true when the proceeding comes before the indictment (in the case of the initial arraignment on a formal complaint) as when it comes after it (at an arraignment on an indictment)."⁷⁰

The Court's most recent examination of the importance of an accused's initial appearance was in *McNeil v. Wisconsin*,⁷¹ where "the State had conceded that the right to counsel attached at the first appearance before a county court commissioner, who set bail and scheduled a preliminary examination."⁷² Justice Souter noted in the *Rothgery* decision that *McNeil* reaffirmed that the right to counsel "attaches at the first formal proceeding against an accused," and that "in most States, at least with respect to serious offenses, free counsel is made available at that time."⁷³

After discussing the controlling precedent, Justice Souter noted that the Court's observation in *McNeil* regarding the number of states affording free counsel was still accurate nearly two decades later:⁷⁴ "[T]he overwhelming consensus practice conforms to the rule that the first formal proceeding is the point of attachment."⁷⁵

67. *Id.* (citing Brief for the Petitioner, *supra* note 65, at 26). In *Miranda v. Arizona*, 384 U.S. 436 (1966), the Supreme Court held that a person accused of a crime must be informed of the "right to remain silent" and the possibility that anything that the accused chooses to say may be used against the accused in court. *Id.* at 469. To guarantee the free will of the accused to choose whether or not to speak to police, the Court decided that the accused has the right to have an attorney present during the interrogation of the accused, and called this right "indispensable to the protection of the Fifth Amendment privilege under the system we delineate today." *Id.* *Jackson* explained the interaction of the Fifth and Sixth Amendments' rights to counsel:

The question is not whether respondents had a right to counsel at their postarraignment, custodial interrogations. The existence of that right is clear. It has two sources. The Fifth Amendment protection against compelled self-incrimination provides the right to counsel at custodial interrogations. The Sixth Amendment guarantee of the assistance of counsel also provides the right to counsel at postarraignment interrogations. The arraignment signals "the initiation of adversary judicial proceedings" and thus the attachment of the Sixth Amendment; thereafter, government efforts to elicit information from the accused, including interrogation, represent "critical stages" at which the Sixth Amendment applies.

Michigan v. Jackson, 475 U.S. 625, 629–30 (1986).

68. *Rothgery III*, 128 S. Ct. at 2586 (quoting *Jackson*, 475 U.S. at 629 n.3).

69. *Id.*

70. *Id.*

71. 501 U.S. 171 (1991).

72. *Rothgery III*, 128 S. Ct. at 2586.

73. *Id.* (quoting *McNeil*, 501 U.S. at 180–81) (internal quotation marks omitted).

74. *Id.*

75. *Id.* The federal government, the District of Columbia, and forty-three states "take the first step toward appointing counsel 'before, at, or just after initial appearance.'" *Id.* at 2586–87 (quoting

The Court explained that in the seven nonconforming states, including South Carolina and Texas, the practice of appointing counsel “is not free of ambiguity.”⁷⁶ One of the amicus briefs suggested that the practice in four of these states, including South Carolina, might conform to the majority practice,⁷⁷ but that the Texas approach is clearly in the minority of state practices.⁷⁸

(b) *Lower Court Holdings and Gillespie County’s Arguments in Favor of the Minority Practice*

Because the majority of states’ practices conform to the Supreme Court’s right to counsel jurisprudence, “[t]he only question is whether there may be some arguable justification for the minority practice.”⁷⁹ The Court found none and rejected the standard adopted by the court of appeals—the prosecutorial awareness standard—which suggested that the attachment of the right to counsel “depends not on whether a first appearance has begun adversary judicial proceedings, but on whether the prosecutor had a hand in starting it.”⁸⁰

In rejecting the prosecutorial awareness standard, the Court explained that neither *Brewer* nor *Jackson* mentioned any relevance of the prosecutor’s involvement, leaving “no room for the factual enquiry the Court of Appeals would require, and with good reason.”⁸¹ A rule “that turned on determining the moment of a prosecutor’s first involvement would be ‘wholly unworkable and impossible to administer,’”⁸² and would make attachment dependent on unreliable factors such as the date of arrest or the jurisdiction’s intake technology and personnel.⁸³ The court of appeals mistakenly believed that its standard was implied by the Supreme Court’s statement that “the right attaches when the government has ‘committed itself to prosecute.’”⁸⁴ The Supreme Court explained that the court of appeals “reasoned that because ‘the decision not to prosecute is the quintessential function of a prosecutor’

Brief for National Ass’n of Criminal Defense Lawyers as Amicus Curiae Supporting Petitioner at 1a, *Rothgery III*, 128 S. Ct. at 2578 [hereinafter Brief for NACDL].

76. *Id.* at 2587.

77. *Id.* (citing Brief for NACDL, *supra* note 75, at 5a–7a). The NACDL’s brief stated that there appears to be a distinction between what South Carolina Appellate Rules require and the actual practice of South Carolina courts in appointing counsel, and thus NACDL was unable to characterize precisely the state’s practice for appointing counsel. Brief for NACDL, *supra* note 75, at 7a. The brief further explained that Texas provides counsel after arrest and the accused’s initial appearance if the accused is being held in custody. *Id.* If the accused is instead released on bond, the accused receives counsel “either at arraignment on the information or indictment, or when adversarial judicial proceedings commence—whichever occurs first. Thus, the appointment of counsel for those charged and released on bail depends on when the Constitution requires the attachment of the right to counsel.” *Id.*

78. *Rothgery III*, 128 S. Ct. at 2587 (citing Brief for NACDL, *supra* note 75, at 5a–7a).

79. *Id.* at 2587–88.

80. *Id.* at 2588.

81. *Id.*

82. *Id.* (quoting *Escobedo v. Illinois*, 378 U.S. 478, 496 (1964) (White, J., dissenting)).

83. *Id.*

84. *Id.* (quoting *Kirby v. Illinois*, 406 U.S. 682, 689 (1972)).

under Texas law, the State could not commit itself to prosecution until the prosecutor signaled that it had.”⁸⁵

The Supreme Court found that the commitment to prosecute is a matter of federal law and thus remains unchanged by a state’s allocation of power to its officials.⁸⁶ Justice Souter explained that “under the federal standard, an accusation filed with a judicial officer is sufficiently formal, and the government’s commitment to prosecute it sufficiently concrete, when the accusation prompts arraignment and restrictions on the accused’s liberty to facilitate the prosecution.”⁸⁷ At this point, the action abridges the defendant’s liberty,⁸⁸ and the identity of the official who initiated the prosecution is immaterial to the standard.⁸⁹ Gillespie County disputed this standard, claiming that the Court should ignore an infringement on the “defendant’s pretrial liberty”⁹⁰ in evaluating the importance of the first appearance because this liberty is protected by the Fourth Amendment⁹¹ and the Sixth Amendment right to a speedy trial,⁹² not the Sixth Amendment right to counsel.⁹³ The Court distinguished its previous decision in *United States v. Gouveia*,⁹⁴ where it held that the Sixth Amendment did not provide additional protection to defendants who were already prison inmates and were placed in administrative detention prior to their indictment.⁹⁵ The inmates’ Sixth Amendment right to counsel did not attach prior to the indictment, but they nonetheless retained other rights under the Fifth Amendment.⁹⁶ The Court stated that *Gouveia* did not apply to Rothgery as it “does not affect the conclusion we reaffirmed two years later in *Jackson*, that bringing a defendant before a court for initial appearance signals a sufficient commitment to prosecute and marks the start of adversary judicial proceedings.”⁹⁷

Gillespie County further attempted to minimize the importance of the initial appearance by arguing that an attachment rule devoid of prosecutorial involvement would mean that the State would commit itself to prosecuting every person the police arrested because each arrestee must have an article 15.17 hearing under Texas law.⁹⁸ The Court affirmed this de facto commitment, as “the State has done just that, subject to the option to change its . . . mind later.”⁹⁹ The State may decide,

85. *Id.* (quoting *Rothgery II*, 491 F.3d 293, 297 (5th Cir. 2007)).

86. *Id.*

87. *Id.* at 2589.

88. *Id.* (quoting *Kirby*, 406 U.S. at 689).

89. *Id.*

90. *Id.*

91. The Fourth Amendment protects the right of people to be free from unreasonable searches and seizures. U.S. CONST. amend. IV.

92. The Sixth Amendment provides the right to a speedy trial in criminal prosecutions. U.S. CONST. amend. VI.

93. *Rothgery III*, 128 S. Ct. at 2589.

94. 467 U.S. 180 (1984).

95. *Rothgery III*, 128 S. Ct. at 2589–90 (quoting *Gouveia*, 467 U.S. at 192).

96. *Id.* (quoting *Gouveia*, 467 U.S. at 192).

97. *Id.* at 2590.

98. *Id.* (quoting Brief of Respondent at 24, *Rothgery III*, 128 S. Ct. 2578 (2008) (No. 07-440)).

99. *Id.*

at any time, to discontinue a case against the arrestee, but until that point, the arrestee has the right to have an attorney preparing a case for the arrestee.¹⁰⁰

The County's next argument addressed the meaning of prosecutorial involvement. The County claimed that the proper test is not whether a prosecutor is involved in the case but rather if the State "has objectively committed itself to prosecute."¹⁰¹ The County maintained that the prosecutor's involvement only constitutes "one form of evidence of such commitment";¹⁰² others include filing formal charges against the suspect, holding "an adversarial preliminary hearing to determine probable cause to file such charges,"¹⁰³ and appearing before a court after indictment or information.¹⁰⁴ The Court again rejected the County's argument, holding that it was contrary to *Brewer* and *Jackson* because "an initial appearance following a charge signifies a sufficient commitment to prosecute regardless of a prosecutor's participation, indictment, information, or what the County calls a 'formal' complaint."¹⁰⁵

Finally, the County claimed that the problem in *Rothgery* was rooted in *Brewer* and *Jackson*, calling the former case "'vague' and thus of 'limited, if any, precedential value.'"¹⁰⁶ It argued that *Brewer* and *Jackson* established a rule that the right attaches when the State files formal charges, with limited exceptions prior to indictment.¹⁰⁷ The Court rejected these contentions, stating that its holdings "were not vague; *Brewer* expressed 'no doubt' that the right to counsel attached at the initial appearance, and *Jackson* said that the opposite result would be 'untenable.'"¹⁰⁸ The Court stated that, by not taking the cases "at face value,"¹⁰⁹ the County mistakenly merged "the attachment question (whether formal judicial proceedings have begun) with the distinct 'critical stage' question (whether counsel must be present at a postattachment proceeding unless the right to assistance is validly waived)."¹¹⁰ The Court explained:

[A]ttachment occurs when the government has used the judicial machinery to signal a commitment to prosecute as spelled out in *Brewer* and *Jackson*. Once attachment occurs, the accused at least is entitled to the presence of appointed counsel during any "critical stage" of the postattachment

100. *Id.*

101. *Id.* (quoting Brief of Respondent, *supra* note 98, at 31) (internal quotation marks omitted).

102. *Id.* (quoting Brief of Respondent, *supra* note 98, at 31) (internal quotation marks omitted).

103. *Id.* (quoting Brief of Respondent, *supra* note 98, at 31) (internal quotation marks omitted).

104. *Id.* (quoting Brief of Respondent, *supra* note 98, at 32).

105. *Id.*

106. *Id.* (quoting Brief of Respondent, *supra* note 98, at 33, 35).

107. *Id.* at 2590–91 (quoting Brief of Respondent, *supra* note 98, at 19, 23). The County included in the exceptions only "those appearances at which the aid of counsel is urgent and 'the dangers to the accused of proceeding without counsel' are great." *Id.* at 2591 (quoting Brief of Respondent, *supra* note 98, at 28).

108. *Id.* at 2591 (quoting *Michigan v. Jackson*, 475 U.S. 625, 629 n.3 (1986); *Brewer v. Williams*, 430 U.S. 387, 399 (1977)).

109. *Id.*

110. *Id.*

proceedings; what makes a stage critical is what shows the need for counsel's presence. Thus, counsel must be appointed within a reasonable time after attachment to allow for adequate representation at any critical stage before trial, as well as at trial itself.¹¹¹

The Court declined to outline the scope of the post-attachment right to counsel, limiting its holding because “the enquiry into that right is a different one from the attachment analysis.”¹¹² According to the Court, the County’s assumption that “attachment necessarily requires the occurrence or imminence of a critical stage”¹¹³ was erroneous because “it is irrelevant to attachment that the presence of counsel at an article 15.17 hearing, say, may not be critical, just as it is irrelevant that counsel’s presence may not be critical when a prosecutor walks over to the trial court to file an information.”¹¹⁴ The Court reiterated its holding in *Jackson* that “[t]he question whether arraignment signals the initiation of adversary judicial proceedings . . . is distinct from the question whether the arraignment itself is a critical stage requiring the presence of counsel.”¹¹⁵ The Court then issued the death blow for Gillespie County: “Texas’s article 15.17 hearing plainly signals attachment, even if it is not itself a critical stage.”¹¹⁶

4. Rothgery’s *Holding*

The Court concluded by stating that its holding was narrow and did not reach Rothgery’s contention that the County’s six-month delay in appointing counsel prejudiced his rights under the Sixth Amendment, nor did it address the applicable standards for resolution of such a claim.¹¹⁷ Rather, the Court simply affirmed its previous holdings, followed by the majority of jurisdictions nationwide, that “a criminal defendant’s initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel.”¹¹⁸ The Court then vacated and remanded the case to the Fifth Circuit for further proceedings in light of its decision.¹¹⁹

111. *Id.*

112. *Id.* at 2591 n.15.

113. *Id.* at 2591.

114. *Id.*

115. *Id.* (quoting *Michigan v. Jackson*, 475 U.S. 625, 630 n.3 (1986)).

116. *Id.* at 2591–92.

117. *Id.* at 2592.

118. *Id.*

119. *Id.*

B. State v. Sterling

In *State v. Sterling*,¹²⁰ the South Carolina Supreme Court addressed a situation in which a defendant terminated the services of his attorney more than two years prior to an indictment.¹²¹ The court held that the defendant could not claim a violation of his Sixth Amendment right to counsel based on purported prejudice because his right to counsel did not attach before he was indicted.¹²²

1. Factual and Procedural Background

In the wake of the collapse of two investment firms in South Carolina,¹²³ a grand jury was convened in June 2003 to investigate the events surrounding the collapse.¹²⁴ In the course of the investigation, the South Carolina Law Enforcement Division (SLED) asked to interview John M. Sterling,¹²⁵ who had served on the board of directors of both organizations.¹²⁶ Sterling sought legal advice from an attorney, Bill Bannister, who accompanied him to the SLED interview on July 30, 2003.¹²⁷ SLED conducted interviews of various other officers of the firms during the same period, including Bannister's clients Larry Owen, Anne Owen, Don Bobo, and Danny Sharpe.¹²⁸ Sterling terminated Bannister's representation by letter on January 19, 2004.¹²⁹

A grand jury indicted Sterling on April 12, 2006, on one count of conspiracy and two counts of securities fraud.¹³⁰ Sterling moved to quash the indictment or, alternatively, to exclude the testimony of Owens, Bobo, and Sharpe due to "Bannister's purported conflict of interest after having represented all parties at the time of their SLED interviews."¹³¹ The trial court denied the motion to quash the indictment in the absence of prosecutorial misconduct but granted Sterling's motion to exclude the witnesses' testimony, finding that "Bannister's past representation of

120. 377 S.C. 475, 661 S.E.2d 99 (2008).

121. *Id.* at 477–78, 661 S.E.2d at 100.

122. *Id.* at 477–79, 661 S.E.2d at 100–01.

123. Carolina Investors, Inc. and HomeGold Financial, Inc. collapsed in 2003, stripping thousands of investors of their life savings and prompting numerous lawsuits, as well as criminal actions, against the firms and their directors. See STATE GRAND JURY OF SOUTH CAROLINA, REPORT OF THE SIXTEENTH STATE GRAND JURY CONCERNING ITS INVESTIGATION OF ANY VIOLATION OF CHAPTER 1, TITLE 35 OF THE UNIFORM SECURITIES ACT, OR ANY CRIME RELATED TO SECURITIES FRAUD OR IN VIOLATION OF THE SECURITIES LAWS OF SOUTH CAROLINA AT CAROLINA INVESTORS, INC., HOMEGOLD, INC. AND HOMEGOLD FINANCIAL, INC. AND OTHER ENTITIES 4–6 (July 14, 2006), available at <http://www.scag.gov/newsroom/pdf/carolinainvestorsreport.pdf>.

124. *Sterling*, 377 S.C. at 477, 661 S.E.2d at 100.

125. *Id.*

126. *Id.* at 477 n.1, 661 S.E.2d at 100 n.1.

127. *Id.* at 477, 661 S.E.2d at 100.

128. *Id.*

129. *Id.*

130. *Id.* at 478, 661 S.E.2d at 100.

131. *Id.*

[Sterling] and the witnesses violated [Sterling's] Sixth Amendment right to counsel in that it created an actual conflict of interest."¹³²

2. *Legal Analysis*

After addressing a preliminary issue concerning the appealability of the case,¹³³ the South Carolina Supreme Court turned to the substantive matter of the exclusion of the witnesses' testimony. The State argued that this exclusion was in error because Sterling "suffered no Sixth Amendment violation and because no actual conflict of interest existed."¹³⁴ The court agreed.¹³⁵

The court examined both the procedural and substantive elements of the Sixth Amendment right to counsel and stated that the right "attaches upon initiation of adversarial judicial proceedings and at all critical stages of a criminal trial."¹³⁶ To show a per se violation of the right, a defendant must "show that counsel acted under an actual conflict of interest."¹³⁷ The trial court's ruling that Sterling's rights were prejudiced was in error because his "Sixth Amendment right *had not attached* at any point during Bannister's representation, *as [Sterling] had not yet been indicted.*"¹³⁸ The State had not initiated criminal proceedings against Sterling or indicted him at the time Bannister represented him, and Bannister ceased representation of Sterling more than two years before the indictment.¹³⁹ The court noted that it "has never found per se Sixth Amendment violations during the pre-indictment stage, and [Sterling] cites no authority to the contrary."¹⁴⁰ It reasoned that "[t]o the extent an attorney is acting under a conflict of interest in the pre-

132. *Id.*

133. The court found that the motion to exclude the testimonies was appealable. *Id.* at 478, 661 S.E.2d at 100–01. The Supreme Court previously interpreted the appealability statute, S.C. CODE ANN. § 14-3-330 (1976), "to allow the immediate appeal of pre-trial orders which would significantly impair the prosecution of a criminal case." *Sterling*, 377 S.C. at 478, 661 S.E.2d at 100–01 (citing *State v. McKnight*, 287 S.C. 167, 168, 337 S.E.2d 208, 209 (1985)). Because the witnesses could provide firsthand accounts of Sterling's knowledge and actions, their testimonies were critical to the State's case and were immediately appealable. *Id.* at 478, 661 S.E.2d at 101.

134. *Id.* at 479, 661 S.E.2d at 101.

135. *Id.*

136. *Id.* (citing *Michigan v. Jackson*, 475 U.S. 625, 629 (1986)).

137. *Id.* A court will only presume prejudice if the defendant shows that the attorney was active in representing conflicting interests and that an actual conflict of interest had an adverse affect on the attorney's performance. *Id.* (quoting *Strickland v. Washington*, 466 U.S. 668, 692 (1984)).

138. *Id.* (emphasis added). The court noted parenthetically that "the Sixth Amendment right attaches only post-indictment, at least in the questioning/statement setting." *Id.* (citing *State v. Council*, 335 S.C. 1, 15, 515 S.E.2d 508, 515 (1999)).

139. *Id.*

140. *Id.* The court referred to two cases in which it did find per se Sixth Amendment violations, where counsel acted under actual conflicts of interest at a trial and at a plea hearing, respectively. *Id.* (citing *State v. Gregory*, 364 S.C. 150, 612 S.E.2d 449 (2005); *Thomas v. State*, 346 S.C. 140, 551 S.E.2d 254 (2001)).

indictment stage, we think that the actual conflict of interest must persist into the post-indictment stage before a court will presume prejudice.”¹⁴¹

The court determined that not only could the right to counsel not have been violated pre-indictment because representation terminated before the indictment, but that Sterling did not even show that an actual conflict of interest existed,¹⁴² and thus the court would not presume prejudice.¹⁴³ In order to “hold that a pre-indictment conflict could pose a Sixth Amendment violation,” Sterling would have to show prejudice, which he was unable to do.¹⁴⁴ The court noted that Sterling nonetheless retained protections during trial, such as the trial court’s ability to hold in camera hearings if the witnesses seemed poised to testify to privileged information and to promulgate protective instructions and orders.¹⁴⁵

The court concluded by noting that the trial court’s remedy for the alleged Sixth Amendment violation of excluding the witnesses’ testimony was atypical because violations of the right to counsel usually arise during adjudication proceedings, and the remedy is normally a new trial.¹⁴⁶ The trial court’s remedy in this case “effectively operated as an expansive version of the exclusionary rule,”¹⁴⁷ a remedy that courts typically reserve for violations of the Fourth Amendment.¹⁴⁸ In order for the exclusionary rule to be the proper remedy in such a case, the supreme court would require more egregious circumstances than those that existed in this case.¹⁴⁹ Because Sterling did not suffer a violation of his Sixth Amendment right to counsel and did not show other prejudice deriving from Bannister’s representation, the South Carolina Supreme Court reversed the trial court’s order excluding the testimonies.¹⁵⁰

141. *Id.* at 479–80, 661 S.E.2d at 101. The court noted two opinions from the Fourth Circuit Court of Appeals in which that court found prejudice when an actual conflict led to adverse effects on pretrial strategies and trial defense, *id.* at 480, 661 S.E.2d at 101 (citing *United States v. Tatum*, 943 F.2d 370, 380 (4th Cir. 1991)), and when an actual conflict of interest existed before the indictment and persisted throughout the trial, *id.* (citing *Hoffman v. Leeke*, 903 F.2d 280, 282, 286–87, 290 (4th Cir. 1990)).

142. *Id.* At the time Bannister represented Sterling and the clients who had testified, criminal proceedings had not been initiated, and thus “the witnesses’ interests were not necessarily adverse to [Sterling’s] interests.” *Id.*

143. *Id.* at 480, 661 S.E.2d at 102.

144. *Id.* The court also noted that there was no evidence of Sterling giving Bannister confidential information, Bannister telling the witnesses privileged information, or the prosecutor engaging in misconduct. *Id.* at 480–81, 661 S.E.2d at 102. The court further noted: “That a defendant must show prejudice absent an actual conflict of interest is extremely important in preventing multiple defendants from frustrating prosecution efforts.” *Id.* at 480 n.2, 661 S.E.2d at 102 n.2.

145. *Id.* at 481, 661 S.E.2d at 102.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* The court suggested that prosecutorial misconduct or an attorney’s intentional divulgence of privileged information to witnesses or the State might qualify as an additional circumstance sufficient to merit such a remedy. *Id.*

150. *Id.* at 481–82, 661 S.E.2d at 102.

IV. WHAT DOES *ROTHGERY* MEAN FOR SOUTH CAROLINA?A. *Does Sterling Comport with Rothgery?*

The initial question in evaluating what *Rothgery* means for South Carolina is whether the South Carolina Supreme Court's decision in *Sterling* comports with *Rothgery*. In *Sterling*, the court noted parenthetically that the right to counsel attaches after indictment and held that Sterling's right to counsel had not yet attached because he had not been indicted.¹⁵¹ *Rothgery* overrules this portion of *Sterling* and South Carolina courts' prior holdings that the right only attaches post-indictment.¹⁵² The Supreme Court in *Rothgery* stated that it was following *Brewer*'s precedent when it held that "by the time a defendant is brought before a judicial officer, is informed of a formally lodged accusation, and has restrictions imposed on his liberty in aid of the prosecution, the State's relationship with the defendant has become solidly adversarial."¹⁵³ This holds true whether the proceeding is pre-indictment or post-indictment.¹⁵⁴ It is at this point—a formal proceeding by the State against the defendant—that the right to counsel attaches.¹⁵⁵ Accordingly, South Carolina's rule that the right to counsel only attaches post-indictment must give way to the new *Rothgery* standard that allows for the Sixth Amendment to attach at an earlier stage in the proceedings.

However, despite the overruling of this portion of *Sterling*, the decision as a whole is compatible with *Rothgery*. *Sterling* was correct in holding that Sterling's right to counsel, in this instance, did not attach until his indictment because, though not always the case, the indictment marked the first formal proceeding by the State against the defendant.¹⁵⁶ Therefore, because the court correctly determined when the right to counsel attached *in this case*, its decision is not disturbed by *Rothgery*.

151. *Id.* at 479, 661 S.E.2d at 101.

152. The South Carolina Supreme Court previously discussed Sixth Amendment attachment in *State v. Register*, 323 S.C. 471, 476 S.E.2d 153 (1996). The court noted that the right "attaches when adversarial judicial proceedings have been initiated and at all critical stages," not simply upon defendant's arrest. *Id.* at 477, 476 S.E.2d at 157 (citing *Hoffa v. United States*, 385 U.S. 293, 304–09 (1966)). It specifically stated that "the Sixth Amendment right attaches only 'post-indictment,' at least in the questioning/statement setting." *Id.*; see also *State v. Council*, 335 S.C. 1, 15, 515 S.E.2d 508, 515 (1999) (citing various Sixth Amendment attachment cases which conform to *Register*'s holding that the right to counsel only attaches post-indictment).

153. *Rothgery III*, 128 S. Ct. 2578, 2586 (2008).

154. *Id.*

155. *Id.* (citing *McNeil v. Wisconsin*, 501 U.S. 171, 180–81 (1991)).

156. See *Sterling*, 377 S.C. at 479, 661 S.E.2d at 101.

B. What Are the Contours of the Sixth Amendment Right to Counsel in South Carolina?

Because the Sixth Amendment to the Constitution guarantees the right to counsel¹⁵⁷ and applies to the states through the Fourteenth Amendment,¹⁵⁸ South Carolina must comply with decisions of the United States Supreme Court which interpret the Sixth Amendment.¹⁵⁹ *Rothgery* is such a decision and thus is binding on all the states. As such, when determining a criminal defendant's right to counsel, South Carolina must abide by the *Rothgery* rule that "a criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel."¹⁶⁰ However, this rule still allows South Carolina flexibility in determining when it must provide counsel to a defendant because the State can, within otherwise legally permissible bounds, delay bringing a defendant before a judicial officer, charging the defendant, and restricting the defendant's liberty until the State is ready to provide the defendant with counsel. This might occur when the State has evidence against a suspect but prefers to continue building its case against the suspect before charging the suspect with a crime, which appears to be what happened to Sterling between his SLED questioning and his indictment.¹⁶¹

Unfortunately, although its holding was theoretically sound, the *Rothgery* Court did not provide concrete markers to guide states in determining exactly which of their judicial proceedings qualify under its standard and thus mark the moment at which the defendant's right to counsel attaches. The holding indicates that when the following three things occur, the right automatically attaches:¹⁶² First, the defendant must appear before a judicial officer.¹⁶³ Second, an official must inform the defendant of the charges.¹⁶⁴ Finally, the defendant's liberty must be restricted.¹⁶⁵ It remains unclear whether a hearing in which fewer than all three of these conditions arise is sufficient to trigger attachment. What is clear is that states are left to evaluate every criminal proceeding to determine whether it meets these three

157. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.").

158. See *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963).

159. However, states are free to provide further protection beyond that which the federal Constitution guarantees. See, e.g., *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980) (citing *Cooper v. California*, 386 U.S. 58, 62 (1967)) (noting the "authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution"); *Cooper*, 386 U.S. at 62 (noting that a prior holding "does not affect the State's power to impose higher standards on searches and seizures than required by the Federal Constitution if it chooses to do so").

160. *Rothgery III*, 128 S. Ct. 2578, 2592 (2008).

161. See *Sterling*, 377 S.C. at 477-78, 661 S.E.2d at 100.

162. *Rothgery III*, 128 S. Ct. at 2592.

163. *Id.*

164. *Id.*

165. *Id.*

standards and thus signals attachment.¹⁶⁶ The ambiguity over what is sufficient may lead to an inconsistent and haphazard application of the standard, depending upon the particular judge's interpretation of the *Rothgery* requirements.

After *Rothgery*, it appears that the right to counsel attaches at the very latest at an indictment. However, *Rothgery* also makes clear that the indictment is by no means the only time the right attaches.¹⁶⁷ The safest way to protect defendants—and the least likely way to be overturned on appeal—is for courts to err on the side of providing a defendant with the right to counsel in any questionable situation.

However, the practical implications of such a liberal application of the “attachment standard” may militate against making every interaction between defendants and the state the triggering point for the right to counsel. Mere police questioning would not signal a “commitment to prosecute”¹⁶⁸ as required by *Rothgery* and thus would not trigger attachment.¹⁶⁹ Further, it seems unreasonable and unneeded to give counsel to a defendant who meets only one prong of the *Rothgery* holding. For example, if a defendant appears before a judicial officer simply to have charges dismissed or to be informed that no charges will be filed, the defendant would not need the assistance of counsel and would not have such a right. However, because only a judicial officer has the power to charge a defendant, officially learning of charges requires appearing before a judicial officer and would thereby satisfy two of the three prongs. Likewise, a court that restricts a defendant's liberty and compels the defendant to appear before a judicial officer would also satisfy two of the three prongs.

Thus, the only grey area appears to be the situation where charges are filed against a defendant, but the defendant's liberty is not restricted. Although nothing in *Rothgery* mandates providing counsel to a defendant in this situation, courts would be wise to provide counsel in order to avoid later claims by defendants that they were deprived of their constitutional rights. In an area of law that is as unclear but as significant as the right to counsel, courts should err on the side of caution and give defendants in this situation the right to counsel. Although doing so may place a larger burden on the legal community, and especially on public defenders, the cost would be justified by ensuring that defendants' constitutional rights are protected and by knowing that the court is less likely to be reversed on appeal. Such a reversal would force another trial—this time with counsel—at the expense of additional judicial resources.

Consider, for example, the savings to Texas's judicial resources if *Rothgery* had been given counsel at the article 15.17 hearing. The speed at which *Rothgery*'s

166. *See, e.g.*, *United States v. Morriss*, 531 F.3d 591, 593–94 (8th Cir. 2008) (holding that the defendant's Sixth Amendment right to counsel did not attach when an FBI agent solicited a statement from defendant even though the government had previously contacted defendant's attorney regarding a plea bargain as an alternative to indicting defendant).

167. *Rothgery III*, 128 S. Ct. at 2583.

168. *Id.* at 2590.

169. *See id.*

attorney was able to disentangle and resolve the matter upon his appointment¹⁷⁰ illustrates that providing counsel at Rothgery's first request would have ended the case within days. Instead, Texas expended resources by jailing Rothgery, bringing him into court several times, and ultimately being forced to defend itself in an ensuing civil action all the way to the United States Supreme Court.¹⁷¹

V. CONCLUSION

Rothgery and *Sterling* represent a change for South Carolina regarding when the right to counsel attaches for a criminal defendant, as the United States Supreme Court clarified that the right does not attach only upon the defendant's indictment. *Rothgery* also marks a change for the Court by establishing the point of attachment potentially much earlier in the criminal process. When read with *Rothgery*, *Sterling* illustrates that South Carolina's decision to allow attachment only after indictment may be too restrictive in some instances, but the overall decision comports with *Rothgery* because in *Sterling*, adversarial judicial proceedings did not begin against Sterling until he was indicted.

While *Rothgery* provides clear theoretical statements regarding the right to counsel, it fails to provide courts with practical guidance on how to determine if the right to counsel exists in situations that do not fall neatly within the fact-specific framework of its decision. As such, South Carolina courts would be wise to err on the side of affording counsel to defendants when there is any question of whether the right has attached, particularly when defendants are charged but their liberty is not restricted.

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170. *See id.* at 2582.

171. Likewise, a state could save money and resources by providing counsel in other similar situations, such as when charges against a defendant will eventually be dismissed or a plea deal could be reached that would prevent imprisonment or further court hearings.