



Access to Counsel at Pretrial Release Proceedings

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The *Rothgery* case

The legal basis for a defendant's right to counsel at the pretrial stage is rooted in the Supreme Court case *Rothgery v. Gillespie County*.¹ In this decision, the Court held that a defendant's right to counsel "attaches" at his first appearance before a judge or magistrate.² Attachment occurs, the Court said, when there has been a commitment made to prosecute the defendant on specific criminal charges.³ Once attachment has occurred, the defendant is guaranteed the presence of counsel at "any critical stage" in the proceedings that follow. The Court defines a critical stage as one in which there are "trial-like confrontations" between the defendant and the state.⁴ Therefore, under *Rothgery*, counsel is not required to be present at the point at which attachment occurs, only those "critical stages" following that attachment. The *Rothgery* decision left open whether a proceeding at which the decision is made to release or detain a defendant pending trial qualifies as one of these critical stages at which counsel must be present.

Rothgery recognized in 2008 that 34 states appoint pretrial counsel for defendants "before, at, or just after initial appearance."⁵ Today, states adopt different interpretations of *Rothgery*'s attachment and critical stage requirements. At least six states have considered whether a pretrial release

proceeding is a critical stage under which defendants must have counsel according to *Rothgery*.

States with a Guarantee of Counsel

Three states have interpreted *Rothgery* to require counsel to be present at a defendant's pretrial release decision.⁶ In each of these states, the court found that the appointment and therefore attachment of the right to counsel occurs before the defendant's pretrial release decision is made, and the point at which that decision is made is a critical stage at which counsel must be present.

In *DeWolfe v. Richmond*, the Court of Appeals of Maryland held that "an indigent defendant is entitled to state-furnished counsel at an initial hearing."⁷ The Maryland court found that counsel is necessary because a release determination could result in continued incarceration for a defendant and therefore a potential loss of his liberty.⁸ In *Gonzalez v. Commissioner of Corrections*, the Supreme Court of Connecticut used a similar reasoning, finding that effective counsel is essential for a defendant in these pretrial release decisions because the decision involves the restraining of a defendant's liberty.⁹ Through *Hurrell-Harring v. State*, the New York Court of Appeals ruled that defendants must be provided counsel at

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bail hearings because of the inherent liberty interest in these types of proceedings.¹⁰

States with no Guarantee of Counsel

Three states have interpreted *Rothgery* to not require counsel to be present at a defendant's pretrial release decision. Instead, the right to counsel attaches at or just after that decision is made. Under this reasoning, the pretrial release decision cannot be considered a critical stage at which a defendant is guaranteed counsel because a critical stage must necessarily follow the point at which counsel attaches.

In *People v. Rojas-Ruiz*, the Appellate Court of Illinois held "that the defendant's Sixth Amendment right to counsel did not attach until...he appeared in court for the first time."¹¹ Similarly in *Ex parte Cooper*, the Alabama Supreme Court cited *Rothgery* and found that the defendant's initial appearance in court was the point at which adversarial judicial proceedings began, requiring a defendant to have the assistance of counsel at all critical stages following, but not including, that point at which a pretrial release decision was made.¹² In *People v. Hurt*, the Court of Appeals of Michigan also emphasized the difference between the point at which counsel attaches and the critical stages that follow, finding that "whether the right to counsel has attached is distinct from whether a defendant has been denied his right to counsel at a critical stage in the proceeding."¹³

Advocates for Pretrial Counsel

The distinction between the attachment of counsel and the critical stages following that attachment remains unclear. This was a topic at the National Symposium on Pretrial Justice in Washington, DC in 2011.¹⁴ At this symposium, advocates for the presence of counsel at pretrial appearances, such as the DC Pretrial Services

Agency, suggested that the presence of counsel assists the court in accurately assessing a defendant's risk and thereby decreases the number of people who are unnecessarily detained in jail during the pretrial stage. Symposium participants thereby recommended the "presence of a defense counsel at the initial appearance who is prepared to make representations on the defendant's behalf for the court's pretrial release decision." In addition, the Bureau of Justice Assistance's Smart Pretrial program lists "provid[ing] access to effective defense counsel at the earliest hearing that could result in pretrial detention" as one of its elements for the implementation of "safe, fair, and effective pretrial procedures" nationwide.¹⁵ A wide variety of research further supports that representation for defendants at this pretrial stage results in courts giving defendants individual consideration and making more efficient and accurate release decisions.¹⁶

Concern about Pretrial Counsel

Those who are concerned about this type of pretrial reform argue that providing counsel to such a large number of defendants on a daily basis would be very expensive and would stretch the already limited public defender system too thin. And while state budgets continue to shrink, adding more work for already overwhelmed attorneys may prove to be impractical.¹⁷

Further Research

The National Council of State Legislatures compiled state constitutional provisions and state procedural rules that provide guidance on how the right to counsel is implemented.¹⁸ This compilation is a resource for anyone who wants to further explore the different constitutional and legislative approaches states take in establishing the right to counsel at pretrial release proceedings.

Endnotes

¹ This decision applies only to the appointment of counsel in federal courts. This brief discusses how states have used *Rothgery* to interpret the appointment of counsel in their own jurisdictions.

² *Rothgery v. Gillespie County*, 554 U.S. 191, 199 (2008).

³ *Rothgery*, 554 U.S. at 211.

⁴ *Rothgery*, 554 U.S. at 212.

⁵ *Rothgery*, 554 U.S. at 203-204.

⁶ The point at which a defendant's pretrial release decision is made varies among states. Some states make this decision at a defendant's initial appearance before the court, while others make this decision at a defendant's arraignment or have specific pretrial release proceedings, such as bail or bond hearings, in place.

⁷ *DeWolfe v. Richmond*, 434 Md. 444, 464 (Md. Ct. App. 2013).

⁸ *DeWolfe*, 434 Md. At 461.

⁹ *Gonzalez v. Comm'r of Corr.*, 308 Conn. 463 (2013).

¹⁰ *Hurrell-Harring v. State of New York*, 15 N.Y.3d 8, 20-21 (2010).

¹¹ *People v. Rojas-Ruiz*, 2016 Ill. App. Unpub. LEXIS 951 at 40 (2016).

¹² *Ex parte Cooper*, 43 So. 3d 547, 549-50 (Ala. 2009).

¹³ *People v. Hurt*, 2013 Mich. App. LEXIS 836 at 12-13 (2013).

¹⁴ <https://www.pretrial.org/download/infostop/NSPJ%20Report%202011.pdf>

¹⁵ <https://www.bja.gov/funding/PretrialTTA16.pdf>

¹⁶ http://www.americanbar.org/content/dam/aba/publications/criminal_justice_magazine/v31/cjspring2016_BUNIN.authcheckdam.pdf

¹⁷ https://www.washingtonpost.com/opinions/our-public-defender-system-isnt-just-broken--its-unconstitutional/2015/09/03/aadf2b6c-519b-11e5-9812-92d5948a40f8_story.html

¹⁸ <http://www.ncsl.org/research/civil-and-criminal-justice/pretrial-right-to-counsel.aspx>