

## Rothgery v. Gillespie County, TX

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### When One Screw-up Ruins Things For The Rest of Us

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**IMPORTANT NOTE! THE SUPREME COURT DECIDED  
MONTEJO V. LOUISIANA IN MAY 2009 WHICH AFFECTED  
THE "ASSERTION" OF SIXTH AMENDMENT RIGHTS.**

**AFTER THAT DECISION, OFFICERS MAY INITIATE INTERROGATION AND SEEK A SIXTH  
AMENDMENT WAIVER EVEN AFTER THE PERSON HAS REQUESTED COUNSEL OR HAD  
COUNSEL APPOINTED. PLEASE SEE THE LEGAL UPDATE ON MONTEJO FOR FURTHER  
INFORMATION.**

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**\*\*Special Note:** Much of the information presented here was obtained from a memorandum prepared by the NC Association of Police Attorneys (Curt Euler, President). Many thanks to the group of attorneys who put together that document. (The bad jokes below are all mine, I'm sad to say.)\*\*

Let us take a moment and reflect on those halcyon\* days of childhood, when all we had to worry about was staying inside the lines when coloring and figuring out how to tie our shoes.\*\* Maybe you, like me, were one of those kids who never got in trouble, always did what the teacher said, and received high marks in every subject.\*\*\* However, many times, if one or two of my fellow students were talking and cutting up, the whole class (most of whom were being little angels) would be punished with "silent lunch." This was a lunch where you couldn't make a sound. The only worse punishment was having to sit boy-girl, boy-girl – who wanted to talk to a girl, anyways?\*\*\*\* And all because little Tommy couldn't keep his mouth shut – oh, the injustice!

\* I didn't know what "halcyon" meant, so I looked it up. It sounds like a made up word to me, but it actually means "golden" or "marked by peace and prosperity." To use it in a sentence for illustration, the reign of George W. Bush has not been halcyon.

\*\* Kids today don't have to tie shoes due to the invention of Velcro. I have a daughter in the fourth grade and I'm still not sure she could tie her shoes. On the other hand, I was almost held back in kindergarten because I couldn't tie my shoes. I had fat fingers.

\*\*\* If you believe this sentence, I have a bridge to nowhere I'd like to sell you. My worst grades were always handwriting and conduct. Seems my teachers thought I had a smart mouth. I've grown out of it.

\*\*\*\* Isn't it amazing that the very things you hated in primary school, talking to girls and naptime, are the very things that you crave as an adult. As the song goes, you don't love what you got until it's gone.

I imagine it was just these kinds of injustices that caused most of you to want to enter the noble profession of law enforcement. The case we will discuss today is one of those situations where one person's screw-up (or county's) has made life tougher on everyone. The case is Rothgery v. Gillespie County and it completely changes how the 6<sup>th</sup> Amendment operates.

Here are the facts of the case. Texas police arrested Rothgery and charged him with Possession of Firearm by a Convicted Felon. The only problem was, unbeknownst to the officers, Rothgery was in fact NOT a convicted felon. He was brought before a magistrate, as required by state law, for a so-called "article 15.17 hearing," at which a determination of probable cause was made, bail was set, and Rothgery was formally apprised of the accusation against him, much like happens in this state. Rothgery posted bond in the amount of \$5000.00 and was released from jail.

No doubt due to our economic woes, Rothgery had no money for a lawyer and made several unheeded oral and written requests for appointed counsel. He was subsequently indicted on the charge, which resulted in his being re-arrested and placed in jail under a \$15,000.00 bond, which he was unable to make. He remained in jail for three weeks. Rothgery was finally appointed an attorney, who promptly made a successful motion for a bond reduction to get Rothgery out of jail and quickly assembled the paperwork needed to show that Rothgery was not a convicted felon. Based on this paperwork, prosecutors dismissed the case.

Rothgery was not pleased. He filed suit under U.S.C. Section 1983 against the county, claiming that their attorney appointing policies violated his Sixth Amendment rights and caused him to spend three unnecessary weeks in the slammer. The U.S. Supreme Court agreed with him.\* This would be a good time to remind you that you may be sued, along with the police department and city for a false arrest. Please be careful and don't make careless mistakes that come back and bite you. I would rather not have the extra work.

\*Technically, they simply vacated a summary judgment entered in favor of the county and remanded it for trial. But you didn't need to know all of that.

The Supreme Court ruled that a person's Sixth Amendment right to counsel attaches when he is brought before a magistrate who determines probable cause and sets bail. This was a change to the long standing rule that the Sixth Amendment did not attach until a person's first appearance in District Court or his indictment, whichever came first. This ruling impacts you when it comes to interrogating persons who have already been brought before a magistrate.

First, by way of review, remember that Miranda deals with the Fifth Amendment's right not to incriminate oneself. You are required to obtain a waiver of these Miranda rights prior to a custodial interrogation. If a person invokes their right to have an attorney present for questioning, you may not ask further questions about this or any other possible charges while the suspect remains in continuous custody.

The Sixth Amendment, on the other hand, deals with the person's right to have an attorney at any critical stage of prosecution, which would include any questioning by government officers. The Sixth Amendment applies regardless of whether the suspect is in custody or not and is charge specific, meaning that even if the Sixth Amendment has been asserted in connection with one charge, it will not preclude interrogation on a different charge.

Here's the rub: a little cared about distinction between when the Sixth Amendment right attaches and when it has been asserted now becomes crucial to determining whether a person can legally be interrogated. The Court has said that the right attaches when the defendant appears before the magistrate and the magistrate finds probable cause. It has not been asserted until the defendant requests, hires or is appointed a lawyer. It is in the time between attaching and asserting that law enforcement may approach the defendant and seek a waiver. After the right has been asserted, unless (1) the suspect initiates the interview and (2) waives his 6<sup>th</sup> Amendment right to counsel\*, questioning may only occur with an attorney present. Read this paragraph several times slowly – we'll wait for you.

\*Generally, you would secure a waiver of Sixth Amendment rights by giving Miranda rights and obtaining a waiver. See pg. 209 of Farb's Arrest, Search, and Investigation (3<sup>rd</sup> edition) for a better explanation of this.

Here are some scenarios that will help you to apply your newfound Constitutional knowledge:

1. Jack is arrested for obtaining controlled substances by fraud. He is not mirandized upon arrest, and no interrogation is done. He is brought before the magistrate, says nothing about a lawyer, and is released on bond. Detective wants to interrogate him.

Miranda doesn't apply because Jack is not in custody (assuming the interview is consensual). Jack's Sixth Amendment right has attached, but he has not asserted it by asking for a lawyer or hiring a lawyer. Therefore, officers should get a waiver of the defendant's Sixth Amendment rights (by going through Miranda warnings) and may question the defendant.

2. Kate is arrested for murder. She is given Miranda warnings, waives her rights, and is interrogated prior to being brought before the magistrate. Kate doesn't say anything about a lawyer while at the magistrate's office. Because she is brought before Magistrate "J", Kate is released on bond.

This follows the same analysis as #1, above. The Sixth Amendment is not an issue when interrogation occurs before the defendant is brought before a magistrate. Officers may approach Kate for interrogation and get her to sign a waiver. The Sixth Amendment right has attached, but she has not asserted it.

3. Sawyer is arrested for Obtaining Property By False Pretenses. Detectives attempt to obtain a Miranda waiver, but Sawyer "lawyers up" by saying he wants an attorney present for any questioning. He is brought before the magistrate where he says nothing. He remains in custody under a \$10,000 bond.

Officers may not re-approach Sawyer while he is in custody for any crime because he invoked his 5<sup>th</sup> amendment right to counsel. As long as he remains in custody, he may not be approached unless he initiates contact with the officer. In that situation, a waiver of his 5<sup>th</sup> and 6<sup>th</sup> amendment rights should be obtained, although this would only require one Miranda waiver.

4. Same as #3, but Sawyer makes bond.

Now he may be approached and a 6<sup>th</sup> amendment waiver obtained. He may be approached and questioned about any charges where he has not been arrested and brought before a magistrate without having to obtain a 6<sup>th</sup> amendment waiver. Remember that the 6<sup>th</sup> amendment is charge-specific.

5. Locke is arrested for carrying a concealed weapon. When brought before the magistrate, Locke says that he wants a lawyer appointed to him.

Officers are prohibited from contacting Locke about the concealed weapon charge unless Locke initiates contact and waives or has his attorney present for questioning. Officers may question Locke about other criminal charges in which he has not been brought before the magistrate but since Locke is in custody, his 5<sup>th</sup> amendment rights apply and the officer will have to give Miranda warnings and obtain a waiver. THIS ANSWER IS CHANGED BY THE MONTEJO CASE (see above note). AFTER MONTEJO, OFFICERS MAY STILL APPROACH LOCKE AND SEEK A WAIVER OF SIXTH AMENDMENT RIGHTS.

6. Charlie is arrested for possession of heroin and brought to the magistrate where he says nothing about a lawyer. Subsequently, he has his first appearance in district court, at which he declares that he will represent himself. He is out on bond.

Charlie's 6<sup>th</sup> amendment right has attached but has not been asserted. The officer may approach him and obtain a waiver of the 6<sup>th</sup> amendment right to counsel.

7. Claire is wanted in High Point but is located in Bennettsville, SC (go figure). She is arrested on a South Carolina warrant as a fugitive from justice. She has been appointed counsel solely for the extradition hearing.

While there is no case on point in the Fourth Circuit or North Carolina State Courts, many other jurisdictions have found that the Sixth Amendment right to counsel does not attach to extradition hearings. See Chewing v. Rogerson, 29 F. 3d 418 (8<sup>th</sup> Cir., 1994), State v. Umphrey, 242 S.W. 3d 473 (Mo. App.E.D. 2007), State v. Wilcox, 2006 WL 3743828 (Ohio., 2006). Therefore, the High Point officer can question Claire without having the appointed attorney present after getting the proper Miranda waiver.

8. Walt is a juvenile. A petition has been issued for him and a secure custody order is issued. When does the 6<sup>th</sup> amendment right attach?

The 6<sup>th</sup> amendment right attaches when the juvenile first appears before a district court judge; the provisions of Chapter 7B provide for no appearance before a judicial official prior to that time.

We end our legal update today with an important warning on officer safety issues. I won't mention any names, but please be reminded of the following:

1. Handcuffs generally do not work when thrown at a fleeing subject like a tiny pair of connected lassos. Even if they were to magically attach to the person's wrists, you would still have to actually catch up to him to make an arrest.
2. Remember when TASERS are used that any contact between the prongs will be zapped (that's the technical term). Anyone who has ever watched those doctor shows knows when they say "clear," they mean CLEAR! When attempting to subdue a suspect, don't yell "hit 'im again" or words to that effect without ensuring that you are not touching the suspect in the area between the TASER prongs.



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