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1 P R O C E E D I N G S

2 (11:06 a.m.)

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

6 Ms. Spinelli.

7 ORAL ARGUMENT OF DANIELLE SPINELLI

8 ON BEHALF OF THE PETITIONER

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

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

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

22 At that point, Rothgery acquired specific
23 rights under Texas law as the accused in a felony case,
24 including the right to have the prosecution against him
25 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 of 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 magistrature?

12 CHIEF JUSTICE ROBERTS: The two are kind of
13 related. If in fact there's not a right to counsel upon
14 the magistrature, but, as you said earlier to Justice
15 Alito, it attaches at the end of the magistrature, 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 magistrature. 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.

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 accrued to
13 defendants in criminal prosecutions.

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

17 MS. SPINELLI: We're not contending that an
18 attorney was required.

19 JUSTICE KENNEDY: The rule is -- I want to
20 know, what do we tell Texas it has to do in all these
21 cases? What do we tell jurisdictions that have to deal
22 with traffic tickets? Does it make a difference that
23 you're held in custody or not held in custody? I don't
24 understand the rule you want us to adopt.

25 MS. SPINELLI: I think the rule -- we're

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

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

13 MS. SPINELLI: No, we believe --

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

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

21 JUSTICE SOUTER: Okay, so the --

22 MS. SPINELLI: And this Court --

23 JUSTICE SOUTER: What is the -- so the point
24 of the magistration is that is the point at which a
25 reasonable time starts running within which Texas must

1 afford -- appoint counsel, isn't that your basic point?

2 MS. SPINELLI: Correct, Justice Souter.

3 JUSTICE SOUTER: Okay.

4 MS. SPINELLI: That's our contention.

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

8 MS. SPINELLI: Not at all.

9 JUSTICE SOUTER: -- itself because there was
10 no counsel there.

11 MS. SPINELLI: No, not at all.

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

16 MS. SPINELLI: No.

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

20 MS. SPINELLI: That's correct.

21 JUSTICE BREYER: Is there any law on that?

22 Is there -- suppose there's an indictment and the
23 defendant finds out about it; he's never arrested;
24 nothing further happens; weeks pass. Now, is there any
25 law that tells me -- it's an indictment, that's clear --

1 and is there any law that tells me, when he requests a
2 counsel be appointed, when they have to do it?

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

5 JUSTICE BREYER: So the answer is no.

6 MS. SPINELLI: Right.

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

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

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

21 MS. SPINELLI: Or how is it --

22 JUSTICE BREYER: I mean -- I'm talking about
23 the people who nobody ever intends to prosecute. What's
24 going to happen, as I think happens quite often, they
25 are brought to the station, they are arrested, they are

1 released on bond, and then everybody forgets about it.

2 MS. SPINELLI: If there are --

3 JUSTICE BREYER: Or they're -- or the D.A.

4 says, you know, forfeit -- like a traffic ticket or
5 something -- forfeit your bond. And I want to know how
6 that's handled under your rule, how is it handled now,
7 how is it handled in the -- discuss it, please.

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

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

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

24 MS. SPINELLI: It happens quite frequently,
25 Justice Breyer, that persons are arrested, brought to

1 the station house, and then released by the police
2 without undergoing an initial appearance. And in that
3 circumstance, we don't contend that a prosecution would
4 have begun.

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

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

22 JUSTICE KENNEDY: Well, what about my
23 traffic ticket?

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

25 JUSTICE KENNEDY: I've never had one so I

1 don't know what they say.

2 (Laughter.)

3 JUSTICE KENNEDY: Other members of the Court
4 can advise me about that.

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

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

20 MS. SPINELLI: Well --

21 JUSTICE SCALIA: Why wouldn't that solve the
22 problem?

23 MS. SPINELLI: First of all, we agree that a
24 prosecution commences upon a first appearance before a
25 judge --

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

2 MS. SPINELLI: Not merely --

3 JUSTICE SCALIA: But you only need counsel
4 at significant phases.

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

8 JUSTICE SCALIA: Right.

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

13 JUSTICE SCALIA: Yes, but it's so wrapped up
14 with how we decide this case. I mean, if I think that
15 counsel has to be appointed right away for -- for
16 Justice Breyer's 500 demonstrators, I'm going to give a
17 different answer to the first question. But if I know
18 that counsel doesn't have to be appointed until the
19 prosecution proceeds to some significant phase where an
20 attorney would be -- would be really helpful, then --
21 then I can -- I can be quite more sympathetic to your --
22 to your argument.

23 MS. SPINELLI: Well, were the Court to reach
24 that alternative argument, which is that -- despite the
25 fact that a criminal prosecution had commenced, and

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

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

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

22 JUSTICE GINSBURG: Any time prior -- any
23 time prior to indictment?

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

25 JUSTICE GINSBURG: So you're saying that

1 that is the critical stage that he needed to have
2 counsel's advice about.

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

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

9 MS. SPINELLI: His right --

10 JUSTICE SCALIA: He'd have to have counsel
11 appointed immediately --

12 MS. SPINELLI: Well --

13 JUSTICE SCALIA: -- to advise him whether to
14 ask for this hearing or not.

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

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

22 MS. SPINELLI: Well, I mean, had he said --
23 had he waived his right to an examining trial, which he
24 didn't do, then, you know, under -- then we would not
25 have --

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

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

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

16 MS. SPINELLI: No. That's actually not
17 correct, Mr. Chief Justice.

18 CHIEF JUSTICE ROBERTS: What does he say
19 about the examining --

20 MS. SPINELLI: At a magistration --

21 CHIEF JUSTICE ROBERTS: What does he say
22 about an examining --

23 MS. SPINELLI: Precisely what he said and
24 what appears on the warning form is: In a felony case,
25 you have a right to an examining trial. There is no

1 provision at the magistration for the defendant to
2 either invoke or waive that right. And there's no
3 indication that any further explanation of that right is
4 given.

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

9 MS. SPINELLI: Well, we're not contending
10 that.

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

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

17 JUSTICE SCALIA: When the trial occurs, it
18 is a critical stage.

19 MS. SPINELLI: Correct. Correct.

20 JUSTICE SCALIA: I have no doubt.

21 MS. SPINELLI: And --

22 JUSTICE SCALIA: But you're claiming that
23 his decision of whether to ask for that or not is a
24 critical stage. And I just don't know any precedent for
25 saying that something that hasn't happened is a critical

1 stage.

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

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

16 With the Court's permission, I'll reserve
17 the balance of my time.

18 JUSTICE KENNEDY: I know -- when we were
19 talking about traffic tickets, you said, well, that was
20 a warrantless arrest. This was a warrantless arrest.

21 MS. SPINELLI: This was a warrantless
22 arrest, but following that --

23 JUSTICE KENNEDY: And then --

24 MS. SPINELLI: But there was more, because
25 following that, there was -- the magistration occurred,

1 at which time the police officer filed an affidavit
2 setting forth the basis of the charges. The magistrate
3 found probable cause, and the magistrate officially
4 informed Rothgery of the accusation against him. And
5 that's why -- that's why -- in Kirby, this Court held
6 this a warrantless arrest does not commence adversary
7 judicial proceedings; in Jackson, on exactly these
8 facts, the Court held that it does.

9 CHIEF JUSTICE ROBERTS: Well, not exactly
10 these facts, because in Jackson the prosecutor had
11 already filed charges.

12 MS. SPINELLI: Charges were filed in Jackson
13 in exactly the same sense that charges were filed here.
14 A document which contained basically simply a factual
15 statement of what had occurred --

16 CHIEF JUSTICE ROBERTS: But the prosecutor
17 wasn't involved here. The prosecutor was involved in
18 Jackson.

19 MS. SPINELLI: That's correct, but we don't
20 believe that should make any difference because the
21 effect on the Defendant of this proceeding is precisely
22 the same, whether or not a prosecutor is involved. And
23 that's true in general and it's true under Texas law.
24 Either way he's faced with a need to negotiate criminal
25 law in order to contest the charges against him. He has

1 a right to do so under Texas law, and he has a right to
2 have the prosecution against him dismissed if an
3 indictment isn't filed within a set period. All of
4 which we believe demonstrate that he was accused and
5 that a prosecution had commenced.

6 May I reserve the balance of my time?

7 CHIEF JUSTICE ROBERTS: Yes. Thank you,
8 counsel.

9 Mr. Coleman.

10 ORAL ARGUMENT OF GREGORY S. COLEMAN

11 ON BEHALF OF THE RESPONDENT

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

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

20 JUSTICE KENNEDY: Then how could they hold
21 them in jail?

22 MR. COLEMAN: It is not uncommon -- in fact,
23 it's universal practice that when one is arrested on a
24 -- without a warrant, it is normally because a police
25 officer sees an individual in the commission of a crime.

1 It's not uncommon to go and to arrest that person, to
2 cease the crime that is taking place and perhaps to
3 prevent other crimes from taking place, and to present
4 them. Gerstein makes clear that this happens all of the
5 time.

6 JUSTICE BREYER: What happens in Texas?

7 JUSTICE KENNEDY: He was held after he saw
8 the magistrate. Suppose he had been held for three
9 months and you couldn't make bail, we don't need
10 counsel?

11 MR. COLEMAN: Texas statute allows for
12 counsel under that situation. But this is an issue that
13 is addressed primarily by the Fourth Amendment.

14 JUSTICE KENNEDY: I am asking what the
15 constitutional rule is.

16 MR. COLEMAN: The Fourth --

17 JUSTICE KENNEDY: We have here a proceeding
18 before a magistrate; this results in custody. And my
19 question is, suppose this were weeks, would counsel be
20 required to be appointed?

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

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

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

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

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

20 MR. COLEMAN: Gerstein says that there must
21 be --

22 JUSTICE SOUTER: I want to know what your
23 answer is here. Get to authority later, but I want to
24 know whether your position is that an individual may be
25 brought by a police officer before a magistrate, charged

1 with no crime, required to post bail, and if he doesn't
2 post bail, be held for three weeks without charge.

3 MR. COLEMAN: That could not happen in
4 Texas.

5 JUSTICE SOUTER: I'm not asking whether it
6 could happen; I'm asking whether it would be
7 constitutional without appointing counsel.

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

10 CHIEF JUSTICE ROBERTS: But it would be a
11 violation of some liberty interest beside the Sixth
12 Amendment.

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

15 JUSTICE SCALIA: No counsel right would
16 attach?

17 No counsel right would attach?

18 MR. COLEMAN: That's correct.

19 JUSTICE SCALIA: I think it's a problem even
20 if you appoint counsel. You say you can keep people
21 without charging them so long as you give them counsel?

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

25 JUSTICE BREYER: But they didn't -- they

1 don't --

2 JUSTICE SOUTER: Without charges filed? In
3 other words, if the lawyer comes in and says, you know,
4 my client is sitting in jail, you've had him there for
5 three days now, and no complaint has been filed against
6 him, we don't know why he is being held -- your answer
7 -- the -- it's a constitutional answer to say, well, you
8 know, that's for us to know and you to find out?

9 (Laughter.)

10 MR. COLEMAN: I think Gerstein would prevent
11 that, Justice Souter.

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

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

19 JUSTICE BREYER: What is the law here in
20 Texas in respect to this particular magistration
21 proceeding? I noticed what happened is that the
22 magistrate tells the person arrested, he says precisely:
23 "I find probable cause to believe" that you -- "that
24 there was probable cause to arrest you." That's what
25 they say, right? It said: "I have determined that

1 probable cause existed for the arrest of the individual
2 accused therein."

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

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

19 JUSTICE BREYER: I could -- I can think
20 there would be tremendous constitutional significance
21 and it would make a difference if all that's really
22 happening is a policeman is arresting someone, in which
23 case we might have liberty interests and others at
24 issue. But what's happening in this proceeding is that
25 the magistrate is deciding that there is probable cause

1 to hold him, in which case it's more like, not
2 completely like, but more like what happens in an
3 indictment or an arraignment, et cetera.

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

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

10 MR. COLEMAN: The answer I believe is that
11 you -- that you find that there is probable cause to
12 make the arrest.

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

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

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

19 MR. COLEMAN: I don't think that there is a
20 difference in this case. I think --

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

23 MR. COLEMAN: Magistrates have a great
24 amount of discretion, and I think if a magistrate was
25 convinced that probable cause existed at the time of

1 arrest and not now, it's quite likely the magistrate
2 would find --

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

9 MR. COLEMAN: I believe so. That's exactly
10 what the Court required in Gerstein, Your Honor.

11 JUSTICE BREYER: Thank you.

12 JUSTICE STEVENS: Mr. Coleman, may I just
13 ask this kind of simple question. If the prosecutor had
14 participated in the magistration, then under Texas law
15 would the right to counsel have arisen?

16 MR. COLEMAN: No, Justice Stevens.

17 JUSTICE STEVENS: Whether the prosecutor
18 participates is not relevant?

19 MR. COLEMAN: There is no role for a
20 prosecutor at a magistration under Article 1517 of the
21 Texas Code of Criminal Procedure.

22 CHIEF JUSTICE ROBERTS: Well, couldn't he
23 point out -- I mean, if this is a probable cause
24 determination and he knows a particular fact, couldn't
25 he say, well, Magistrate, you should know this, and the

1 magistrate would say, well, I didn't know that, so
2 there's no probable cause?

3 MR. COLEMAN: That's possible.

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

13 And we would say -- we would say likely at
14 that point that, yes, that formal criminal judicial
15 proceedings had initiated, and it's not uncommon. But
16 in this circumstance --

17 JUSTICE STEVENS: What about the very
18 proceeding in this case? Supposing instead of a
19 detective bringing in the affidavit, that the prosecutor
20 did it, had the detective's affidavit, and the
21 prosecutor said: This is a case we intend to pursue
22 more seriously. That's all he says to the judge. Would
23 have that been sufficient?

24 MR. COLEMAN: No, Justice Stevens.

25 JUSTICE STEVENS: It would not?

1 MR. COLEMAN: An expression of subjective --

2 JUSTICE STEVENS: I got the impression from
3 the briefs that the absence or presence of the
4 prosecutor made a difference. But you're telling me I'm
5 wrong under that?

6 MR. COLEMAN: Under the circumstances where
7 no formal charges have been brought, a statement by a
8 prosecutor that they are looking at it or that they
9 intend to bring some is not itself the initiation of
10 formal adversary judicial proceedings.

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

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

23 JUSTICE SCALIA: So what happens in the
24 interim? Is he -- is he charged in the interim, or is
25 he just held because he is going to be charged, which is

1 what's going on here.

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

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

12 MR. COLEMAN: No, Justice Souter. Texas
13 statutes do allow for the filing of a complaint in some
14 circumstances. It's not frequently used. But that's a
15 complaint that has to be filed in the district court or
16 in the justice of the peace court.

17 JUSTICE GINSBURG: What was filed by the
18 police? What was filed by the police --

19 MR. COLEMAN: Nothing was filed.

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

24 MR. COLEMAN: Yes.

25 JUSTICE GINSBURG: -- to show probable cause

1 and it was the burden of the State in the presence of
2 the police officer to prove probable cause. So that had
3 to be based on something. What was it based on?

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

7 JUSTICE GINSBURG: And then -- and then the
8 defendant was told or was given Miranda warnings. What
9 was said to him precisely about right to counsel in the
10 warnings that the magistrate gave him?

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

16 JUSTICE GINSBURG: Yes. But if he is
17 told -- the defendant is listening to this. And,
18 magistrate, you just told me I have a right to counsel.
19 Okay, I would like counsel. And then the magistrate
20 says, no you're not entitled to counsel?

21 MR. COLEMAN: I don't think that's what
22 would happen. I think if he had insisted on counsel
23 being present for the bail portion of the 1517
24 magistration, I believe that they would have gotten
25 somebody to come and --

1 JUSTICE SOUTER: Would they have been
2 obligated to get somebody to come?

3 MR. COLEMAN: Under Texas statute they
4 would.

5 JUSTICE SOUTER: Under the Sixth Amendment?

6 MR. COLEMAN: No.

7 JUSTICE SOUTER: No.

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

16 MR. COLEMAN: We completely agree that if
17 that were the case, Coleman -- this Court's decisions
18 make absolutely clear he would have been entitled to
19 counsel for an examining trial and would have been -- we
20 would have been obligated and would have appointed
21 counsel at a reasonable time before that examining trial
22 so that the preparations could take place.

23 JUSTICE ALITO: Why would the situation be
24 different simply because Texas law doesn't require the
25 examining trial, but gives the defendant the option of

1 demanding one?

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

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

19 MR. COLEMAN: I certainly do believe that
20 the court would. I believe that a decision that the
21 right attaches, that there is an initiation of formal
22 judicial proceedings at the magistration, would
23 contradict not only Kirby, but also Gerstein and
24 Gouveia.

25 JUSTICE KENNEDY: Well -- no. But my

1 assumption was assuming that the defendant is remanded
2 to custody. I added that.

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

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

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

17 For example, it's quite clear under the
18 circumstances, there are 14 people accused, they
19 couldn't have all have done it, they want to investigate
20 further. Or maybe there are other examples. But, for
21 the primary purpose, then the right attaches.

22 So you pick up Gerstein and add to Gerstein
23 that additional requirement. What about that? What
24 harm would that cause? What inconvenience would it
25 cause, what difficulties, et cetera?

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

9 It simply said that our Fourth Amendment
10 precedents go to the liberty interests. Our Sixth
11 Amendment speedy-trial and other precedents go to the
12 liberty interests.

13 The right to counsel is not specifically a
14 liberty-interest protection. It is something, as Chief
15 Justice Roberts mentioned a few minutes ago as we set
16 out in our brief, something that protects your right to
17 a fair trial. And there are -- there are proceedings
18 that take place along the way that the Court has held
19 are critical stages, and we need and want counsel to be
20 present for them, and so we have so dictated. But
21 getting behind --

22 JUSTICE GINSBURG: I thought you -- I
23 thought you recognized that if he had opted to have this
24 examining trial to determine whether there really was
25 probable cause, that he would be entitled to counsel at

1 that examining trial. And, yet, that's detached from
2 the fair trial. The whole purpose of it is that they
3 will never get to trial.

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

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

19 Justice Breyer, you asked a hypothetical
20 that I would like -- I would like to address because it
21 is something that happens all the time, and I think
22 should inform the Court's decision here. And, that is,
23 it is not uncommon, and some statistics that I have seen
24 suggest that it may happen in half of the cases, where
25 an individual is arrested, magistrated, released, and no

1 charges are ever brought. So the bulk of your 500
2 protesters are never brought.

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

8 JUSTICE STEVENS: Only if they ask for them.
9 Only if they ask for the lawyer.

10 MR. COLEMAN: If they ask for them.

11 JUSTICE STEVENS: That's why I wondered --

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

21 MR. COLEMAN: If -- if the court were to
22 make a rule that depended solely on incarceration, that
23 is true. I don't understand Mr. Rothgery to be making
24 that argument because he was released on bond.

25 JUSTICE BREYER: And you couldn't -- you

1 couldn't because of the fact that bail -- if you're
2 going to insist on bail, that in effect is
3 incarceration. But the reason I asked the question,
4 which I would ask you the same, is there are a lot of
5 States, we're told, that do have counsel attach in
6 circumstances similar to this.

7 So they must have some way of dealing with
8 the problem that I raised if it's really a problem. And
9 I want to -- and that's -- and I want to -- if we're
10 going into this, I think I need to know how this is
11 dealt with.

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

16 I do not understand what happens in each of
17 those -- in each of those States, but I have at least
18 seen decisions in some of those States that suggest that
19 they don't act that much differently than we do, and
20 that -- that they do apply a critical-stage-type
21 analysis in evaluating --

22 JUSTICE BREYER: You see, you would have
23 given him a counsel. I mean, in fact, if he had wanted
24 one, Texas would give him one. So Texas must have -- it
25 must not be a problem. The problem, I just --

1 MR. COLEMAN: You mean at the magistration?

2 JUSTICE BREYER: Yes.

3 MR. COLEMAN: If he would have asked for
4 one, he would have gotten one.

5 JUSTICE BREYER: So the problem I raise
6 can't be a real problem.

7 JUSTICE STEVENS: Let me ask on Texas
8 procedure. Supposing after the magistration he wanted
9 to have the charges dismissed. Could he have hired a
10 lawyer to come in and ask the judge to dismiss the
11 charges?

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

15 JUSTICE STEVENS: Let's say he wanted to get
16 a release from bond and said he wanted to terminate his
17 custody. Is there any procedure whatsoever available to
18 a defendant to say: I want to get this monkey off my
19 back after this bond premium?

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

22 JUSTICE STEVENS: And could he have a lawyer
23 appear before the Court to ask for that?

24 MR. COLEMAN: I don't --

25 JUSTICE STEVENS: Could the judge say: You

1 got to appear yourself?

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

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

9 MR. COLEMAN: Well, that's an issue that
10 doesn't come up because judges don't exclude --

11 JUSTICE STEVENS: We are talking about
12 theoretical problems here, and the question is whether
13 he would he have had a right to a lawyer asking him to
14 get released from bond. Twenty minutes after the first
15 proceeding ended his father hired a lawyer and brought
16 him in. Would the lawyer have been allowed to appear?

17 MR. COLEMAN: The difference between the
18 Sixth Amendment strict requirements and practicalities
19 is a significant one. I don't think the Sixth Amendment
20 would necessarily have required it. The -- I am aware
21 --

22 JUSTICE STEVENS: Even though he is paying
23 for his own lawyer?

24 MR. COLEMAN: It is the same as every other
25 --

1 JUSTICE STEVENS: That's your answer?

2 MR. COLEMAN: -- situation.

3 JUSTICE STEVENS: He would not have had a
4 right under the Constitution to have a lawyer come in
5 and say: I want to get released from this bond. I find
6 that hard to believe.

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

9 JUSTICE STEVENS: It would not include the
10 right to be represented by counsel if I understand you
11 correctly.

12 MR. COLEMAN: It would not be a Sixth
13 Amendment right to counsel. There could be a right if
14 you otherwise have a lawyer; that the State cannot
15 exclude that lawyer from participating on your behalf.
16 But it would not be an "attachment," an "appointment"
17 issue, where you are entitled to appointment of counsel
18 to do that.

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

25 So he is out on bail. He has no lawyer, but

1 he wants to contest the State's right to hold him at
2 all, and he asks for a lawyer to help him do that.

3 MR. COLEMAN: I think if -- if he were to
4 ask somebody, he would be told that you can ask for an
5 examining trial. If you ask for that, we will appoint
6 you a lawyer; and you will have your examining trial
7 unless the State decides to indict before we actually
8 get to it.

9 JUSTICE ALITO: Why is the --

10 JUSTICE SOUTER: Now -- no, please.

11 JUSTICE ALITO: Why is the question of
12 whether the right attaches, which seems to mean
13 different things in different situations, a separate
14 question from what I would think would be the question
15 here: Whether he had the right to have counsel
16 appointed for him.

17 Why isn't that the question, and
18 "attachment" is simply a label that is used to express
19 one of the conditions for having the right to appoint a
20 counsel?

21 MR. COLEMAN: I have given this great
22 thought, Justice Alito. In my mind, the only doctrinal
23 difference it really makes is the situation that this
24 Court has described in Michigan v. Jackson, which I have
25 previously addressed in the Cobb case which I argued.

1 But in most other circumstances we think
2 that the analysis is essentially the same, because the
3 Court has never said that there isn't a right -- there
4 is a right to have the assistance of counsel without
5 having a critical stage.

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

15 JUSTICE GINSBURG: Is it then episodic?
16 That is, if the right is turned on when there is a
17 critical event, and then the critical event is over, and
18 no more right to counsel until the next critical event?
19 It's not -- you have no right to counsel in between
20 those critical events?

21 MR. COLEMAN: Once -- once a case gets
22 going, I don't believe this Court has ever been
23 presented with a case where there has been attachment,
24 there have been some critical stages, and then the State
25 has decided to deny access. And we don't think that the

1 Court would like --

2 JUSTICE GINSBURG: So you only need this one
3 critical stage, and then you get appointed counsel at
4 that stage, and that counsel will continue thereafter.
5 You don't have to --

6 MR. COLEMAN: That is the usual course of
7 things.

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

16 MR. COLEMAN: In Texas, because the Fair
17 Defense Act permits the appointment of counsel for those
18 who are held in custody, all persons who request counsel
19 are appointed counsel within one business day in the
20 large counties and within one -- within three business
21 days in the smaller counties. And so that --

22 JUSTICE KENNEDY: So then there was just a
23 misapplication of the statute here when this man was
24 held for three days, and then he requested counsel?

25 MR. COLEMAN: No. Section 1.051(j)

1 authorized the counties who went -- to not appoint
2 counsel when an individual is released on bail, and to
3 await -- to await the first critical stage or the
4 initiation of adversary judicial proceedings; whichever
5 occurs first, it says. And so once this gentleman was
6 indicted, that would disappear; and he would be entitled
7 to counsel, as he was appointed counsel immediately upon
8 indictment.

9 JUSTICE KENNEDY: Well, I'm talking about
10 the first phase before there was an indictment, just the
11 probable-cause phase. You say even then there is --
12 under this Texas statute there is a right to have
13 counsel in one day?

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

17 JUSTICE STEVENS: Then I am not sure why we
18 are having this discussion.

19 MR. COLEMAN: Well, because Mr. Rothgery was
20 released on bail, and so the county was authorized not
21 to appoint counsel.

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

1 MR. COLEMAN: "Examining trial."

2 JUSTICE SOUTER: "Examining trial."

3 MR. COLEMAN: Right.

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

7 MR. COLEMAN: Once -- once an examining
8 trial is scheduled, I'm not sure there are one or two
9 days, but requests -- I think that's what would have
10 happened. The Constitution requires appointment of
11 counsel for an examining trial a reasonable time before
12 the examining trial to allow for preparation.

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

15 MR. COLEMAN: No. The examining trial,
16 itself --

17 JUSTICE SOUTER: What are they finding
18 probable cause for if they don't know what the charge
19 is?

20 MR. COLEMAN: This Court in Coleman said
21 that the examining trial, because of the potential harm
22 to a fair trial in the future, would define it as a --

23 JUSTICE SOUTER: No, but I realize if the --
24 if somebody is going to demonstrate probable cause, the
25 probable cause has got to be probable cause to hold

1 someone to answer for a particular charge. So why
2 hasn't there, as a matter of definition, got to be a
3 charge, even on your reasoning, by the time the
4 examining trial is held?

5 MR. COLEMAN: An examining trial is an
6 extended version of a probable-cause determination. It
7 is not holding on a charge --

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

11 MR. COLEMAN: Probable cause that -- that a
12 crime has been committed.

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

16 MR. COLEMAN: If -- if that were the law,
17 Gerstein would have to be reversed.

18 JUSTICE SOUTER: Well, I'm just asking what
19 you do. Is that the case? Is no charge filed? Then,
20 at the end of the probable cause hearing you say: Well,
21 we -- the judge says: Well, you've got probable cause
22 to hold this person for possessing a gun after having
23 been convicted of a felony, but there doesn't happen to
24 be any charge to that effect here. Is that the state of
25 the law, in fact?

1 MR. COLEMAN: That is what preliminary
2 hearings and examining trials have always been about.
3 Yes, Your Honor.

4 CHIEF JUSTICE ROBERTS: Thank you, Counsel.
5 Ms. Spinelli, you have three minutes.

6 REBUTTAL ARGUMENT OF DANIELLE SPINELLI
7 ON BEHALF OF THE PETITIONER

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

13 MS. SPINELLI: I don't believe so, Justice
14 Kennedy. It's correct that Gerstein says that the
15 probable-cause determination made under Gerstein is not,
16 itself, a critical stage, and we are not contending
17 otherwise.

18 The Gerstein determination is something
19 separate from the initial appearance that occurred here.
20 A Gerstein determination is made for the purpose of
21 determining whether there was probable cause for an
22 arrest. It can be made ex parte. It's essentially the
23 equivalent of what happens prior to arrest when a
24 magistrate decides whether there is probable cause to
25 issue a warrant.

1 What happened here, by contrast, was after
2 arrest and after the police had decided to --
3 Mr. Rothgery, he was brought before a magistrate. He
4 was officially informed of the accusation against him,
5 and at that time he acquired the right to contest the
6 accusation against him in an examining trial, which we
7 believe shows that he was accused within the meaning of
8 the Sixth Amendment, and a prosecution had begun.

9 And we are not contending that that initial
10 proceeding was, itself, a critical stage where counsel
11 was required; and it's not necessary to contend that in
12 order to prevail on the point that that was when a
13 prosecution commenced, which is the only question that
14 we believe is properly before this Court and the only
15 one we are asking it to resolve.

16 CHIEF JUSTICE ROBERTS: So Texas would be
17 better off if they didn't have a magistration proceeding
18 at all, if they didn't have a proceeding to alert the
19 individual of the charges against him; they did not have
20 a proceeding to read him his rights; they did not have a
21 determination of probable cause. They would be better
22 off if they didn't do any of that?

23 MS. SPINELLI: Well, I mean I think you are
24 suggesting, Mr. Chief Justice, that reaffirming the rule
25 adopted in Jackson would create, you know, a perverse

1 incentive for States to do away with this proceeding. I
2 don't believe that that's the case because, as Justice
3 Breyer observed, 45 jurisdictions already follow the
4 rule of appointing counsel at, or immediately following,
5 the initial appearance, which the -- any CDL brief lays
6 out and which neither Respondent nor its State amici
7 have contested.

8 CHIEF JUSTICE ROBERTS: Well, what's in it
9 for the State to provide this additional layer?
10 Because, of course, the person gets Miranda warnings
11 when he is arrested. And so why -- why should the State
12 do this?

13 MS. SPINELLI: The initial appearance serves
14 a specific, substantive purpose which I think is well
15 described in the Seventh Circuit's decision in *Armstrong*
16 cited on page 15 of our reply brief, which is this is
17 the proceeding at which the defendant is informed: You
18 are now a criminal defendant. This is the accusation
19 against you, and these are your rights as a defendant in
20 a criminal proceeding.

21 And for that reason, as the *Armstrong*
22 decision says, it is commonly recognized across
23 jurisdictions as the inception of a formal prosecution,
24 and we believe that's the rule that this Court has
25 already laid out in *Brewer* and *Jackson* and should

1 reaffirm today.

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

4 MS. SPINELLI: Of course, absolutely. I
5 mean, just to respond to one other question that arose
6 during the course of Respondent's argument, I think it
7 is important to understand that in Texas, as in other
8 jurisdictions, there are two phases in a felony
9 prosecution.

10 There is an initial phase that commences in
11 a magistrate court where a document setting out the
12 charges will be filed either by the police or by a
13 prosecutor, and the magistrate at that point has
14 jurisdiction over that criminal case. It is only later
15 that an indictment or information will be filed in the
16 general trial court with jurisdiction to enter final
17 judgment.

18 But this Court has repeatedly rejected the
19 notion that a prosecution begins only in that second
20 phase. It rejected it expressly in Moore. It rejected
21 it in Coleman, in Brewer, in Jackson, and in statements
22 in Kirby and McNeil. So that can't be the rule.

23 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

24 MS. SPINELLI: Thank you.

25 CHIEF JUSTICE ROBERTS: The case is

1 submitted.

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

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