



Police Law Bulletin



Durham Police Department

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Now Available



New Booklet of Selected Ordinances from the Durham City Code

As you should be aware, the Durham City Council passed a recodification to the Durham City Code earlier this year. Consequently, most of the section numbers and titles to the City ordinances changed, and some ordinances were repealed altogether. A section translation table was provided to assist in identifying any newly assigned section number. Now, however, the new City Code has been posted on the city's website. In addition, a new booklet of selected ordinances from the Durham City Code has been created. Do *not* rely upon the booklet of selected ordinances last revised in 2004. Doing so will likely result in an improper pleading. The new booklet of selected ordinances has been posted on the officers' supplemental website so copies may be printed directly from there. Be certain to print all three parts: the cover page; the table of contents, and the text of the booklet. Copies may also be obtained, by advance request, from the police attorneys' office.



United States Supreme Court



Sixth Amendment Right to Counsel Attached (Began) at Proceeding Before Magistrate Who Determined Probable Cause and Set Bail; Prosecutor Need Not Be Aware of or Involved in Proceeding for it to be Considered Initiation of Adversary Judicial Proceedings Under Sixth Amendment Right to Counsel

Rothgery v. Gillespie County, ___ S. Ct. ___, ___ L.Ed.2d ___, (23 June 2008).

Local Texas officers arrested Rothgery and brought him before a Texas state magistrate, who found probable cause, formally apprised him of the accusation, and set bail. Rothgery was released after posting bond. Based on an unwritten county policy of denying appointed counsel for indigent defendants out on

bond until at least the entry of an information or indictment, Rothgery was not appointed counsel for six months.

The only issue before the Court was whether the proceeding before the magistrate was the initiation of adversary judicial proceedings under the Sixth Amendment so that the right to counsel attached (began) then. The Court, citing *Brewer v. Williams*, 430 U.S. 387 (1997), *Michigan v. Jackson*, 475 U.S. 625 (1986), and other cases, ruled that the proceeding was the initiation of adversary judicial proceedings, triggering the consequential obligation of the state to appoint counsel within a reasonable time once the defendant requests such assistance. A prosecutor need not be aware of or be involved with the proceeding for it to be considered the initiation of adversary judicial proceedings.

This ruling affects North Carolina case law on investigative activities. Recall that North Carolina appellate courts have ruled that the Sixth Amendment right to counsel does not attach (begin) for a felony until the first appearance in district court or indictment, whichever occurs first. See Robert L. Farb, *Arrest, Search, and Investigation in North Carolina* (3d. ed. 2003), at pages 206, 210 and 212. However, in light of the United States Supreme Court ruling in *Rothgery*, for a typical felony case that begins with an arrest either with or without a warrant and an appearance before a magistrate or other judicial official, the Sixth Amendment right to counsel now attaches (begins) with the appearance before the magistrate or other judicial official. The attachment (beginning) of the Sixth Amendment right to counsel no longer awaits the defendant's first appearance in district court. This means that any critical stage occurring thereafter, such as an officer's deliberate elicitation of information from the defendant by interrogation or conversation, or the defendant's appearance in a live lineup, will first require a valid waiver by the defendant. Based upon the ruling in *Patterson v. Illinois*, 487 U.S. 285, 108 S. Ct. 2389, 101 L. Ed. 2d 261 (1988), and North Carolina Supreme Court rulings in accord, *Miranda* warnings are usually sufficient to waive the Sixth Amendment right to counsel. An officer may solicit such a waiver up until the defendant invokes his or her Sixth Amendment rights by requesting counsel, making statements about plans to hire counsel, retaining counsel, or having counsel appointed. Once the defendant invokes his or her Sixth Amendment rights, an officer should not solicit a waiver unless the defendant initiates further communication about the crime, or the defendant's attorney is present.

This ruling most likely does not affect North Carolina statutory law on the appointment of counsel for judicial proceedings. The Court in *Rothgery* noted that there is a distinction between when the Sixth Amendment right to counsel attaches (begins) and a critical stage of a prosecution, at which a defendant has a Sixth Amendment right to have counsel represent him or her. Under N.C.G.S. 15A-601(c), a defendant, if not released on a felony charge, is entitled to a first appearance before a district court judge within 96 hours of being taken into custody or the next district court session, whichever occurs first. Under that same statute, a defendant, if released, is entitled to a first appearance before a district court judge at the next district court session. Appointment of counsel for indigents is made at the first appearance. Although not decided in *Rothgery*, it is highly likely that the Court would rule that neither a proceeding before a magistrate nor a first appearance before a district court judge is a critical stage of the prosecution so that a defendant has a Sixth Amendment right to have counsel represent him or her at these proceedings. On the other hand, a probable cause hearing is clearly a critical stage of the prosecution. See *Coleman v. Alabama*, 399 U.S. 1 (1970). North Carolina statutory law already provides for the right to counsel at a probable cause hearing under G.S. 15A-606 (e) (for non-indigent defendants) and under G.S. 7A-451 (b)(4) for indigent defendants.



Test Yourself



1. An officer obtains a warrant from the local magistrate charging John Doe with felony breaking and entering. Doe has not been taken into custody. Does Doe have 5th Amendment *Miranda* rights, 6th Amendment *Massiah* rights, neither, or both?
2. Doe is arrested on the outstanding warrant and is taken, without unnecessary delay, for an initial appearance before a magistrate. Doe is unable to post bond and is placed in jail. Does Doe have 5th Amendment *Miranda* rights, 6th Amendment *Massiah* rights, neither, or both?
3. At this point, Doe has made no indication that he wants or intends to hire, or already has hired, an attorney. Prior to his first appearance in district court, an officer's solicitation of a valid waiver from Doe would violate the defendant's 5th Amendment *Miranda* rights, 6th Amendment *Massiah* rights, neither, or both?
4. Suppose instead that before being led away to jail, Doe tells the arresting officer that, "This is bullshit. I want a lawyer." Prior to his first appearance in district court, an officer's solicitation of a waiver from Doe would violate the defendant's 5th Amendment *Miranda* rights, 6th Amendment *Massiah* rights, neither, or both?
5. Doe has his first appearance in district court where an attorney is appointed to represent him. Doe is returned to jail while his attorney makes arrangements for bond to be posted. Doe has 5th Amendment *Miranda* rights, 6th Amendment *Massiah* rights, neither, or both?
6. At this point, an officer's solicitation of a waiver from Doe would violate the defendant's 5th Amendment *Miranda* rights, 6th Amendment *Massiah* rights, neither, or both?
7. Doe's attorney arranges for the defendant's bond to be posted. Doe is released from jail pending trial. Doe has 5th Amendment *Miranda* rights, 6th Amendment *Massiah* rights, neither, or both?
8. At this point, an officer's solicitation of a waiver from Doe would violate the defendant's 5th Amendment *Miranda* rights, 6th Amendment *Massiah* rights, neither, or both?

Answers:

1. Neither. The defendant's 5th Amendment *Miranda* rights do not attach until the defendant has been taken into custody and an officer attempts to interrogate him. The *Rothgery* decision held that a defendant's Sixth Amendment rights attach when the defendant appears before a magistrate. It does not appear to indicate that such attachment occurs when an officer obtains a warrant from a magistrate without the defendant's presence.
2. Both. The defendant's 5th Amendment *Miranda* rights attach when the defendant has been taken into custody and an officer attempts to interrogate him. According to the ruling in *Rothgery*, a defendant's Sixth Amendment rights attach once the defendant appears before a magistrate, at first appearance, or indictment, whichever occurs first.

3. Neither. Once a defendant's 5th and 6th Amendment rights have attached, officers may solicit a valid waiver from the defendant if the defendant has not yet invoked his rights by indicating that he wishes to remain silent (5th Amendment only), or by requesting counsel, making statements about plans to hire counsel, retaining counsel, or having counsel appointed.
4. Both. Once a defendant's 5th and 6th Amendment rights have attached, and the defendant has indicated that he wants or has an attorney, an officer may not approach the defendant in an attempt to obtain a waiver from him unless the defendant has first initiated the conversation about the crime or the defendant's attorney is present.
5. Both. The defendant's 5th Amendment *Miranda* rights attach when the defendant has been taken into custody and an officer attempts to interrogate him. According to the ruling in *Rothgery*, a defendant's Sixth Amendment rights attach once the defendant appears before a magistrate, at first appearance, or indictment, whichever occurs first.
6. Both. Once a defendant's 5th and 6th Amendment rights have attached, and the defendant has indicated that he wants or has an attorney, an officer may not approach the defendant in an attempt to obtain a waiver from him unless the defendant has first initiated the conversation about the crime or the defendant's attorney is present.
7. 6th Amendment *Massiah* rights. 5th Amendment *Miranda* rights cease to exist once a defendant is no longer in custody. After attachment, a defendant's 6th Amendment *Massiah* rights remain with the defendant until the offense to which they have attached is disposed of by the State.
8. 6th Amendment *Massiah* rights. 5th Amendment *Miranda* rights cease to exist once a defendant is no longer in custody. On the other hand, after attachment, a defendant's 6th Amendment *Massiah* rights remain with the defendant until the offense to which they have attached has been disposed of by the State. Once the defendant has invoked those rights by indicating that he wants or has an attorney, an officer may not approach the defendant in an attempt to obtain a waiver from him unless the defendant has first initiated the conversation about the crime or the defendant's attorney is present.