In the

United States Court of Appeals

For the Seventh Circuit

No. 21-3268

NELSON GARCIA, JR.,

Petitioner-Appellee,

v.

RANDALL HEPP,

Respondent-Appellant.

Appeal from the United States District Court for the
Eastern District of Wisconsin.
No. 20-cv-336 — **Nancy Joseph**, *Magistrate Judge.*

ARGUED MAY 31, 2022 — DECIDED APRIL 25, 2023

Before SCUDDER, ST. EVE, and KIRSCH, *Circuit Judges*.

SCUDDER, *Circuit Judge*. Wisconsin police officers placed Nelson Garcia in a lineup after a court commissioner found probable cause for his arrest and set bail. Garcia did not have counsel at the lineup. State prosecutors used the ensuing eyewitness identification against Garcia in his trial for bank robbery. The Wisconsin Court of Appeals affirmed Garcia's conviction, determining that the state's failure to appoint counsel before the lineup did not violate his Sixth Amendment rights

because the right to counsel had not yet attached. Garcia then sought federal habeas corpus relief under 28 U.S.C. § 2254, which the district court granted.

No doubt Congress intended and wrote the path to habeas relief as narrow and demanding. But narrow does not mean unavailable. The Wisconsin Court of Appeals' resolution of Garcia's Sixth Amendment right-to-counsel claim falls within the narrow class of objectively unreasonable state court decisions warranting habeas relief. Even affording the Wisconsin Court of Appeals the vast deference owed by § 2254(d)(1), we see no reasonable way of squaring its decision with the Supreme Court's long line of cases on the attachment of a defendant's right to counsel, including most recently in *Rothgery v. Gillespie County*, 554 U.S. 191 (2008). We therefore affirm the district court's grant of habeas relief based on Garcia's Sixth Amendment right-to-counsel claim.

I

A

In December 2011 a man entered a bank in Milwaukee and handed the teller, D.L., a note stating that he was robbing the bank. The teller turned over $3,500 in cash. The robbery was caught on camera, and police released the video footage to the media. Several tipsters identified Nelson Garcia as the robber. The police arrested Garcia without a warrant on January 2, 2012.

Two days later Detective Ralph Spano of the Milwaukee Police Department appeared in court to submit a "Probable Cause Statement and Judicial Determination" form, also known as a CR-215 form, to a Milwaukee County court commissioner to establish a basis for Garcia's continued

detention. The CR-215 form contains two sections. The section for the "Probable Cause Statement" requires a statement of facts establishing probable cause for continued detention. The "Judicial Determination" section affords space for a court official to determine probable cause and set bail. The form also includes a distribution list that names the "Arrested Person/Counsel" as a required recipient of the completed form, along with the court, sheriff, and detention facility.

Milwaukee County officials use the Wisconsin CR-215 form to satisfy the probable cause requirement for continued detention following a warrantless arrest under *Gerstein v. Pugh*, 420 U.S. 103 (1975), and *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991). The CR-215 form itself references the Fourth Amendment and Wisconsin Statute § 970.01, "Initial Appearance Before a Judge," for its authority. In practice, the form combines the *Riverside* probable cause determination with the setting of bail. The form is normally executed in person in a commissioner's courtroom.

In Garcia's case, Detective Spano indicated on the CR-215 form that he had "probable cause to believe that [Garcia] committed" bank robbery and violated his parole. In his required probable cause statement Detective Spano included a description of the surveillance footage and the multiple tips as the basis for his belief. He then brought the CR-215 form to the courthouse where a Milwaukee County court commissioner, essentially a magistrate judge, made the requisite judicial determination. The court commissioner checked a box on the form stating: "I find probable cause to believe that the arrested person committed the offense(s) as listed above," and set bail for Garcia at $50,000. Garcia remained in his jail cell and was not present for the CR-215 determination.

A few hours after the court commissioner made the probable cause finding—and without appointing counsel for Garcia—the police conducted an in-person lineup with D.L. and a second teller. D.L. identified Garcia as the robber, stating she was 100% certain in her identification. The second teller did not make a positive identification.

On January 7, 2012, three days after the lineup, Wisconsin prosecutors filed a criminal complaint charging Garcia with bank robbery. Garcia appeared in court later the same day represented by a public defender and learned of the charges against him. Ten days later Garcia appeared at a preliminary hearing, where the trial court ordered him detained pending trial.

Garcia chose to go to trial and sought to represent himself. The Milwaukee County judge denied that request, and the trial ended in a guilty verdict, with the state having featured D.L.'s eyewitness identification testimony. The trial judge later sentenced Garcia to 15 years' imprisonment.

B

Garcia appealed his conviction to the Wisconsin Court of Appeals. Relying on the Supreme Court's decision in *Rothgery v. Gillespie County*, 554 U.S. 191 (2008), he argued his Sixth Amendment right to counsel attached when the court commissioner found probable cause, set bail, and executed the CR-215 form. Attachment at the CR-215 form's execution, Garcia continued, meant that the subsequent lineup was a critical stage of the prosecution under *United States v. Wade*, 388 U.S. 218 (1967), triggering his Sixth Amendment right to counsel. Garcia requested a new trial because the government

used the lineup evidence against him at trial in violation of his Sixth Amendment right.

The Wisconsin Court of Appeals rejected Garcia's position and affirmed his conviction. The court acknowledged the similarities between Garcia's case and *Rothgery* but distinguished the two cases on a factual point—the defendant's physical presence at the probable-cause hearing. In *Rothgery* the defendant was in the courtroom for the probable cause and bail determination, whereas Garcia remained in jail and was not in the courtroom when the court commissioner executed the detective's CR-215 form. The Wisconsin Court of Appeals also noted that the CR-215 form did not expressly label Garcia's alleged conduct as a formal charge, whereas the state's form in *Rothgery* did. The Wisconsin Court of Appeals believed these distinctions were conclusive and held that, under *Rothgery*, Garcia's Sixth Amendment rights had not attached upon execution of the CR-215 form. So no violation had occurred.

On direct appeal, Garcia also pressed his contention that the trial court violated his Sixth Amendment right to self-representation by denying his request to represent himself at trial. The Wisconsin Court of Appeals rejected this argument, relying on the Supreme Court's decision in *Faretta v. California*, 422 U.S. 806 (1975).

Garcia then appealed to the Supreme Court of Wisconsin. The court granted Garcia's petition, and an evenly divided court affirmed without an explanation of the merits.

C

With all avenues for relief in state court exhausted, Garcia pursued habeas corpus relief in federal court. Invoking 28 U.S.C. § 2254(d)(1), he argued that the Wisconsin Court of

Appeals' decision reflected an unreasonable application of clearly established law regarding his Sixth Amendment rights—specifically, the Supreme Court's decisions in *Rothgery*, *Wade*, and *Faretta*. See *Dassey v. Dittman*, 877 F.3d 297, 302 (7th Cir. 2017) (en banc) (explaining that under § 2254, federal courts review "the 'last reasoned state-court decision' to decide the merits" (quoting *Johnson v. Williams*, 568 U.S. 289, 297 & n.1 (2013))).

The district court granted Garcia's § 2254 petition, concluding that the Wisconsin Court of Appeals unreasonably applied both *Rothgery* and *Faretta* in affirming Garcia's conviction.

The state now appeals the district court's ruling.

II

A

The Supreme Court has emphasized many times over that Congress set the bar high for federal habeas petitioners. See *Harrington v. Richter*, 562 U.S. 86, 102 (2011) ("If this standard is difficult to meet, that is because it was meant to be."). Congress intended this deferential standard to be more than "ordinary error correction through appeal." *Id*. at 102–03. By its terms § 2254(d)(1) provides that federal courts "shall not" grant relief unless the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

Section 2254(d)(1)'s two clauses have independent meaning. See *Williams v. Taylor*, 529 U.S. 362, 404 (2000). Under the "contrary to" clause, a state court decision that "applies a rule that contradicts the governing law set forth in" the Supreme

Court's cases or "confronts a set of facts that is materially indistinguishable from a decision of th[e] Court but reaches a different result" receives no deference. *Brown v. Payton*, 544 U.S. 133, 141 (2005) (citing *Williams*, 529 U.S. at 405).

Under the "unreasonable application" clause, federal courts also afford no deference to a state court decision when "the state court applies [the Supreme] Court's precedents to the facts in an objectively unreasonable manner." *Id.* Again, the bar is high: to grant federal habeas relief, the state court's decision must be "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington*, 562 U.S. at 103.

Conducting the necessary and proper inquiries under § 2254(d)(1) requires us to identify the "clearly established Federal law" to be applied. 28 U.S.C. § 2254(d)(1). This "statutory phrase refers to the holdings … of [the Supreme] Court's decisions as of the time of the relevant state-court decision." *Williams*, 529 U.S. at 412. Of course, clearly established law includes more than the four corners of a rule announced in a single case. We consider all cases that "provide a *body* of clearly established law" governing the issue. *Sims v. Hyatte*, 914 F.3d 1078, 1089 (7th Cir. 2019) (emphasis added) (discussing seven Supreme Court cases that clearly establish when the prosecution must disclose material impeachment evidence); see also *Dassey*, 877 F.3d at 303–05 (discussing the "Supreme Court's many cases applying the voluntariness test" that make up the body of clearly established law regarding custodial confessions).

B

In affirming Garcia's conviction, the Wisconsin Court of Appeals focused singularly on the Supreme Court's decision in *Rothgery v. Gillespie County*. Everyone agrees that *Rothgery* is important. But *Rothgery* is by no means an isolated precedent; nor did it announce a new rule. To the contrary, the Court in *Rothgery* applied a longstanding body of clearly established Sixth Amendment law to novel facts. Analyzing Nelson Garcia's case here is not as straightforward as reading *Rothgery* and doing a side-by-side comparison. To understand whether the Milwaukee police violated Garcia's right to counsel, we must, as the Court did in *Rothgery*, draw on the additional cases that constitute the greater body of Sixth Amendment law. See *Dassey*, 877 F.3d at 304 (examining several Supreme Court cases for a § 2254(d)(1) analysis where the "Supreme Court precedents do not draw bright lines"). Determining the body of law to apply may end with *Rothgery*, but it does not, as the Wisconsin Court of Appeals believed, begin there.

We start with the Constitution. The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall … have the Assistance of Counsel for his defence." U.S. Const. amend. VI. The Supreme Court has announced principles to protect this right for at least 90 years, dating to its 1932 decision in *Powell v. Alabama* that the Sixth Amendment requires indigent defendants accused of capital offenses to receive "the guiding hand of counsel at every step in the proceedings against him." 287 U.S. 45, 69 (1932).

The U.S. Reports contain many decisions identifying every step of a criminal prosecution in which an accused receives Sixth Amendment protection. The controlling inquiry comes

in two parts: attachment and critical stages. The "critical stage" inquiry is normally the second step of a court's analysis, but we briefly address it first because it is not at issue here. In *United States v. Wade*, the Court read "the Sixth Amendment guarantee to apply to 'critical' stages of the proceedings" because of the Amendment's express guarantee of counsel for a criminal defendant's "*defence*." 388 U.S. at 224–25 (emphasis in original). In Billy Joe Wade's case, the Court held that his post-indictment, pretrial lineup was a critical stage requiring counsel. See *id.* at 237. Ditto here: everyone agrees that Garcia's in-person lineup was a critical stage under *Wade*.

The main point of contention is instead over "attachment." Before concluding that a defendant has a right to counsel at a critical stage, a court must also find that the criminal prosecution has commenced. See *Kirby v. Illinois*, 406 U.S. 682, 688 (1972) (plurality opinion). Here, if Garcia's right did not attach at the CR-215 hearing, he would not have been guaranteed the right to counsel at the lineup even though it would be a critical stage under *Wade*. Indeed, for the last 50 years the Supreme Court has highlighted the "firmly established" rule that the Sixth Amendment right to counsel "attaches only at or after the time that adversary judicial proceedings have been initiated against [the accused]." *Id.* (citing *Powell*, 287 U.S. 45).

Kirby distinguished the state's criminal judicial proceedings from "routine police investigation," the latter of which does not receive the same "absolute constitutional guarantee" of counsel. *Id.* at 690. The Court emphasized that the line dividing routine pre-prosecution investigation from adversarial prosecutorial proceedings was "far from a mere formalism"

and indeed was central to Sixth Amendment protections, especially given the vast state-by-state variation in criminal proceedings. *Id.* at 689. The Court took great care to emphasize the substantive importance of the attachment inquiry:

> It is the starting point of our whole system of adversary criminal justice. For it is only then that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law. It is this point, therefore, that marks the commencement of the 'criminal prosecutions' to which alone the explicit guarantees of the Sixth Amendment are applicable.

Id. at 689–90.

Kirby's reasoning echoes throughout the Court's later opinions identifying other pretrial confrontations that mark the commencement of criminal prosecutions. The Court has underscored time and again that the focus of the Sixth Amendment attachment inquiry is on the actions of the state, not the accused. See *Brewer v. Williams*, 430 U.S. 387, 401 (1977) (reaffirming that the Sixth Amendment right to counsel attaches once adversary proceedings have commenced); *United States v. Gouveia*, 467 U.S. 180, 188–89 (1984) (emphasizing the same point); *Moran v. Burbine*, 475 U.S. 412, 430 (1986) (same); *Michigan v. Jackson*, 475 U.S. 625, 632 (1986) (same); *McNeil v. Wisconsin*, 501 U.S. 171, 181 (1991) (same).

C

Fast forward several decades to 2008, and we come to the Supreme Court's consideration of Sixth Amendment attachment in *Rothgery*. The Court granted review to answer whether the Fifth Circuit correctly held "that adversary judicial proceedings [ ] had not commenced, and petitioner's Sixth Amendment rights had not attached, because no prosecutor was involved in petitioner's arrest or appearance before the magistrate." Petition for Writ of Certiorari at i, *Rothgery*, 554 U.S. 191 (No. 07-440). Front and center in the Court's analysis was *Kirby*'s rule that a "criminal prosecution" is the "point at which 'the government has committed itself to prosecute.'" *Rothgery*, 554 U.S. at 198 (quoting *Kirby*, 406 U.S. at 689 (plurality opinion)). The Court sought to determine whether the Texas proceedings "mark[ed] that point," thereby triggering "the consequent state obligation to appoint counsel." *Id.*

The question arose from facts similar to Garcia's case. Texas law creates a procedure that "combines the Fourth Amendment's required probable-cause determination with the setting of bail" for arrestees who had been detained without a warrant. *Id.* at 195. Police had arrested Walter Rothgery without a warrant after an erroneous database search suggested he was a felon in possession of a firearm. Soon after the initial detention, the arresting officer filed an affidavit of probable cause that described the facts supporting probable cause for the arrest. Upon reviewing the affidavit and concluding there was probable cause, "the magistrate informed Rothgery of the accusation, set his bail at $5,000, and committed him to jail." *Id.* at 196. No state prosecutors were present or aware of the magistrate's actions against Rothgery—just

the police officer, magistrate, and Rothgery were there. The case was dismissed six months later when Rothgery's assigned counsel helped him prove that he had never been convicted of a felony. See *id.* at 196–97.

Rothgery then invoked 42 U.S.C. § 1983 and filed suit against the Texas county in federal court alleging that he would not have been indicted, rearrested, or jailed for three weeks if the court had appointed a lawyer soon after the probable-cause hearing. See *id.* at 197. The Fifth Circuit affirmed the district court's entry of summary judgment for the county, agreeing that Rothgery's Sixth Amendment right to counsel did not attach when the magistrate executed the probable cause and bail determination form. The Fifth Circuit saw the prosecutor's absence as a factual distinction that prior cases never addressed. The court interpreted the Supreme Court's silence as "neutral[ity] on the point," *id.* at 205, and concluded that the right to counsel had not attached because "the relevant prosecutors were not aware of or involved in Rothgery's arrest or appearance before the magistrate," unlike in the Court's prior cases. *Id.* at 197.

The Supreme Court reversed. The Court held that the Fifth Circuit erred in its narrow focus "on the activities and knowledge of a particular state official" over a broader "focus[ ] on the start of adversarial judicial proceedings." *Id.* at 198–99. The Court explained that its prior silence on the issue of a prosecutor's presence demonstrated that fact's lack of relevance to the Sixth Amendment's guarantees and not, as the Fifth Circuit believed, the Court's endorsement of its importance or even neutrality. *Id.* at 206 ("Neither *Brewer* nor *Jackson* said a word about the prosecutor's involvement as a relevant fact, much less a controlling one."). Rather, the Court

continued, "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." *Id.* at 207.

The Court drew on its body of Sixth Amendment law to reemphasize that what controls are the recognized indicators of the government's "commitment to prosecute." A prosecutor's presence had never been recognized as such a litmus test. Indeed, adopting a rule that turns on the presence or absence of state officials, the Court cautioned, "would have the practical effect of resting attachment on such absurd distinctions as the day of the month an arrest is made." *Id.* at 206. So elevating form over substance would invite states to gerrymander pretrial proceedings in an attempt to escape the clear holdings of the Supreme Court's precedents and deny criminal defendants the benefits of their constitutional rights.

In holding that right-to-counsel attachment did not turn on the presence of a prosecutor, *Rothgery*'s reasoning hewed closely to *Kirby*, *Brewer*, *Jackson*, and the other Sixth Amendment cases that came before it. It is impossible to miss the Court's diligent and thorough invocation of these exact cases in its explanation of the Sixth Amendment's commitment to substance over form:

> [U]nder the federal standard [for attachment of the Sixth Amendment right to counsel], an accusation filed with a judicial officer is sufficiently formal, and the government's commitment to prosecute it sufficiently concrete, when the accusation prompts arraignment and restrictions on the accused's liberty to facilitate the prosecution, see *Jackson*, 475 U.S. at 629, n. 3; *Brewer*, 430 U.S. at 399; *Kirby*, [406 U.S.] at 689

> (plurality opinion); see also n. 9, *supra*, at [199]. From that point on, the defendant is "faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law" that define his capacity and control his actual ability to defend himself against a formal accusation that he is a criminal. *Kirby*, [406 U.S.] at 689 (plurality opinion). By that point, it is too late to wonder whether he is "accused" within the meaning of the Sixth Amendment, and it makes no practical sense to deny it. See Grano, Rhode Island v. Innis*: A Need to Reconsider the Constitutional Premises Underlying the Law of Confessions*, 17 Am. Crim. L.Rev. 1, 31 (1979) …. All of this is equally true whether the machinery of prosecution was turned on by the local police or the state attorney general.

Rothgery, 554 U.S. at 207–08.

Examining the Court's Sixth Amendment jurisprudence—from its beginnings in *Powell*, through its applications in *Kirby*, *Brewer*, *Gouveia*, *Burbine*, *Jackson*, and *McNeil*, to its ending with the on-point application in *Rothgery*—shows that *Rothgery* itself did not announce a new rule of right-to-counsel attachment that directly resolves Garcia's case. Quite the opposite. *Rothgery* instead clarified that a state government's commitment to prosecute does not turn on the presence of a state prosecutor—a conclusion flowing directly from the clearly established rule that the Sixth Amendment right to counsel attaches once the government's actions have set the wheels of judicial machinery in motion.

D

That returns us to Garcia's case. Applying the clearly established legal principles reiterated in *Rothgery* compels the conclusion that Garcia's Sixth Amendment right to counsel attached when the Milwaukee County court commissioner appeared in court and executed the CR-215 form.

The Texas procedure in *Rothgery* is identical to that used by Milwaukee County, except that Walter Rothgery was present in the courtroom for his hearing and Nelson Garcia was not. But this distinction alone cannot be enough to conclude that the Sixth Amendment right did not attach. Remember that one of the important lessons from *Rothgery* itself is that the Supreme Court's silence regarding certain facts, such as a prosecutor's presence, is not an invitation to distinguish a novel case without regard for broader principles. Nowhere in its lengthy articulation of the federal standard for attachment did the Court mention, let alone emphasize, the defendant's physical presence at the probable-cause proceeding. Nor can any reference to the defendant's presence be found in the Court's concise restatement of the legal rule: "Attachment occurs when the government has used the judicial machinery to signal a commitment to prosecute as spelled out in *Brewer* and *Jackson*." *Id.* at 211–12.

All relevant facts show the state signaled its commitment to prosecute Garcia with the filing of the CR-215: the detective brought the form accusing Garcia of robbery to the commissioner's courtroom, the commissioner found probable cause for Garcia's continued detention based on the detective's statement, and the commissioner set Garcia's bail at $50,000, thereby restricting his liberty beyond mere arrest. Though it is unclear whether Garcia ever received a copy of the CR-215

form, he should have. State law directed the county to inform Garcia of the accusations against him, as spelled out on the CR-215 form itself.

To our eye, these are the exact indicators the Supreme Court has identified as evincing a state's formal commitment to prosecute, none of which turns on Garcia's presence in the courtroom. The accusation filed with the court commissioner was "sufficiently formal," the county's commitment to prosecute "sufficiently concrete," and the commissioner's finding enough to "prompt[ ] restrictions on [Garcia's] liberty." *Id.* at 207. By the time the court commissioner found probable cause to continue Garcia's detention and set bail, "it [was] too late to wonder whether [Garcia was] 'accused' within the meaning of the Sixth Amendment." *Id.* "What counts is that the complaint filed with the magistrate accused [Garcia] 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 [Garcia] locked up)." *Id.* at 199 n.9. From that point forward, Garcia shifted from an investigated party to an accused. And that practical reality had a legal consequence: the Sixth Amendment's guarantees necessarily kicked in.

The Wisconsin Court of Appeals committed error in holding otherwise. And under § 2254(d)(1), we go one step further and conclude that this incorrect holding was also an unreasonable one. The state court's focus on Garcia's absence from the CR-215 hearing was so far afield from the Court's clearly established Sixth Amendment precedents that its holding is wrong beyond "fairminded disagreement." *Harrington*, 562 U.S. at 103.

The Wisconsin Court of Appeals too narrowly distinguished Garcia's case from *Rothgery* without engaging with

the clearly established body of Sixth Amendment law of which *Rothgery* is a part. The Wisconsin court incorrectly rested its decision on a mere factual distinction while overlooking the clearly established legal rule directed at other aspects of the CR-215 proceeding. Though Garcia's absence from the courtroom during the CR-215 hearing was certainly a "new factual permutation[ ]," it was a difference small enough to leave "the necessity to apply the earlier rule … beyond doubt." *White v. Woodall*, 572 U.S. 415, 427 (2014) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 666 (2004)). The Wisconsin Court of Appeals failed to fully consider the clearly established rule that attachment occurs at the initiation of "adversarial judicial proceedings," *Rothgery*, 554 U.S. at 198–99, and this error led to the court's incorrect and unreasonable conclusion.

However you state the legal test for attachment, Milwaukee's CR-215 hearing fits the bill. Regardless of Garcia's absence from the courtroom, the commissioner's execution of the CR-215 form constituted "the first formal proceeding against [him as] an accused." *McNeil*, 501 U.S. at 181. Nor could the execution of the form be called anything other than an "adversary judicial proceeding[ ]" against Garcia, especially given the detective's delivery and presentation of the form to the commissioner in his courtroom. *Gouveia*, 467 U.S. at 188–89; *Brewer*, 430 U.S. at 401. By the time the court commissioner made a judicial determination of probable cause and set the terms of Garcia's bail, it had become clear both that "the government's role [had] shift[ed] from investigation to accusation," *Burbine*, 475 U.S. at 430, and that Garcia, who "had previously been just a 'suspect,'" was now "an 'accused' within the meaning of the Sixth Amendment." *Jackson*, 475 U.S. at 632. From that point on, Garcia found himself "faced

with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law." *Kirby*, 406 U.S. at 689 (plurality opinion).

Under the long line of Sixth Amendment cases—all of which reinforces a clearly established legal rule—we are unable to view the CR-215 hearing as reflecting anything other than a decision by the state of Wisconsin to set its "judicial machinery" in motion against Garcia. *Rothgery*, 554 U.S. at 211. It is of no Sixth Amendment consequence that Garcia never appeared in court during the CR-215 proceeding. If we were to conclude that the Wisconsin Court of Appeals' decision was reasonable because of that factual distinction alone, we would risk hollowing § 2254(d)(1).

Remember, too, that § 2254(d)(1)'s two clauses have independent meaning. See *Williams*, 529 U.S. at 404. When the facts are not identical to precedent, as in Garcia's case, § 2254(d)(1)'s "contrary to" clause is not at issue—we analyze only whether there was an "unreasonable application." But if *any* factual distinction sufficed to affirm a lower court's judgment as one that is not "unreasonable," then courts applying clearly established laws to new sets of facts would *never* satisfy the "unreasonable application" clause. Such a conclusion would render the "unreasonable application" clause altogether redundant.

The "unreasonable application" clause of § 2254(d)(1) is demanding, but it is not an empty set. Meeting its stringent requirement involves exactly what we have done here—taking a close look at the manner in which a state court applied the Supreme Court's clearly established law. In Garcia's case, the Wisconsin Court of Appeals based its conclusion on immaterial factual distinctions and lost sight of at least 50 years

of Supreme Court precedent instructing courts to examine the steps that the government has taken toward adversarial prosecutorial proceedings. See *Rothgery*, 554 U.S. at 207 (citing *Jackson*, 475 U.S. at 629 & n.3; *Brewer*, 430 U.S. at 399; and *Kirby*, 406 U.S. at 689 (plurality opinion)).

Our conclusion about Wisconsin's CR-215 proceeding is not isolated. Three federal judges in Wisconsin with no involvement in this case have reached the conclusion that we believe is compelled by the clearly established body of Sixth Amendment law—that the Sixth Amendment right to counsel attaches at the CR-215 hearing. The first judge to review the issue, shortly after the Court decided *Rothgery*, put it best:

> A conclusion regarding a defendant's Sixth Amendment right to counsel based on form, i.e. the physical appearance before a judicial officer, rather than substance, i.e. a judicial officer finding probable cause, fixing bail, and the arrestee being informed of the preliminary charges against him, would lay the groundwork for absurd results that are antithetical to constitutional aims. … [I]t is these events that are most crucial to the constitutional calculus and not the means by which these actions were completed. It is this utilization of the "judicial machinery" that signals a commitment to prosecute and thus triggers an arrestee's right to counsel under the Sixth Amendment. [*Rothgery*, 554 U.S. at 211].

United States v. West, No. 08-CR-157, 2009 WL 5217976, *9 (E.D. Wis. Mar. 3, 2009) (Goodstein, Mag. J.). See also *Jackson*

v. Devalkenaere, No. 18-CV-446, 2019 WL 4415719, *3 & n.1 (E.D. Wis. Sept. 16, 2019) (Stadtmueller, J.); *United States v. Mitchell*, No. 15-CR-47, 2015 WL 5513075, *3–4 (E.D. Wis. Sept. 17, 2015) (Adelman, J.).

And here, too, the district court in this very case reached a conclusion aligned with today's holding not only on the merits, but under § 2254(d)(1)'s demanding standard. In granting Garcia's petition, the district court observed that "[t]he *Rothgery* Court did not create a rule where a defendant's constitutional rights vary from jurisdiction to jurisdiction based upon the state's individual procedures." *Garcia v. Foster*, 570 F. Supp. 3d 659, 666 (E.D. Wis. 2021) (Joseph, Mag. J.). The district court correctly focused on substance over form. Applying not just *Rothgery*'s holding but the legal underpinnings supporting its outcome, the district court concluded that "[g]iven the functional equivalence of the Texas procedure and the Milwaukee County procedure acknowledged by the Wisconsin Court of Appeals, it was unreasonable for the Wisconsin Court of Appeals to determine that one triggered the right to counsel while the other did not." *Id.* We agree.

III

We end where everything began. Milwaukee police arrested Nelson Garcia without a warrant and detained him. Garcia remained in jail when the police went to the county courthouse two days later to make their case against him in front of a court commissioner—a state official empowered to make judicial findings in response to criminal allegations. The commissioner then exercised that power by executing a form, provided by state law, that accused Garcia of the bank robbery, established probable cause for his continued detention, and set his bail. A few hours later, police took Garcia to a

lineup without counsel, where the bank teller positively identified him as the robber. The state then used this evidence against Garcia at trial.

The judicial machinery of the state's adversarial process necessarily began to turn against Garcia after the court commissioner executed the CR-215 form. The state's failure to appoint counsel for the lineup therefore violated Garcia's Sixth Amendment rights. The state cannot escape the Sixth Amendment's requirements by keeping arrestees in jail while taking formal actions toward prosecution. The Wisconsin Court of Appeals unreasonably concluded otherwise.

Because we grant Garcia's petition on these grounds, we do not reach his Sixth Amendment claim to self-representation under *Faretta*. We AFFIRM the district court's decision to grant Garcia's petition for habeas relief.

KIRSCH, *Circuit Judge*, dissenting. The majority offers compelling arguments about how to understand *Rothgery v. Gillespie County*, 554 U.S. 191 (2008). I disagree, however, with its application of the highly deferential standard that federal courts apply when reviewing state court decisions under 28 U.S.C. § 2254(d)(1). In my view, the Wisconsin Court of Appeals' decision was not "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011). With respect, I dissent.

Nelson Garcia wasn't there when a county commissioner completed a CR-215 form two days after his warrantless arrest. The commissioner determined there was probable cause for Garcia's arrest and set bail. Shortly after the form was completed, Garcia was placed in a lineup. Had the lineup occurred before the CR-215 form was completed, Garcia would have no Sixth Amendment claim to bring. And had Garcia been present when the CR-215 form was completed, there would be no daylight between this case and *Rothgery*. But these are not the facts. Rothgery was present for his proceeding; Garcia was not. Given *Rothgery*'s repeated use of "initial appearance," I cannot conclude that the Wisconsin Court of Appeals was objectively unreasonable—that no fairminded jurist could agree with its determination—for concluding that following a warrantless arrest, a defendant's appearance before a neutral magistrate is a prerequisite to the attachment of the Sixth Amendment right to counsel.

Individuals can be arrested with or without a warrant. In *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991), the Supreme Court held that individuals arrested without a warrant

are entitled to judicial review of their arrest within 48 hours. Wisconsin created the CR-215 form to satisfy *Riverside*'s requirements. In a CR-215 proceeding, the arresting officer hands the form to a county commissioner (in effect, a magistrate judge), who reviews the officer's affidavit and determines whether probable cause exists to continue detaining the defendant. Milwaukee County, where Garcia was arrested, conducts the CR-215 proceeding without the defendant. Although the Supreme Court has never said so, Wisconsin's Supreme Court has held that a defendant need not be present at his *Riverside* hearing. *State v. Koch*, 499 N.W.2d 152, 160 (Wis. 1993).

If the CR-215 proceeding only determined probable cause, a defendant's presence would be immaterial. The Supreme Court has never held that a *Riverside* hearing triggers the right to counsel. Yet the CR-215 proceeding does more than just determine probable cause: it sets bail.

Wisconsin statutes provide that "[b]ail may be imposed *at or after the initial appearance* only upon a finding by the court that there is a reasonable basis to believe that bail is necessary to assure appearance in court." Wis. Stat. § 969.01(1) (emphasis added). Wisconsin also, like many states, authorizes bail to be set *before* a defendant is arrested. Wis. Stat. § 969.05(2) ("The amount and method of posting bail may be endorsed upon felony warrants."). But nowhere in Wisconsin statutes is there authority to impose bail before an "initial appearance" except upon a warrant. See generally Wis. Stat. § 969.

One would be forgiven for thinking that, since the CR-215 proceeding sets bail after a defendant's arrest, then it must be "the initial appearance." But "initial appearance" is a term of art in Wisconsin. See Wis. Stat. § 970.01–.02. "Any person who

is arrested shall be taken within a reasonable time before a judge in the county in which the offense was alleged to have been committed" for his "initial appearance." § 970.01(1). "At the initial appearance the judge shall inform the defendant" of "the charge against the defendant" and of "his or her right to counsel," "shall furnish the defendant with a copy of the complaint," and "shall admit the defendant to bail." § 970.02(1)–(2). Garcia's "initial appearance," as Wisconsin uses the term, happened five days after the CR-215 proceeding and was the first time he appeared before a magistrate.

Of course, no one contends that the Supreme Court's use of "initial appearance" in *Rothgery* meant the procedure outlined in Wisconsin law. A defendant present at his CR-215 proceeding has had an initial appearance as *Rothgery* uses the term because he has had his first appearance before a judicial officer. *Rothgery*, 554 U.S. at 199 ("Texas's article 15.17 hearing is an *initial appearance*: Rothgery was *taken before a magistrate*, informed of the formal accusation against him, and sent to jail until he posted bail.") (emphases added). But Garcia was not brought before a judicial officer before the lineup at issue here. As a result, the Wisconsin Court of Appeals seized upon *Rothgery*'s repeated use of "initial appearance" or its equivalent to determine that Garcia's absence from the CR-215 proceeding meant that his right to counsel did not attach at that proceeding. That conclusion was not unreasonable.

Time and again, *Rothgery* uses language like "initial appearance," "first appearance," and "before a judge." *Rothgery*'s opening line sets the scene: "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." 554 U.S. at 194 (emphasis added). And the Court concludes: "Our holding is narrow. … We merely reaffirm what we have held before and what an overwhelming majority of American jurisdictions understand in practice: *a criminal defendant's initial appearance before a judicial officer*, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel." *Id*. at 213 (emphasis added).

In all, *Rothgery* uses "initial appearance" and its cognates more than 25 times. And it does so not merely in passing, but in critical portions of its analysis. Take *Rothgery*'s description of *Brewer v. Williams*, 430 U.S. 387 (1977), one of the seminal cases on the attachment of the right to counsel: "the Court nevertheless held that the defendant's right had clearly attached for the reason that '[a] warrant had been issued for his arrest, *he had been arraigned on that warrant before a judge in a … courtroom*, and he had been committed by the court to confinement in jail." 554 U.S. at 200 (emphasis added); see *id*. at 200 n.10 (noting "*Brewer*'s separate, emphatic holding that *the initial appearance marks the point at which the right attaches*.") (emphasis added). Or look to the Court's description of *Michigan v. Jackson*, 475 U.S. 625 (1986): "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." 554 U.S. at 202 (emphasis added). Even *Rothgery*'s explanation of when the prosecutorial process has begun is infused with language suggesting that presence matters: "an accusation filed with a judicial officer is sufficiently formal, and the government's commitment

to prosecute it sufficiently concrete, when the accusation prompts *arraignment* and restrictions on the accused's liberty to facilitate the prosecution." 554 U.S. at 207 (emphasis added). It was not unreasonable for the Wisconsin Court of Appeals to interpret "arraignment" as the defendant's appearance before a magistrate. Indeed, *Rothgery* even defines "arraignment" as the "first time before a court." 544 U.S. at 199 (quoting W. LaFave, J. Israel, N. King & O. Kerr, Criminal Procedure § 1.4(g), at 135 (3d ed. 2007)). Nor was it unreasonable for the Wisconsin Court of Appeals to conclude that the Supreme Court meant what it said when it wrote that "*a criminal defendant's initial appearance before a judicial officer*, where he learns the charge against him and his liberty is subject to restriction, *marks the start of adversary judicial proceedings* that trigger attachment of the Sixth Amendment right to counsel." 544 U.S. at 213 (emphases added).

To the majority, the question is whether the Wisconsin Court of Appeals misunderstood that the right attaches at the "initiation of adversarial judicial proceedings." *Ante* at 17. But that phrase is hardly self-defining. The majority quotes *Rothgery* for the principle that the initiation of adversarial judicial proceedings occurs once the government has "used the judicial machinery to signal a commitment to prosecute as spelled out in *Brewer* and *Jackson*." *Ante* at 15 (quoting 544 U.S. at 211–12). But both *Brewer* and *Jackson* make arraignment—the "first time before a court"—the bedrock of their analysis. *Brewer*, 430 U.S. at 398–99; *Jackson*, 475 U.S. at 629 & n.3. Determining when "adversarial judicial proceedings" begin is difficult. It was not unreasonable for the Wisconsin Court of Appeals to conclude that Garcia's absence was material to the attachment inquiry given the Supreme Court's case law

emphasizing arraignment or initial appearance as consistent with—if not proof of—a commitment to prosecute.

The majority also quotes the last sentence of *Rothgery*'s footnote 9 in service of its holding that a probable cause finding that prompts legal action triggers Sixth Amendment attachment. *Ante* at 16 (quoting 554 U.S. at 199 n.9). Footnote 9 appears at the end of a lengthy sentence highlighting the importance of a defendant's appearance before a judge:

> This first time before a court, also known as the "'preliminary arraignment'" or "'arraignment on the complaint,'" see 1 W. LaFave, J. Israel, N. King, & O. Kerr, Criminal Procedure § 1.4(g), p. 135 (3d ed. 2007), is generally the hearing at which "the magistrate informs the defendant of the charge in the complaint, and of various rights in further proceedings," and "determine[s] the conditions for pretrial release," *ibid*. Texas's article 15.17 hearing is an initial appearance: Rothgery was taken before a magistrate, informed of the formal accusation against him, and sent to jail until he posted bail.[9]

554 U.S. at 199. Footnote 9 reads, in full:

> The Court of Appeals did not resolve whether the arresting officer's formal accusation would count as a "formal complaint" under Texas state law. See 491 F.3d, at 298–300 (noting the confusion in the Texas state courts). 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." *Virginia v. Moore*, 553 U.S. 164, 175 (2008). See 491 F.3d, at 300 ("We are reluctant to rely on the formalistic question of whether the affidavit here would be considered a 'complaint' or its functional equivalent under Texas case law and Article 15.04 of the Texas Code of Criminal Procedures—a question to which the answer is itself uncertain. Instead, we must look to the specific circumstances of this case and the nature of the affidavit filed at Rothgery's appearance before the magistrate" (footnote omitted)). *What 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).*

544 U.S. at 199 n.9 (cleaned up) (emphasis added).

The majority concludes that the last sentence of footnote 9 means *all* that counts in determining whether Garcia's Sixth Amendment right attached is that the complaint accused him of a particular crime and prompted legal action in response. But when read as a whole, another, reasonable reading of footnote 9 emerges. Footnote 9 speaks to the insignificance of how Texas state law defines "formal complaint" in determining whether the document filed at Rothgery's article 15.17 hearing was sufficiently formal to trigger the prosecutorial process. It expounded not on the ultimate attachment inquiry,

but only on one of its component parts—a formal accusation. In other words, it is at least reasonable to read the last sentence of footnote 9 (in light of the sentences that precede it) as: What counts *as a formal accusation* "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[.]"

There are yet more reasons that the Wisconsin Court of Appeals could have rejected the majority's selective reading of footnote 9. If accepted, what happens when a federal criminal complaint is filed? A federal complaint accuses a defendant of committing a particular crime and requires a judge to issue an arrest warrant—or, to use footnote 9's terms, "prompts the judicial officer to take legal action in response." See Fed. R. Crim. P. 3 ("The complaint is a written statement of the essential facts constituting the offense charged.") & Fed. R. Crim. P. 4(a) ("If the complaint or one or more affidavits filed with the complaint establish probable cause to believe that an offense has been committed and that the defendant committed it, the judge *must* issue an arrest warrant to an officer authorized to execute it.") (emphasis added). If *all* that counts in the attachment inquiry is the filing of a complaint that prompts legal action, the Wisconsin Court of Appeals might well have concluded that federal defendants not yet in custody now have the right to counsel. But we rejected that conclusion in *United States v. States*: "the mere filing of a federal criminal complaint does not trigger the right to counsel." 652 F.3d 734, 741 (7th Cir. 2011) (citing *United States v. Boskic*, 545 F.3d 69, 83 (1st Cir. 2008), *United States v. Duvall*, 537 F.2d 15, 22 (2d Cir. 1976) (Friendly, J.), *United States v. Alvarado*, 440 F.3d 191, 200 (4th Cir. 2006), *United States v. Moore*, 122 F.3d 1154, 1156 (8th Cir. 1997), *United States v. Pace*, 833 F.2d 1307,

1310–12 (9th Cir. 1987), and *United States v. Langley*, 848 F.2d 152, 153 (11th Cir. 1988)).

Similarly, the majority draws support from three district court cases that conclude an ex parte CR-215 proceeding triggers the right to counsel. *Ante* at 19–20. That other courts agree with the majority on the merits is not evidence that the contrary conclusion is unreasonable. Moreover, two of those cases were federal prosecutions, meaning § 2254(d)(1)'s deferential standard of review was not in play. *Ante* at 19–20 (citing *United States v. West*, No. 08-CR-157, 2009 WL 5217976 (E.D. Wis. Mar. 3, 2009) and *United States v. Mitchell*, No. 15-CR-047, 2015 WL 5513075 (E.D. Wis. Sept. 17, 2015)). The third was a civil action against officers who placed a suspect in a lineup after an ex parte CR-215 proceeding but before his initial appearance. *Ante* at 19-20 (citing *Jackson v. Devalkenaere*, No. 18-CV-446, 2019 WL 4415719 (E.D. Wis. Sept. 16, 2019)). While that court agreed that the right to counsel attached at the CR-215 proceeding, it granted the officers qualified immunity because at the time of the lineup "it was not clearly established that the right to counsel attaches after the commissioner's probable cause determination." *Jackson*, 2019 WL 4415719, at *3. The *Jackson* court went further still, noting that the Wisconsin Court of Appeals' decision that we review today "demonstrates that the moment at which the right to counsel attaches has been a point of legal debate." *Id*. at *3 n.1. That alone resolves this case.

To the majority, appearance is irrelevant; a probable cause finding that prompts judicial legal action triggers the right to counsel. Maybe so, but determining whether the Wisconsin Court of Appeals was correct (a question that I do not answer) is not our task. Our sole inquiry must be whether any error

was beyond reason. Against the backdrop laid out above, our analysis can and should start and stop with the conclusion that the Wisconsin Court of Appeals' reliance on the Supreme Court's most recent statement of the law and attention to Garcia's absence was not "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington*, 562 U.S. at 103. I respectfully dissent.