

titled to preserve actual control over the case he chooses to present to the jury,” and consequently, standby counsel’s participation “should not be allowed to destroy the jury’s perception that the defendant is representing himself.”<sup>355</sup> But participation of standby counsel even in the jury’s presence and over the defendant’s objection does not violate the defendant’s Sixth Amendment rights when serving the basic purpose of aiding the defendant in complying with routine courtroom procedures and protocols and thereby relieving the trial judge of these tasks.<sup>356</sup>

### **Right to Assistance of Counsel in Nontrial Situations**

***Judicial Proceedings Before Trial.***—Even a preliminary hearing where no government prosecutor is present can trigger the right to counsel.<sup>357</sup> “[A] criminal defendant’s defendant’s initial appearance before a judicial officer, where he learns the charges 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.”<sup>358</sup> “Attachment,” however, may signify “nothing more than the beginning of the defendant’s prosecution [and] . . . not mark the beginning of a substantive entitlement to the assistance of counsel.”<sup>359</sup> Thus, counsel need be appointed only “as far in advance of trial, and as far in advance of any pre-trial ‘critical stage,’ as necessary to guarantee effective assistance at trial.”<sup>360</sup>

*Dicta* in *Powell v. Alabama*,<sup>361</sup> however, indicated that “during perhaps the most critical period of the proceedings . . . that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thoroughgoing investigation and preparation [are] vitally important, the defendants . . . [are] as much entitled to such aid [of counsel] during that period as at the trial itself.” This language was gradually expanded upon and the Court developed a concept of “a critical stage in a criminal proceeding” as indicating when the defendant must be represented by counsel. Thus,

<sup>355</sup> 465 U.S. at 178.

<sup>356</sup> 465 U.S. at 184.

<sup>357</sup> *Rothgery v. Gillespie County*, 128 S. Ct. 2578 (2008) (right to appointed counsel attaches even if no public prosecutor, as distinct from a police officer, is aware of that initial proceeding or involved in its conduct).

<sup>358</sup> 128 S. Ct. at 2592.

<sup>359</sup> 128 S. Ct. at 2592 (Alito, J., concurring). Justice Alito’s concurrence, joined by Chief Justice Roberts and Justice Scalia, was not necessary for the majority opinion in *Rothgery*, but the majority noted that it had not decided “whether the 6-month delay in appointment of counsel resulted in prejudice to Rothgery’s Sixth Amendment rights, and have no occasion to consider what standards should apply in deciding this.” *Id.*

<sup>360</sup> 128 S. Ct. at 2595 (Alito, J. concurring).

<sup>361</sup> 287 U.S. 45, 57 (1932).