Rothgery v. Gillespie County: Applying the Supreme Court's Latest Sixth Amendment Jurisprudence to North Carolina Criminal Procedure

Rebecca Yoder

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INTRODUCTION

When analyzing the constitutionality of a statute that may result in an expansion of federal power, those on the bench who favor less federal regulation have sometimes highlighted the important role of the states as "laboratories." One of the greatest virtues of federalism, the analogy goes, is that "a single courageous [s]tate may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." The social and economic innovation among the states which federalism promotes is particularly evident in the area of criminal procedure. This diversity is, to a great extent, due to the peculiarities of each state. The law of criminal procedure takes shape according to the state's level of administrative resources, the size of the local population, the degree to which issues of criminal law are visible to the public, and the degree of political response to public opinion on various issues.

Of course, state-level experimentation must always yield to federal statutory and Constitutional commands. Indeed, the United States


2. Gonzales, 545 U.S. at 42 (quoting New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

3. See Jerold H. Israel et al., Criminal Procedure and the Constitution 2–3 (Thomas Reuters 2010) (1989). The authors identify four factors that promote the diversity of criminal procedure: (1) uniformity among the states in this area of law is not required to prevent an adverse effect on interstate commerce or the "free flow of goods"; (2) the "criminal justice process must be shaped in light of the state's administrative environment" as well as the local population and resources; (3) criminal procedure tends to involve "issues of high visibility, and, often, high emotional content, leading to lawmaking decisions" that reflect the local constituency; (4) "the integrated character of the criminal justice [process] means that a divergence between states in their law governing one part of the process most likely will necessitate further differences at other stages of the process." Id.
Constitution — particularly the Fourth, Fifth, Sixth, and Eighth Amendments — is the unifying force of criminal law among the states. A recent Supreme Court case illustrating this interplay between state level experimentaton and constitutional uniformity is Rothgery v. Gillespie County.\(^4\) In Rothgery, the Court attempted to clarify an area of constitutional criminal procedure that has received varied treatment in state criminal courts: the point at which a criminal defendant's Sixth Amendment\(^5\) right to counsel "attaches."\(^6\) In Rothgery, the Court held that "a criminal defendant's initial appearance before a judicial officer, where he learns of the charge against him and his liberty is subject to restriction, marks the start of adversarial judicial proceedings that trigger attachment of the Sixth Amendment right to counsel."\(^7\) According to the Court, it simply reaffirmed prior case law\(^8\) and reiterated the belief that "the constitutional significance of judicial proceedings cannot be allowed to founder on the vagaries of state criminal law, lest the attachment rule be rendered utterly vague and unpredictable."\(^9\)

Despite the Court's efforts in Rothgery to shore up a "bright-line rule" for attachment based upon prior case law,\(^10\) the contours of the Sixth Amendment right to counsel are still somewhat obscure. To understand the impact of the Court's holding, each state will need to

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5. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.").
6. Rothgery, 554 U.S. at 198 ("The Sixth Amendment right of the 'accused' to assistance of counsel in 'all criminal prosecutions' is limited by its terms: 'it does not attach until a prosecution is commenced.'" (quoting McNeil v. Wisconsin, 501 U.S. 171, 175 (1991))).
7. Id. at 213.
8. Id. at 199 ("[W]e have twice held that the right to counsel attaches at the initial appearance before a judicial officer." (citing Michigan v. Jackson, 475 U.S. 625, 629 n.3 (1986); Brewer v. Williams, 430 U.S. 387, 399 (1977))).
9. Id. at 199 n.9 (quoting Virginia v. Moore, 553 U.S. 164, 175 (2008)).
10. In United States v. Morriss, the Eighth Circuit Court of Appeals refers to Rothgery as establishing a "bright-line rule" which "unambiguously reaffirmed" that the initial appearance before a judicial officer "marks the start of adversary judicial proceedings that trigger the attachment of the Sixth Amendment right to counsel." 531 F.3d 591, 594 (8th Cir. 2008) (quoting Rothgery, 554 U.S. at 213). Morriss sought to suppress statements voluntarily made to an investigator on the basis that his right to counsel had attached, and therefore he could not be questioned without presence of counsel. Id. at 593. Because the defendant was still under investigation and had not yet made a court appearance at the time the statements were made, the court did not have to consider whether a particular part of the process constituted "the initiation of adversary judicial criminal proceedings," only that that no proceedings had yet occurred. Id. at 593–94 (quoting Kirby v. Illinois, 406 U.S. 682, 689 (1972)).
assess its criminal procedure and identify how to reconcile the Court's holding with current practices. This Comment identifies two areas of North Carolina criminal procedure that have been impacted by the Court's holding in Rothgery: (1) the expanded scope of a defendant's protection under the Sixth Amendment during police questioning under Rothgery; and (2) Rothgery's impact on attachment of the right to counsel in light of the arresting officer's discretion to cite the arrestee rather than perform a full custodial arrest. This Comment will discuss: the disconnect between the rule enunciated in Rothgery and current North Carolina criminal procedure; the impact of Rothgery on current practices, specifically police interrogation of defendants without the presence of counsel and the practice of misdemeanor citation and custodial arrest; and finally, recommendations for streamlining North Carolina criminal procedure to comply with the Court's holding in Rothgery.

I. FROM THE FIRST APPEARANCE TO THE INITIAL APPEARANCE: EARLIER ATTACHMENT OF THE RIGHT TO COUNSEL UNDER ROTHGERY

On July 15, 2002, Walter Rothgery, who had never been convicted of a felony, was mistakenly arrested for possession of a firearm by a felon based on an erroneously recorded warrant.\(^{11}\) After his arrest, Rothgery was brought before a magistrate "without unnecessary delay"\(^ {12}\) for an article 15.17 hearing, as required by Texas law.\(^ {13}\) The article 15-17 hearing was the first post-arrest procedure and the point at which a magistrate reviewed the existence of probable cause for Rothgery's arrest, informed Rothgery of the "accusation against him" and of his right to counsel, and set conditions for pre-trial release.\(^ {14}\) Rothgery was released after posting bond and promising to appear for subsequent proceedings.\(^ {15}\) However, Rothgery was rearrested in January of 2003 on

12. TEX. CODE CRIM. PROC. art. 14.06(a) (Supp. 2010) (requiring that "the person making the arrest or the person having custody of the person arrested shall take the person arrested or have him taken without unnecessary delay, but not later than 48 hours after the person is arrested, before the magistrate" who "shall immediately perform the duties described in Article 15.17 of this Code").
13. Id. art. 15.17. The Court in Rothgery notes that the Texas article 15.17 hearing "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." 554 U.S. at 195.
15. Id. at 196.
an indictment charging him with possession of a firearm by a felon and, unable to post bond, he remained in jail for three weeks. Six months after Rothgery's initial appearance, and after several requests by Rothgery, counsel was appointed. The indictment was eventually dismissed after counsel presented documentation confirming that Rothgery had never been convicted of a felony. Rothgery then brought an action against Gillespie County based on 42 U.S.C. § 1983. The district court granted summary judgment for the county, and the Fifth Circuit Court of Appeals affirmed. The Supreme Court granted certiorari, and ultimately vacated the lower court judgment and remanded the case.

On appeal, the issue before the Supreme Court was whether the petitioner's Sixth Amendment right to counsel was violated by the county's unwritten procedure of delaying attachment of the right to counsel until "relevant prosecutors" were aware of the defendant's arrest or appearance before a magistrate. The Court rejected the prosecutorial awareness standard of attachment as arbitrary, having "the practical effect of resting attachment on such absurd distinctions as the day of the month an arrest is made . . . or 'the sophistication, or lack thereof, of a jurisdiction's computer intake system.'" Rather, "what counts as a commitment to prosecute is an issue of federal law unaffected by allocations of power among state officials under a State's law." With the apparent goal of uniformly establishing the point of attachment among the states, the Court held that the Sixth Amendment

16. Id.
17. See id. (noting that Rothgery requested counsel at the article 15.17 hearing and made "several oral and written requests for appointed counsel, which went unheeded").
18. Id.
19. Id. at 197.
21. Id. at 807.
22. See Rothgery v. Gillespie County, 491 F.3d 293, 294 (5th Cir. 2007).
25. Id. at 197. The county argued that criminal proceedings had not commenced for attachment purposes due to the fact that there was "no indication that the officer who filed the probable cause affidavit at Rothgery's appearance had any power to commit the state to prosecute without the knowledge or involvement of a prosecutor." Id. at 197–98 (quoting Rothgery, 491 F.3d at 297).
26. Id. at 206 (quoting Brief for Brennan Center of Justice et al. as Amici Curiae 11).
27. Id. at 207.
28. See supra text accompanying note 9.
right to counsel attached at the defendant's initial appearance before a judicial officer. 29

The Court's language strongly suggests an attempt to create a bright-line rule applicable in every state criminal court. 30 In fact, Rothgery has been cited by the Eighth Circuit as having established a "bright-line rule . . . requiring appearance before a judicial officer" before the Sixth Amendment right to counsel attaches. 31 However, the Court's failure to use consistent language throughout its opinion creates some confusion that may prevent state courts from applying the Rothgery holding as a bright-line rule. The confusion results from the fact that the different terms that the Court uses to refer to the proceeding at which the right to counsel attaches, while intending to refer to a single moment in the criminal process, may, in light of a particular state's procedure, refer to two separate and distinctly different moments in the criminal process. 32

According to the Court, its decisions in Brewer v. Williams 33 and Michigan v. Jackson 34 controlled its holding in Rothgery. 35 The Court wrote, "This Court has held that the right to counsel guaranteed by the Sixth Amendment applies 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." 36 The Court continued, "As the Court of Appeals recognized . . . we have twice held that the right to counsel attaches at the initial appearance before a judicial officer." 37 In each instance, the Court cited Brewer and Jackson as the cases in which it so held.

29. Rothgery, 554 U.S. at 213.
30. See supra note 10 and accompanying text.
31. United States v. Morriss, 531 F.3d 591, 594 (8th Cir. 2008) ("Morriss argues, in effect, that we should abandon the bright-line rule the Court unambiguously reaffirmed in Rothgery requiring appearance before a judicial officer and adopt a more flexible approach based upon a case-by-case examination of the prosecutors' and/or investigators' actions.").
32. These terms commonly include initial appearance, first appearance, preliminary arraignment, arraignment on the complaint, and initial arraignment. Each of these terms can be used to refer to a defendant's first time before a judicial officer.
36. Id. at 194 (emphasis added).
37. Id. at 199 (emphasis added).
The Court also cited a third case, McNeil v. Wisconsin,38 as an example of its "latest look at the significance of the initial appearance" as the point of attachment.39 The Court stated, "In McNeil, 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."40 The Court in McNeil ultimately reaffirmed "that \[the\] Sixth Amendment right to counsel attaches at the first formal proceeding against an accused," and observed that "in most States, at least with respect to serious offenses, free counsel is made available at that time."41

In North Carolina, the terms "initial appearance" and "first appearance" refer to two distinct procedures in the criminal process, each of which are codified in sections 15A-51142 and 15A-60143 of the North Carolina General Statutes, respectively. Under North Carolina law, an arresting officer must, "without unnecessary delay," take an arrestee before a magistrate who must inform the defendant of the charge against him, his right to communicate with counsel and friends,44 and the conditions of pretrial release.45 Furthermore, if the arrest was made without a warrant, the magistrate must determine whether probable cause for the arrest exists.46 The "first appearance," on the other hand, is conducted by a district court judge and must occur within 96 hours of the defendant's arrest if the defendant is not released from custody after the initial appearance before a magistrate.47 At the "first appearance," the defendant is given his warning against self-incrimination48 and the sufficiency of the charge is reviewed.49 In addition, the defendant is informed of his right to counsel and, if the

39. Rothgery, 554 U.S. at 203 (emphasis added).
40. Id. (emphasis added).
41. Id. (quoting McNeil, 501 U.S. at 180–81) (emphasis added).
43. Id. § 15A-601. The title of this provision is: "First appearance before a district court judge; right in felony and other cases in original jurisdiction of superior court; consolidation of first appearance before magistrate and before district court judge; first appearance before clerk of superior court; use of two-way audio and video transmission." Id.
44. Id. § 15A-501.
45. Id.
46. Id. § 15A-511(c)(1).
47. Id. § 15A-601(c).
48. Id. § 15A-602.
49. Id. § 15A-604.
defendant requests counsel, a determination is made whether the defendant is indigent, thus qualifying for court-appointed counsel.50

The fact that the Court in Rothgery uses the terms "initial appearance" and "first appearance" interchangeably when referring to the point of attachment presents an issue specific to North Carolina law: whether the point of attachment established by Rothgery corresponds to the section 15A-511 initial appearance51 or the section 15A-601 first appearance52 before a district court judge. The answer lies in the Court's description of what constitutes an "initial" or "first" appearance. Regardless of the term the Court uses to refer to the point of attachment, it clearly describes this point in the criminal process as having two distinct characteristics: (1) it is, chronologically speaking, the defendant's first encounter with a judicial officer, and (2) it is the point at which a judicial officer informs the defendant of "the formal accusation"53 against him. The second characteristic further raises the issue of what constitutes a "formal accusation" against a defendant. In Rothgery, the Court rejects any distinction between a formal complaint filed by a prosecutor and an "arresting officer's formal accusation" in the form of an affidavit.54 Rather, "[w]hat counts is that the complaint filed with the magistrate accused Rothgery of committing a particular crime and prompted the judicial officer to take legal action in response (here, to set the terms of bail and order the defendant locked up)."55

50. Id. § 15A-603.
51. Id. § 15A-511.
52. Id. § 15A-601.
53. Rothgery v. Gillespie County, 554 U.S. 191, 199 (2008) ("Rothgery was taken before a magistrate, informed of the formal accusation against him, and sent to jail until he posted bail." (emphasis added)); see also id. at 202 ("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." (emphasis added)).
54. See id. at 223–24 (Thomas, J., dissenting) (arguing that the original meaning of "criminal prosecution" for the purposes of the Sixth Amendment right to counsel requires the filing of formal charges because "[t]he affidavit of probable cause clearly was not the type of formal accusation Blackstone identified with the commencement of a criminal 'prosecution'").
55. Id. at 199 n.9 ("The Court of Appeals did not resolve whether the arresting officer's formal accusation would count as a 'formal complaint' under Texas state law. But it rightly acknowledged (albeit in considering the separate question whether the complaint was a 'formal charge') that the constitutional significance of judicial proceedings cannot be allowed to founder on the vagaries of state criminal law, lest the attachment rule be rendered utterly 'vague and unpredictable.'" (internal citations omitted)).
56. Id.
The Court's description in Rothgery of the point of attachment corresponds to North Carolina's section 15A-511 initial appearance before a magistrate. This procedure constitutes, chronologically speaking, the first-in-time appearance of the defendant before a judicial officer and also the point at which the defendant is informed of "the charges against him." Like the Texas article 15.17 hearing, the North Carolina section 15A-511 initial appearance marks the point of attachment of the Sixth Amendment right to counsel, "with the consequent state obligation to appoint counsel within a reasonable time once a request for assistance is made."

II. TWO AREAS OF IMPACT: THE EFFECT OF AN EARLIER ATTACHMENT RULE ON NORTH CAROLINA CRIMINAL PROCEDURE

Contrary to Rothgery's attachment rule, the current state of the law in North Carolina is that the Sixth Amendment right to counsel attaches at a defendant's first appearance before a district court judge pursuant to section 15A-601 of the North Carolina General Statutes. This first appearance is neither the first-in-time appearance before a judicial officer nor the point at which the defendant is informed of the charge against him. Rather, it is the section 15A-511 initial appearance that

57. N.C. GEN. STAT. § 15A-501 ("Upon the arrest of a person, with or without a warrant, but not necessarily in the order hereinafter listed, a law-enforcement officer ... [m]ust, with respect to any person arrested without a warrant and, for purpose of setting bail, with respect to any person arrested upon a warrant or order for arrest, take the person arrested before a judicial official without unnecessary delay.").

58. Under section 15A-511(b) of the North Carolina General Statutes, the magistrate must "inform the defendant of: [t]he charges against him; [h]is right to communicate with counsel and friends; and [t]he general circumstances under which he may secure release under the provisions of Article 26, Bail." Id. § 15A-511(b). The defendant's right to communicate with counsel at this stage, it should be noted, simply constitutes the right to use the telephone to contact family, friends, and counsel who may assist him with pretrial release. See State v. Haas, 505 S.E.2d 311, 311 (N.C. Ct. App. 1998).

59. Rothgery, 554 U.S. at 198.

60. See State v. Gibbs, 436 S.E.2d 321, 345 (N.C. 1993) ("Although the first appearance itself is not a critical stage of criminal judicial proceedings at which a defendant is entitled to counsel ... we conclude defendant's Sixth Amendment right to counsel attached during his first appearance on 4 June, when the State's position against him solidified as to the murder charges and counsel was appointed."); accord State v. Nations, 354 S.E.2d 510, 514 (N.C. 1987) ("Applying these principles to the present case, it is clear that defendant's right to counsel attached at his first appearance before a judge of the district court, on 27 September 1985, at which time counsel was appointed to represent him.").

61. See supra notes 42-50 and accompanying text.
constitutes a "criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction." Thus, the section 15A-511 initial appearance, not the section 15A-601 first appearance, "marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel" under Rothgery.

The attachment rule established by Rothgery impacts North Carolina criminal procedure in two ways: (1) the scope of a criminal defendant's Sixth Amendment right to have the presence of counsel during police questioning and interrogation is expanded under Rothgery; and (2) the rule established by Rothgery means that the only thing precluding the attachment of the right to counsel for some misdemeanor arrestees is the arresting officer's discretion to issue the defendant a citation rather than perform a full custodial arrest, after which an initial appearance would be made and the right to counsel would attach.

A. The Right to Presence of Counsel during Post-Attachment Police Interrogation: The Impact of Rothgery on the Admissibility of Police Investigation and Interrogation

Under current North Carolina law, a defendant's Sixth Amendment right to counsel attaches at the defendant's first appearance pursuant to section 15A-601 of the North Carolina General Statutes and "applies at and after any pretrial proceeding that is determined to constitute a critical stage in the proceedings against the defendant." However, the first appearance itself is not a critical stage at which the defendant is entitled to the presence of counsel. A custodial interrogation of the

62. Rothgery, 554 U.S. at 213.
63. Id.
64. N.C. GEN. STAT. § 15A-601 (2010); see also supra notes 42-50 and accompanying text.
65. Gibbs, 436 S.E.2d at 345 (quoting State v. Detter, 260 S.E.2d 567, 579-82 (N.C. 1979)).
66. N.C. GEN. STAT. § 15A-601(a) ("This first appearance before a district court judge is not a critical stage of the proceedings against the defendant."); see also Gibbs, 436 S.E.2d at 345 ("[T]he [first] appearance [pursuant to N.C.G.S. § 15A-601] before a district court judge is not a critical stage because it is not an adversarial judicial proceeding where rights and defenses are preserved or lost or a plea taken." (quoting Detter, 260 S.E.2d at 582)).
67. See State v. Haddock, 190 S.E.2d 208, 212 (N.C. 1972) ("By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way . . . ." (citing Miranda v. Arizona, 384 U.S. 436, 444 (1966))).
defendant, on the other hand, is considered a "critical stage" entitling a defendant to the presence of counsel under the Fifth Amendment. Additionally, once the Sixth Amendment right to counsel attaches, the police may not "deliberately elicit" statements from the defendant without the presence of counsel, or without a valid waiver of the right to counsel. Furthermore, the Sixth Amendment's protection is both broader and narrower than the Fifth Amendment's in that its application is not limited to custodial interrogations; however, the Sixth Amendment's protection applies only once a criminal prosecution has commenced. In the words of the Supreme Court, "The Sixth Amendment guarantees the accused, at least after the initiation of formal charges, the right to rely on counsel as a 'medium' between him and the State."

Whether an attempt by law enforcement to initiate interrogation has occurred before or after the attachment of the right to counsel has been the subject of several United States Supreme Court and North Carolina Supreme Court cases. The significance of this issue concerns

68. See N.C. GEN. STAT. § 7A-451(b)(1) (enumerating "critical stages" at which entitlement to services of counsel exists); see also State v. Doss, 183 S.E.2d 671, 677 (N.C. 1971) ("The in-custody interrogation was a critical stage in the proceeding, at which time the defendant was entitled to counsel under G.S. [§17A-451(b)(1)."]).

69. See Massiah v. United States, 377 U.S. 201, 206 (1964); see also Gibbs, 436 S.E.2d at 345 ("[T]he police may not question a defendant [whose Sixth Amendment right to counsel has attached], absent a valid waiver, without the presence and assistance of counsel." (quoting Detter, 260 S.E.2d at 580)); see also Brewer v. Williams, 430 U.S. 387, 401 (1977) ("Rather, the clear rule of Massiah is that once adversary proceedings have commenced against an individual, he has a right to legal representation when the government interrogates him. It thus requires no wooden or technical application of the Massiah doctrine to conclude that Williams was entitled to the assistance of counsel guaranteed to him by the Sixth and Fourteenth Amendments."). It should be noted that the Fifth Amendment protection and the Sixth Amendment protection overlap. The Fifth Amendment continues to apply once the Sixth Amendment attaches, but is limited to "custodial interrogations." The Sixth Amendment protection is not limited to custodial interrogations, but applies any time law enforcement officers attempt to deliberately elicit statements from a defendant without the presence of counsel.

70. Massiah, 377 U.S. at 206.


72. See generally Michigan v. Jackson, 475 U.S. 625 (1986), overruled by Montejo v. Louisiana, 129 S. Ct. 2079 (2009); Brewer v. Williams, 430 U.S. 387 (1977); Gibbs, 436 S.E.2d 321; Detter, 260 S.E.2d 567. Under Jackson, once a defendant requested counsel under the Sixth Amendment at a preliminary hearing, police officers could not approach the defendant to initiate questioning without the presence of counsel. Jackson, 475 U.S. at 636. Thus, a defendant's waiver and voluntary statement given during a non-custodial interrogation would nonetheless be invalid if the police initiated the interrogation without presence of counsel. Since Montejo, police can approach a defendant whose
the admissibility of the statement(s) into evidence in a criminal trial. Where the police attempt to elicit statements from a defendant subsequent to attachment of the right to counsel, and absent a valid waiver of the right to the presence of counsel, the statements of the defendant are potentially inadmissible at trial under the exclusionary rule. Therefore, identifying the point of attachment in relation to the purported attempt to elicit incriminating statements is critical in determining whether a defendant's Sixth Amendment right has been violated, thereby triggering the exclusionary rule.

The most recent North Carolina case addressing the issue of attachment within the context of police interrogation and questioning is State v. Gibbs, involving a defendant sentenced to death for three counts of first-degree murder. In Gibbs, the defendant moved to suppress incriminating statements that he made in the course of two interviews with police, citing the Fifth and Sixth Amendments of the United States Constitution, as well as article 1, sections 19 and 23 of the North Carolina Constitution as bases for a violation of his rights. The court proceeded to analyze the defendant's contention by examining whether the defendant's right to counsel had attached when the statements were made. The court's analysis in Gibbs rested on a previous case addressing a similar issue, State v. Detter, in which the court held that once the right to counsel attaches, "police may not question a defendant, absent a valid waiver, without the presence and assistance of counsel." Therefore, in analyzing the defendant's protection under the Sixth Amendment, the relevant issue was whether, at the time of questioning, Gibbs' right to counsel had attached. The court held that the defendant's right to counsel attached at his first appearance on June 4, 1990 pursuant to section 15A-601. Therefore, since the defendant's

Sixth Amendment right to counsel has attached and seek a waiver of the right to counsel. See Montejo, 129 S. Ct. at 2089–91. If the waiver is valid, subsequent statements will not be inadmissible on the basis that police approached the defendant and initiated interrogation. See id.

73. See generally Massiah v. United States, 377 U.S. 201 (1964) (excluding post-indictment statements surreptitiously elicited by the government and without presence of counsel); Spano v. New York, 360 U.S. 315 (1959) (excluding a post-indictment confession of the defendant made while being questioned in the jailhouse, without presence of counsel).

74. Gibbs, 436 S.E.2d 321.
75. Id. at 344.
76. Id. at 344–46.
77. Detter, 260 S.E.2d at 580.
78. Gibbs, 436 S.E.2d at 345–46.
79. Id.
right to counsel had not yet attached at the time that the police interviews occurred, there was no constitutional violation and the defendant's statements were not inadmissible under the Sixth Amendment.\(^{80}\)

However, if the case had occurred after Rothgery, the result surely would have been different. In Gibbs, the defendant's section 15A-511 initial appearance occurred on the morning of May 31, 1990.\(^{81}\) The defendant's incriminating statements, which were the subject of the court's decision, were made during interviews that had occurred on May 30, 1990, around 8:00 pm on May 31, 1990, and on June 3, 1990.\(^{82}\) The defendant's initial appearance was conducted “[s]oon after 6:32 pm” on May 31.\(^{83}\) Finally, the defendant's first appearance pursuant to section 15A-601 occurred on June 4, at which point his right to counsel was deemed to have attached.\(^{84}\) Applying the Court's holding in Rothgery, it seems that the defendant's right to counsel would have attached at the initial appearance on the evening of May 31 and any subsequent statement deliberately elicited by police\(^{85}\) without the presence of counsel and without a valid waiver would have been subject to exclusion.\(^{86}\) Gibbs initially confessed to the murders during an

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80. Id.

81. See id. at 343–46. According to the court, Gibbs voluntarily arrived at the police department on May 31, 1990 and was interviewed by the police. Id. at 332. Later that day, the defendant was “taken to the magistrate's office, where arrest warrants were served on him, and then returned to the police department.” Id. at 343. The court does not specifically name this proceeding, but later in its opinion, the court references the May 31 appearance before the magistrate in calculating the 96-hour time period after the section 15A-511 initial appearance within which a defendant must be brought before a district court judge for his first appearance pursuant to section 15A-601. The court stated, “In the instant case the record shows defendant made his first appearance on 4 June 1990, within ninety-six hours of 31 May, when he was taken into custody.” Id. at 345. The May 31 appearance before the magistrate was the section 15A-511 initial appearance before a magistrate.

82. Id. at 332, 343–45.

83. Id. at 343.

84. Id. at 345.

85. According to Kuhlmann v. Wilson, police “deliberately elicit” a statement from a defendant when the police engage in some sort of “action, beyond merely listening . . . designed deliberately to elicit incriminating remarks.” 477 U.S. 436, 459 (1986).

86. See Rothgery v. Gillespie County, 554 U.S. 191, 213 (2008). Ultimately, Gibbs' statements were admissible because the Fifth Amendment did not apply to exclude the statements. Gibbs, 436 S.E.2d at 347. The court held that, although Gibbs was in custody and had requested counsel, an “interrogation” within the meaning of Miranda had not occurred and therefore the statements were not excluded under the Fifth Amendment. Id. However, had the Sixth Amendment been deemed to have attached,
interview at 1:40 pm on May 31, before the initial appearance was conducted that evening. However, during Gibbs' subsequent interview at 8:00 pm on May 31, he “described his movements on the night of the murder in great detail,” including the acquisition of a weapon for the purposes of going to the victims' house that night. Furthermore, during the June 3 interview, Gibbs admitted that he made his girlfriend, Yvette Gay, come with him on the night of the murder and “made her stand watch.” Ultimately, Gibbs was convicted of three counts of first-degree murder under theories of premeditation and deliberation and felony murder. Yvette Gay was convicted for three counts of first-degree murder under the same theories in a separate proceeding. The exclusion of Gibbs' statements would likely have affected the weight of the state's evidence against both Gibbs and Gay, specifically as to the element of premeditation and deliberation.

Gibbs illustrates the interplay between current North Carolina procedure and the earlier attachment rule established by Rothgery with respect to police questioning and interrogation procedures. Under the current North Carolina practice of pinning attachment of the right to counsel to the first appearance, as opposed to the initial appearance, the Sixth Amendment protection for the presence of counsel during police attempts to deliberately elicit incriminating statements occurring between the initial appearance and first appearance is deemed inapplicable, because the right to counsel has not yet attached. If North Carolina law were in compliance with Rothgery, a defendant's right to counsel would attach at the initial appearance and would entitle the defendant to the presence of counsel, unless validly waived, during any subsequent critical stages, including custodial interrogations and

87. Gibbs, 436 S.E.2d at 332.
88. Id.
89. Id. at 332–33.
90. Id. at 334.
92. See supra notes 79–86 and accompanying text.
93. See supra note 68 and accompanying text.
non-custodial police interviews\(^\text{94}\) that occur in the intervening period between the initial appearance and first appearance.

**B. Police Discretion and Attachment of the Right to Counsel: The Impact of Rothgery on Misdemeanor Arrest and Citation Procedures\(^\text{95}\)**

In North Carolina, a law enforcement officer who has probable cause to believe a person has committed a misdemeanor offense in his presence may issue a citation ordering the suspect to appear in court\(^\text{96}\) or, under certain circumstances,\(^\text{97}\) perform a custodial arrest.\(^\text{98}\) Should the officer choose the latter option, he must transport the suspect for initial appearance before a magistrate to determine whether probable cause exists, and, if so, the magistrate must inform the defendant of the charge against him, his right to communicate with counsel and friends, and the conditions of pretrial release.\(^\text{99}\)


\(^{95}\) Even though Rothgery dealt with a felony offense, the Court does not explicitly limit its holding to felony offenses to the exclusion of misdemeanor offenses. In a subsequent Texas Court of Appeals case, Williamson County v. Heckman, No. 03-06-00600-CV, 2010 WL 1632901 (Tex. App. Apr. 23, 2010), which was filed before the decision in Rothgery, several petitioners charged with various misdemeanor offenses attempted to bring a class action based on an alleged “systematic and deliberate scheme” by judges and magistrates in Williamson County, Texas. \textit{Id.} at *1. The petitioner’s contend that judicial officials engaged in the scheme to “deprive persons accused of misdemeanor offenses in Williamson County of their right to be represented by counsel and of their right to obtain court-appointed counsel when they are financially unable to hire a lawyer.” \textit{Id.} The court ultimately held that the petitioners’ individual claims were moot, and therefore they did not have standing to pursue a claim on behalf of a class. \textit{Id.} at *13. In establishing the claims were moot, the court noted that Williamson county, in response to “intervening changes in the law” including the decision in Rothgery, “amended their magistrate procedures to ensure the provision of additional information and assistance to accused persons regarding their right to counsel and refined their procedures for ensuring prompt appointment of counsel when a request is made.” \textit{Id.} at *11. One policy adopted by the county included the distribution of a document titled “Information About Your Right to a Court-Appointed Attorney” informing the defendant how to obtain counsel and “requiring the magistrate to ‘ensure that reasonable assistance in completing the necessary forms for requesting appointment of counsel is provided to the person.’” \textit{Id.} at *11 n.15.

\(^{96}\) See N.C. GEN. STAT. § 15A-302(c) (2010). The citation must identify the crime charged, the name and address of the person cited, the officer issuing the citation, as well as an order to appear in a designated court on a certain date and time. \textit{Id.}

\(^{97}\) See \textit{id.} § 15A-401(b) (detailing when an arresting officer can make a warrantless arrest for a misdemeanor); see also ROBERT L. FAR, ARREST, SEARCH, AND INVESTIGATION IN NORTH CAROLINA 35–36 (3d ed. 2003).

\(^{98}\) See N.C. GEN. STAT. § 15A-401.

\(^{99}\) See \textit{id.} § 15A-511(b); see also supra text accompanying notes 44–46.
As many as forty-six states have adopted citation procedures as a means of reducing the cost of processing and detaining suspects, reducing the amount of time an officer spends arresting and transporting suspects, and allowing the officer to remain in his or her patrol district to respond to other criminal activity. Whether an officer decides to perform a custodial arrest, rather than issue a citation, may depend on a variety of factors, including, but not limited to: the type of offense, the suspect's behavior, verification of the suspect's address within the jurisdiction, or the suspect's failure to provide proper identification. Allowing the officer to use such discretion has not been without controversy. For example, in a five to four decision, the Supreme Court affirmed a Fifth Circuit judgment upholding an officer's decision to make a custodial arrest of a woman for driving without her seatbelt and for failing to secure her children in seat belts. In a dissenting opinion in the case below, Fifth Circuit Judge Reynaldo Garza argued that the officer had probable cause to stop the vehicle, but "should have given [the driver] a citation to appear instead of seizing her, putting handcuffs behind her back, and taking her to the police station." The strongly worded dissent of Judge Garza highlights the controversy surrounding an officer's exercise of discretion to perform a custodial arrest in light of the impact of such an arrest on the individual.

While controversy surrounding a police officer's discretion to make a warrantless custodial arrest typically involves the Fourth Amendment right against unreasonable search and seizure, such discretionary decision-making may now have additional controversial implications with respect to the Sixth Amendment in light of the Supreme Court's decision in Rothgery. The earlier attachment rule established by Rothgery means that the only thing precluding the attachment of the right to counsel for some misdemeanor arrestees is the officer's discretion to cite the arrestee rather than perform a full custodial arrest, after which an initial appearance would, "without unnecessary delay,"


101. Id. at 318.

102. See Atwater v. City of Lago Vista, 195 F.3d 242, 244 (5th Cir. 1999), aff'd, 532 U.S. 318 (2001).

103. Atwater, 195 F.3d at 247 (Garza, J., dissenting) (emphasis added).

104. U.S. CONST. amend. IV.

105. See N.C. GEN. STAT. § 15A-501(2) (2010) (requiring that a person arrested without a warrant be brought "before a judicial official without unnecessary delay"); see
be conducted and the right to counsel would attach. An officer's discretion on this issue will, at least under North Carolina law, determine whether the "initiation of adversary judicial proceedings" occurs shortly after the event that gave rise to the offense, a condition precedent to attachment of the Sixth Amendment right to counsel under *Rothgery*.\textsuperscript{106} Whether this result is considered to be significant or merely a procedural quirk of no importance depends upon one's understanding of the purpose and scope of the Sixth Amendment right to counsel.

*Rothgery* provides two bases for arguing that an officer's discretion on this matter should not determine the attachment of a defendant's constitutional right to assistance of counsel: (1) the Court's rejection of the prosecutorial awareness standard for attachment,\textsuperscript{107} which is underscored by the Court's broader rejection of arbitrariness and lack of uniformity as related to attachment of the Sixth Amendment right to counsel; and (2) the Court's recognition of the defendant's need to obtain counsel in order to prepare a defense and avoid trial altogether.\textsuperscript{108}

To illustrate an officer's discretion to cite or arrest for a misdemeanor offense, consider the following hypothetical: A police officer is assigned to patrol the area around a large stadium during a sporting event. Shortly after beginning his patrol, the officer notices a group of people congregating around two young men who are shouting obscenities and approaching each other as if to engage in a physical fight. Friends of the young men attempt to restrain the two as the officer approaches. Rather than make a custodial arrest for disorderly conduct, a misdemeanor under section 14-288.4 of the North Carolina General Statutes,\textsuperscript{109} the officer decides to issue a citation. After all, the officer has just begun his patrol and spending an hour transporting the suspects for booking would detract from the time that he needs to spend patrolling the event. Hours later, as people are leaving the event, the officer happens upon a similar scene. Having reached the end of his shift, and on his way back to the station, the officer chooses to arrest and transport the suspects back to the station for booking and initial appearance.

Two hypothetical groups of suspects "apprehended" for the same offense of disorderly conduct, yet, according to the Supreme Court's

\begin{itemize}
\item \textit{Also id. § 15A-511(a)(1) ("A law-enforcement officer making an arrest with or without a warrant must take the arrested person without unnecessary delay before a magistrate as provided in G.S. 15A-501.").}
\item \textit{106. See Rothgery v. Gillespie County, 554 U.S. 191, 213 (2008).}
\item \textit{107. See id. at 206–07.}
\item \textit{108. See id. at 209–10.}
\item \textit{109. N.C. GEN. STAT. § 14-288.4.}
\end{itemize}
decision in Rothgery, the second group may be entitled to appointed counsel shortly after the event under the Sixth Amendment whereas the first group of suspects may not be similarly entitled. In Rothgery, the Supreme Court established that a defendant’s initial appearance before a magistrate, irrespective of prosecutorial involvement, “marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel.” The Court rejected the prosecutorial awareness standard for attachment proffered by the respondent, which required that “relevant prosecutors” be aware of the particular arrest or initial appearance before the right attached. The Court held that such a system for measuring the point of attachment was arbitrary, having “the practical effect of resting attachment on such absurd distinctions as the day of the month an arrest is made . . . or ‘the sophistication, or lack thereof, of a jurisdiction’s computer intake system.’” Subjecting the Sixth Amendment right to the vicissitudes of a jurisdiction's administrative system or a prosecutor's awareness of judicial proceedings at a particular moment is, according to the Court, impermissible. Rather, “what counts as a commitment to prosecute is an issue of federal law unaffected by allocations of power among state officials under a State's law.”

As illustrated above, the Court's decision to uniformly establish the point of attachment at the initial appearance before a judicial officer was motivated by the Court's general disdain for the various and seemingly arbitrary factors influencing the attachment of the right to counsel. The Court's rejection was supported by its emphasis on the significance of the commencement of a criminal prosecution, at which point the right to counsel attaches. Reiterating its previous decision in Kirby v.
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Illinois, the Court repeated that "[t]he rule is not 'mere formalism,' but a recognition of the point at which 'the government has committed itself to prosecute.'"120 Whether by "formal charge, preliminary hearing, indictment, information, or arraignment,"121 the initiation of criminal judicial proceedings marks the moment the defendant "finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law."122 Whether the state has objectively committed itself to fully prosecuting the defendant is irrelevant;123 rather, what matters is that the defendant is "brought before a judicial officer, is informed of a formally lodged accusation, and . . . the state's relationship with the defendant has become solidly adversarial."124

This "adversarial position" vis-à-vis the state in which the defendant now finds himself is not merely theoretical, but has practical implications as well. The Court notes that "a defendant subject to accusation after initial appearance is headed for trial and needs to get a lawyer working, whether to attempt to avoid that trial or to be ready with a defense when the trial date arrives."125 The majority's recognition of this point suggests a broader interpretation of the purpose and scope of the right to counsel beyond the traditional "critical stage" analysis requiring assistance of counsel only at "certain pretrial events [that] may so prejudice the outcome of the defendant's prosecution."126 Rather, the Court's language suggests that appointed counsel's role includes efforts, shortly after appointment, to investigate the charge and begin formulating a defense.127 The benefits of a broader interpretation of the scope of appointed counsel's role are illustrated by the facts in Rothgery: factual investigation by Rothgery's attorney shortly after appointment revealed the deficiency of the charge against Rothgery, which led to dismissal of the charge.128 While factual investigation in the early stages may not uncover such significant deficiencies, investigation by counsel shortly after the events giving rise to the charge is especially important for identifying and contacting witnesses whose memories may diminish,

120. Id. at 198 (quoting Kirby v. Illinois, 406 U.S. 682, 689 (1972)).
121. Id. (quoting United States v. Gouveia, 467 U.S. 180, 188 (1984)).
122. Id. at 198 (quoting Kirby, 406 U.S. at 689).
123. See id. at 202.
124. Id.
125. Id. at 210 (emphasis added).
126. Id. at 217 (Alito, J., concurring); see also Leading Cases, 122 Harv. L. Rev. 306, 315 (2008).
127. Rothgery, 554 U.S. at 217.
128. See id. at 196–97.
as well as locating other physical evidence vulnerable to destruction, which may be necessary for a defense at trial.

Prior to Rothgery, both the Supreme Court and the Sixth Circuit recognized the importance of assistance of counsel during periods of time close to the point of attachment, but which do not formally constitute a critical stage. For example, in Mitchell v. Mason, the Sixth Circuit held that a defendant convicted of second-degree murder was denied effective assistance of counsel due to the absence of counsel throughout the pre-trial period, a period that the court described as “critical” because “it encompasses counsel’s constitutionally imposed duty to investigate the case.” Most notably, the Supreme Court in Powell v. Alabama recognized the importance of representation during the pre-trial period as “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, thorough-going investigation and preparation were vitally important.” In a more recent case, the Supreme Court, commenting on the Sixth Amendment right to counsel, provided that “[t]he core of this right has historically been, and remains today, ‘the opportunity for a defendant to consult with an attorney and to have him investigate the case and prepare a defense for trial.”

As one legal commentator points out, the longer a defendant goes without assistance of counsel after being charged with an offense, “the odds of successfully challenging the state’s evidence shift more decidedly against the defendant.” Mounting a successful defense requires prompt investigation and identification of witnesses who, as more time passes, are more likely to be unavailable or unwilling to cooperate. Furthermore, “[t]he delay in representation damages the attorney-client relationship and makes it more difficult for the client to trust his lawyer’s assessment to exercise his trial rights.” Finally, the earlier the representation, the sooner an attorney can review the charging document for any weaknesses or errors and so “prevent an unlawful or

130. Mitchell, 325 F.3d at 743.
131. Powell, 287 U.S. at 57.
134. Id.
135. Id. at 19.
unjust prosecution."¹³⁶ This last point is precisely the type of error that could have been detected by an attorney in Rothgery's case early on, rather than six months after the initial appearance and after Rothgery had been jailed twice.¹³⁷ A simple review of Rothgery's criminal history by his appointed attorney would have revealed that he was never convicted of a felony, and therefore could not be charged with possession of a firearm by a felon.¹³⁸ For a defendant in North Carolina charged on a citation with a misdemeanor, the date on which the citation directs them to appear is typically the day on which the case will be tried, affording them virtually no real opportunity to be appointed counsel prior to trial. As a result, many North Carolina defendants are deprived of the benefits associated with an earlier attachment rule, including the ability to identify key witnesses, preserve vulnerable evidence, and establish a meaningful attorney-client relationship in advance of trial.

In Rothgery, the Court's repudiation of arbitrariness with respect to the point of attachment, coupled with its recognition that the right to assistance of counsel includes the need to prepare a defense and to attempt to avoid trial altogether, strongly calls into question any legitimate basis for allowing an officer's discretion to determine the attachment of the constitutional right to counsel for misdemeanor offenders. If it is arbitrary to rest attachment on the awareness of a particular prosecutor, it is likewise arbitrary to rest attachment on an arresting officer's discretion to cite or perform a custodial arrest.¹³⁹ Coupled with the practical importance of assistance of counsel to prepare a defense or negotiate a plea,¹⁴⁰ there is no meaningful basis to preclude attachment for one defendant charged with a particular misdemeanor offense, but not another defendant charged with the same offense simply because the individual officer involved chose to perform a custodial arrest, rather than issue a citation.

III. CONCLUSION

In Rothgery, the Court creates a bright-line rule that the Sixth Amendment right to counsel attaches at a defendant's first-in-time appearance before a judicial officer where the defendant is informed of

¹³⁶. Id. at 20.
¹³⁸. Id.
¹³⁹. See supra text accompanying notes 96–103.
¹⁴⁰. See supra text accompanying notes 125–27.
the charge against him. In North Carolina, the point of attachment established by Rothgery corresponds to a defendant's initial appearance pursuant to section 15A-511 of the North Carolina General Statutes, not the section 15A-601 first appearance as is currently the law in North Carolina. The Court's decision to uniformly establish an earlier attachment rule is motivated by its repudiation of the seemingly arbitrary factors that affect attachment of the right to counsel, as well as the Court's recognition that assistance of counsel is necessary at an earlier stage in order for a defendant to prepare a defense and potentially avoid trial altogether.

Compliance with the Supreme Court's holding in Rothgery will require North Carolina to amend sections of chapter 15A of the North Carolina General Statutes, specifically sections 15A-511, 15A-601 and 15A-603. The current procedure of informing the defendant of the right to counsel and determining indigency is detailed under section 15A-603 and conducted at the section 15A-601 first appearance. This procedure ought to be removed from section 15A-601 and transposed to the section 15A-511 initial appearance procedure. As the law currently stands, the magistrate must, at the initial appearance, inform the defendant of his right to communicate with counsel and friends, but this right is limited simply to use of a telephone to contact those who may assist him with pretrial release. This part of section 15A-511 should be expanded to include the indigency inquiry and determination outlined in section 15A-603. Upon informing the defendant of his right to communicate with counsel, the magistrate should inquire whether the defendant is able to obtain counsel and inform the defendant that he will be provided counsel if he is determined to be indigent, as detailed under section 15A-603. These changes to chapter 15A will bring North Carolina law in to compliance with Rothgery and will avoid confusion as to the defendant's right to presence of counsel during subsequent attempts by police to elicit statements from the defendant. In so doing, North Carolina will minimize potential future motions for suppression of evidence filed on the premise that a defendant was deprived assistance.

141. Rothgery, 154 U.S. at 213.
143. Id. § 15A-601.
144. See supra text accompanying notes 42–59.
145. See supra text accompanying notes 125–27.
146. N.C. GEN. STAT. § 15A-603(b) ("The judge must inform the defendant of his right to be represented by counsel and that he will be furnished counsel if he is indigent.").
147. Id. § 15A-511(b)(2); see also State v. Haas, 505 S.E.2d 311 (N.C. Ct. App. 1998).
of counsel during police interrogations conducted after the defendant’s right to counsel was deemed to have attached under Rothgery.

As to the matter of misdemeanor citation and custodial arrest procedures: A majority of states have wisely adopted procedures that allow law enforcement officials to use discretion when deciding to physically arrest a defendant that the officer has probable cause to believe has committed a misdemeanor offense.\textsuperscript{148} Rather than make a physical arrest, the officer who simply issues a citation helps reduce the judicial cost of arresting, transporting, and processing each suspect, and, furthermore, helps to increase local safety by maintaining a more consistent presence in the community.\textsuperscript{149}

However, judicial economy is not the only interest implicated by the officer’s decision to issue a citation. Under Rothgery, the officer’s decision to issue a citation, a decision that may depend on a variety of factors, can effectively prevent the triggering of attachment of the Sixth Amendment right to counsel soon after the event that gives rise to the offense.\textsuperscript{150} The misdemeanor defendant who never appears before a magistrate will not be informed of his right to counsel,\textsuperscript{151} if at all, until his court appearance and will thus be deprived of the right to counsel in the intervening period. The benefits of the right to counsel in this period are, according to the majority in Rothgery, significant and include the ability of the defendant to prepare a defense and to attempt to potentially avoid trial altogether.\textsuperscript{152} Also of critical importance is the right to have counsel present when questioned by police. Absent the appearance before a magistrate, a defendant currently has no mechanism to request that counsel be appointed to represent him or her in defending against the charge, while the prosecution may be busily preparing a case.

State legislatures that have adopted discretionary arrest procedures should ensure that the interest of judicial economy promoted by misdemeanor citation and the Sixth Amendment right to counsel for defendants who, but for the officer’s discretion, would have made an initial appearance, are both preserved. In North Carolina, officers who


\textsuperscript{149} Id.

\textsuperscript{150} See Rothgery, 554 U.S. at 213.

\textsuperscript{151} See N.C. GEN. STAT. § 15A-511(b).

\textsuperscript{152} See Rothgery, 554 U.S. at 210.
choose to issue a citation to a misdemeanor offender should, along with
the citation, provide a document with instructions that the person
charged may appear in court, request an attorney, and have his
indigency status determined. The document could be similar in form to
the one adopted by Williamson County in Texas, a county that amended
its policies in response to Rothgery to ensure that misdemeanor
defendants are informed about their right to counsel.153

Similar to the "disposition court" already in existence in Wake
County, North Carolina,154 each county should establish a particular day
and time during which individuals cited with a misdemeanor could
appear to request counsel and fill out the paperwork necessary for an
indigency determination. For counties that provide appointed counsel
from a rotating list of attorneys or on an ad hoc basis, the name and
contact information of the appointed attorney can be provided to the
defendant immediately following the indigency determination. Where a
more formal system of indigent defense services exist, such as a public
defender's office, the court can forward the defendant's information to
the public defender and provide the indigent defendant with contact
information for the public defender's office.

Together, amending sections 15A-511, 15A-601, and 15A-603, and
reforming the misdemeanor citation procedure, would bring North
Carolina in line with Rothgery and would ensure that the discretion of
the arresting officer – a valuable tool in reducing judicial costs – does
not separate a misdemeanor defendant from the right to counsel to
which he would otherwise be entitled had the officer decided to perform
a custodial arrest. Furthermore, these changes will promote the
constitutional uniformity sought to be achieved by the Court in Rothgery
and will guarantee that attachment of the right to counsel is not reduced
to a "mere formalism" subject to the various factors of a particular
criminal administrative system.155 In the words of the Court, the point
of attachment is "the point at which... the adverse positions of
government and defendant have solidified," and the accused 'finds

153. See supra note 95. The document provided to defendants is titled "Information
About Your Right to a Court-Appointed Attorney" and includes details about how and
when a defendant can obtain an appointed attorney. Williamson County v. Heckman,

154. See Wake County Clerk of Court, Criminal Division: Disposition Court,
http://web.co. wake.nc.us/courts/disposition.html (last visited Oct. 9, 2010). The
disposition court allows people cited with traffic violations to come to the courthouse
any time between 7:45 am and 3:30 pm to pay off their citations without having to wait
in the courthouse for several hours. Id.

155. Rothgery, 554 U.S. at 198 (quoting Kirby v. Illinois, 406 U.S. 682, 689 (1972)).
himself faced with the prosecutorial forces of organized society.\textsuperscript{156} The attachment rule established by \textit{Rothgery} is based largely on the Court's recognition of the significance of the adversarial relationship between the state and the defendant, as well as the practical reality that "a defendant subject to accusation after initial appearance is headed for trial and needs to get a lawyer working, whether to attempt to avoid that trial or to be ready with a defense when the trial date arrives."\textsuperscript{157} In light of the Court's explication of the Sixth Amendment right to counsel and its admonition of the seemingly arbitrary factors affecting its attachment, \textit{Rothgery} makes clear that this is one area of constitutional criminal procedure foreclosed from further experimentation and variation among the states.

\textit{Rebecca Yoder}

\textsuperscript{156} \textit{Id.}
\textsuperscript{157} \textit{Id.} at 210.