No. _____

In the Supreme Court of the United States

_____

GEORGE E. MCFARLAND,
Petitioner,

vs.

BOBBY LUMPKIN, Director, Texas Department of Criminal Justice,
Correctional Institutions Division
Respondent.

_____

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI

_____

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THIS IS A CAPITAL CASE

CAPITAL CASE

QUESTIONS PRESENTED

This petition raises two questions related to two distinct claims, both arising under the Sixth Amendment. First, George McFarland alleged below and in state court that the circumstances of the representation at trial, including the fact that his retained counsel slept through much of the capital trial, amounted to a constructive denial of counsel. Second, McFarland alleged below and in state court that he was denied counsel during a police lineup, which resulted in the admission of an out-of-court, stranger-eyewitness identification against him.

1. For a constructive-denial-of-counsel claim involving a sleeping lawyer, does clearly established law require an inquiry into whether "the surrounding circumstances made it so unlikely that any lawyer could provide effective assistance"?

2. In *Rothgery v. Gillespie County, Tex.*, 554 U.S. 191 (2008), this Court corrected the Fifth Circuit's misapplication of clearly established Sixth Amendment law about when the right to counsel attaches in a case whose facts arose in Texas. Is the Fifth Circuit continuing to invoke its gloss of prosecutorial awareness when deciding whether adversarial proceedings have begun in the face of *Rothgery*?

PARTIES TO THE PROCEEDINGS BELOW

All parties appear on the cover page in the caption of the case.

LIST OF PROCEEDINGS

- *State v. McFarland*, No. 619600 (262nd Dist. Ct. July 14, 1992)
- *McFarland v. State*, No. AP-71,557 (Tex. Crim. App. Feb. 21, 1996), *reh'g denied* (June 19, 1996)
- *Ex parte McFarland*, No. AP-75,044 (Tex. Crim. App. May 18, 2005)
- *McFarland v. Davis*, No. H-05-v-03916 (S.D Tex. Apr. 2, 2019)
- *McFarland v. Lumpkin*, No. 19-70011 (5th Cir. Feb. 14, 2022)

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The opinion of the United States District Court for the Southern District of Texas denying McFarland's petition for writ of habeas corpus and denying a certificate of appealability ("COA") on all matters was issued on April 2, 2019 and is attached as Appendix 2. The opinion of the United States Court of Appeals for the Fifth Circuit granting a COA is published as *McFarland v. Davis,* 812 Fed. Appx. 249 (5th Cir. 2020), attached as Appendix 3. The opinion of the Fifth Circuit affirming the district court's denial of habeas relief was published as *McFarland v. Lumpkin*, 26 F.4th 314 (5th Cir. 2022), attached as Appendix 4. The opinion of the Fifth Circuit denying *en banc* and panel petitions for rehearing was issued on March 29, 2022, attached as Appendix 5.

JURISDICTION

The district court had jurisdiction over the habeas cause under 28 U.S.C. § 2441. The Fifth Circuit had appellate jurisdiction to review the district court's judgment by virtue of its grant of a COA. 28 U.S.C. §§ 2253 and 2254. This Court has jurisdiction to review the Fifth Circuit's opinion affirming the district court's judgment pursuant to its authority to issue writs of certiorari. 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the U.S. Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right…to have the Assistance of Counsel for his defense."

28 U.S. Code § 2254(d) provides, "An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

STATEMENT OF THE CASE

A Harris County court convicted and capitally sentenced George McFarland in 1992, under circumstances that made it virtually impossible for him to receive a fair trial. Before trial, McFarland's retained counsel, John Benn, grossly neglected the case, leaving him wholly unprepared for a trial that he subsequently slept through. A second lawyer—inserted by the trial court without McFarland's consent and over his objection—was physically present at the trial but operated under express instructions from the trial judge *precluding him* from taking any action in the case without Benn's prior approval. After failing to coordinate any aspect of the case with the inserted lawyer, Benn effectively left the inserted lawyer—who had no prior experience defending capital cases—to conduct most of the trial as he napped.

Despite retained counsel's indifference to the outcome of trial, the State's evidence was unreliable at best, and nonexistent at worst. Its evidence of guilt hinged entirely upon two types of evidence—from two witnesses—that the Innocence Project has identified as major contributors to wrongful conviction: incentivized (bargained-for) testimony (which, as described below, the

witness later recanted in a sworn statement) and a stranger eyewitness identification. As described in further detail herein, their testimony was susceptible to impeachment in critical respects but went largely unchallenged. The State had no physical evidence connecting McFarland to the crime.

Notwithstanding these circumstances, and in the face of a constructive-denial-of-counsel challenge under *United States v. Cronic*, 466 U.S. 648 (1984), the state court denied relief because there was an "active, awake, and zealous" lawyer in the courtroom during the trial. The state court ignored *Cronic*'s clearly-established test for constructive denial of counsel, which required the court to analyze the actual circumstances surrounding the representation. It instead focused on the mere presence of the awake-and-inserted lawyer—as did the district court and the Fifth Circuit, both of which subsequently denied habeas relief. Because the Fifth Circuit's framework for analyzing this *Cronic* claim conflicts with that of the Sixth Circuit, the Court should grant certiorari to review it.

McFarland's Sixth Amendment rights also were violated even before the trial. After his arrest, police placed McFarland in a lineup without any counsel present, despite McFarland's never having waived his right to counsel. He was selected out of the lineup by a stranger eyewitness: a Houston Police Department employee whose physical description of the perpetrator at the scene did not match McFarland's physical appearance. That selection would later provide the basis for the *only* eyewitness testimony at trial linking McFarland to the offense, and was critical in securing McFarland's conviction. The Court should also grant certiorari to review the Fifth Circuit's disposition of McFarland's Sixth Amendment lineup claim, because it ignored the settled law in *Rothgery v. Gillepsie Cnty., Texas*, 554 U.S. 191 (2008). *Rothgery* involved a Texas case and established Sixth Amendment law about when the right to counsel attaches.

A. Investigation and Arrest

On November 15, 1991, Kenneth Kwan was fatally shot after returning to his convenience store. The police took statements from witnesses at the scene, including James Powell, a security guard who was accompanying Kwan, and Carolyn Bartie, an employee of the Houston Police Department ("HPD") who was sitting in her car in the store's parking lot at the time of the shooting. The police found only one piece of physical evidence at the scene—a spent bullet inside the store. It was never connected to any gun or person.

The statements of Powell and Bartie differed as to who shot Kwan, and neither of them described anyone at the scene matching McFarland's physical appearance. Powell and Bartie stated that they saw a man with a plastic bag at the scene, but Bartie believed the man with the plastic bag was the shooter, ROA.132–33, and Powell believed that an accomplice of the man with the plastic bag was the shooter. ROA.129–30. Two other eyewitnesses said that the shooter was unidentifiable because he wore a ski mask. ROA.1599–600; ROA.1618. Bartie told police that the man with the plastic bag was "in his mid to late 30's," and "about 5'7'' to 5'8''" with "medium brown skin[ ]." ROA.133. McFarland, however, is "over 6 feet tall," and dark-skinned. ROA.4328–29; *see also* ROA.1599. Bartie also told officers that "[i]t all happened so fast that I don't think that I would be able to identify either one of the guys who robbed the store." ROA.133.

On November 20, 1991, police officer W.I. Stephens prepared a photo spread. ROA.1993. Powell was unable to identify any individual from the photo spread. ROA.3051. Bartie made a "tentative" identification of McFarland's photo on December 12, ROA.3046–47, but subsequently requested to see the man in the photo in person before making a firm identification. ROA.3065–68.

On January 2, 1992, Stephens filed a sworn complaint against McFarland with a magistrate judge, accusing McFarland of committing the robbery-homicide. ROA.1996–97. In response, the

magistrate judge issued an arrest warrant based on Bartie's "strong tentative" identification of McFarland. ROA.1996–97. The warrant commanded peace officers to bring McFarland before the judge. ROA.1995. McFarland was arrested the next day and placed in a lineup without counsel, the Sixth Amendment right to which he did not waive. ROA.3129; ROA.3131. At the lineup, Powell was unable to identify anyone, though he thought McFarland's skin was closest in complexion to the person with the plastic bag. ROA.3058; ROA.3119–20. Having previously picked McFarland as a "strong tentative" in the photo array, Bartie identified him as the man holding the plastic bag. ROA.3057–58. After Bartie's identification, the police did no further investigation. ROA.1535.

On January 4, 1992, a second complaint was filed against McFarland, sworn to by HPD Sergeant Shirley. ROA.5291.

B. Circumstances of Trial Representation

McFarland distrusted the criminal justice system and did not want to be represented by any lawyer selected by the court. ROA.4261–62. At least by January 6, 1992, he privately retained attorney John Benn to represent him. ROA.5294. By April, "the trial judge [had] recognized that Mr. Benn—although he was clearly the sole attorney applicant wanted—was elderly and unprepared to try a capital murder case."[1] *Ex parte McFarland*, 163 S.W.3d 743, 759 (Tex. Crim. App. 2005) (noting that the trial judge "could foresee that Mr. Benn might not provide reasonably competent representation…."). Benn had done no work on the case. Although trial was set for July, he had spoken to no witnesses and filed no motions. ROA.4290. Instead of informing

[1] *See* Henry Weinstein, *A Sleeping Lawyer and a Ticket to Death Row*, Los Angeles Times (July 15, 2000), https://www.latimes.com/archives/la-xpm-2000-jul-15-mn-53250-story.html (quoting Judge Shaver as describing Benn as having "the appearance of 'a heavy drinker…. His clothes looked like he slept in them. He was very red-faced; he had protruding veins in his nose and watery red eyes'") (alteration in the original).

McFarland about this conclusion, reporting Benn's unfitness to practice to the State Bar of Texas,[2] or holding a hearing to determine whether to remove Benn from the case,[3] and thereafter permitting McFarland an opportunity to retain different counsel—the trial judge, Judge Shaver, began to orchestrate the insertion of a second lawyer in the case without McFarland's knowledge or consent.

Judge Shaver first approached lawyer Sanford Melamed about representing McFarland in April 1992. ROA.4256. No record was made of this proceeding in McFarland's case, and neither McFarland nor his retained counsel Benn were present. After meeting with the judge, Melamed visited McFarland—without McFarland's retained counsel present—to persuade him to sign a form requesting counsel. ROA.2136. McFarland, suspicious of Melamed, refused to sign the request. ROA.2136. Despite McFarland's refusal, the unsigned "request" was nevertheless filed in the case. *See* Appendix 1.

The request, dated April 3, 1992, read, "Now comes George E. McFarland…and respectfully petitions the Court to appoint counsel to represent him in said felony cause and would show to the Court that he is too poor to employ counsel." Appendix 1. McFarland did not so petition the court, and he did not show that he was too poor to employ counsel. He had already employed counsel: Benn. Printed next to the signature line of the "request" are the words, "D refused to sign." *Id*. Notwithstanding the absence of any affiant, a Deputy District Clerk signed the request as being "sworn to and subscribed" before the clerk on April 3, 1992. *Id*. The trial judge signed the order appointing Melamed pursuant to this "request" the same day. *Id*. In that

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2 *See* Tex. Gov't Code Annot. tit. 2, Subtit. G, App. C, Canon 3(D)(2) (requiring judge to report a lawyer's incompetence to the state bar or take other appropriate action).

3 Though courts are constrained by the Sixth Amendment right to counsel in removing lawyers selected by criminal defendants, they may do so where ethics and fairness so dictate. *See Wheat v. United States*, 486 U.S. 153, 160 (1988).

same order, the judge set the trial for July 13, 1992. *Id.* No record was made of who filed the unsigned "request" or what transpired in court without McFarland's presence on April 3, 1992.

Because of the highly unusual circumstances—and dubious legality and legitimacy—of the appointment, Judge Shaver stripped Melamed of any autonomy to act as McFarland's legal agent. He instructed Melamed that "he was not to make any decisions in the case without first seeking the approval of both Mr. Benn and [McFarland]." *McFarland*, 163 S.W.3d at 750. This court directive effectively handcuffed Melamed to Benn. Melamed, who had no prior capital trial experience, accordingly decided "to not do anything to effect the case without seeking [Benn's] prior approval" and thus "felt [he] couldn't…take responsibility for preparing the trial strategy." ROA.4880. Melamed told Benn several times that Melamed expected them to meet to "actually divide up the workload," but Benn never contacted him. ROA.4556.

In or around June, Melamed again met privately with Judge Shaver and reported that Benn was neglecting the case and would not meet with Melamed to jointly plan. ROA.4265–66. Though Judge Shaver told Melamed he should assume Benn would not do anything, ROA.4266, Judge Shaver did not remove Benn from the case, refer Benn to the State Bar, or disclose to McFarland the concerns about Benn's neglect harbored by Melamed and the judge himself. ROA.4293–94. Although Melamed felt comfortable enough to privately speak to Judge Shaver about Melamed's concerns about McFarland's representation, Melamed did not create any record of Benn's neglect or incompetence on McFarland's behalf in court, nor did he consult with McFarland about it. ROA.4294. McFarland was kept in the dark.

Benn and Melamed never had "any substantive communication…on any topic" at any point before or during the trial. ROA.4560; ROA.4558. Benn never told Melamed what Melamed's role would be before or during trial, nor did he attempt to divide responsibilities between them.

They never discussed strategy, exchanged notes or ideas, divided trial preparation or in-court responsibilities, or coordinated in any way.[4] ROA.4556–58. Melamed understood only that Benn would assume responsibility for examining eyewitness Bartie and preparing a mitigation case. ROA.4558. Melamed had no knowledge of Benn's strategy (if any) at trial, including what statements he would make to the jury during *voir dire*, ROA.4285, and what he would say during opening and closing arguments. ROA.4316. Neither attorney interviewed any witnesses or investigated the extraneous offenses on which the State relied at sentencing. ROA.4333–37.

When trial started, Melamed's expectation was still that Benn would be handling the majority of the trial, including *voir dire*. ROA.4559. Ultimately, however, Benn delegated virtually the entirety of the trial to Melamed. Benn did not make an opening statement. Melamed, caught off guard, gave an opening statement consisting of a boilerplate comment about reasonable doubt. ROA.1434–35. Benn, without input from or prior warning to Melamed, decided on the fly who would cross-examine the State's witnesses. ROA.4560. Benn examined just three of the State's 14 witnesses during the merits phase. ROA.1513–14; ROA.1604–05; ROA.1684–89. Melamed performed the rest of the cross-examinations with no prior notice. In keeping with Judge Shaver's instructions to not make any decisions without Benn's approval, Melamed believed he was there "by agreement to subordinate myself to . . . Benn and not to do anything to override him." ROA.4330. During Benn's cross-examination of eyewitness Bartie, despite Melamed recognizing discrepancies in her testimony which Benn did not address, he did nothing because,

[4] Benn's preparation for trial consisted of "reading the State's case and briefing a few points of law on evidence." ROA.2169; ROA.2931. While Melamed was not given any instructions from Benn on how to prepare for trial, he did conduct minimal, although deficient, trial preparation by reviewing the State's file, ROA.2931, filing some basic pre-trial motions, ROA.5302–470, and unsuccessfully attempting to locate a list of potential witnesses McFarland provided to him. ROA.2151.

owing to Judge Shaver's instructions, it was not his "place" to "second-guess" Benn. ROA.4318; ROA.4331.

Further, Benn slept through substantial portions of the trial, leaving Melamed no choice but to act alone. Melamed noticed Benn's "sleeping would occur after lunch" and "grew worse as the days wore on." ROA.4559. Numerous trial attendees, including journalists observing it from the public seats, noticed Benn's persistent sleeping. Jury members thought Benn's sleeping was "so blatant and disgusting" that they discussed it "a couple of times." ROA.196. By the end of the trial, the bailiff and Melamed "stopped making any attempt to keep Benn awake." ROA.4560. Despite Benn's numerous deficiencies during trial, Melamed failed to protect McFarland's right to counsel, including by failing to consult with McFarland or move the court to inquire about Benn's inability to provide competent representation.

Benn told Melamed that he would prepare for the sentencing phase—an assurance that Melamed relied on when choosing not to prepare himself—but Benn failed to do so. ROA.4560; ROA.4332–40. By the time Melamed realized he "was on [his] own" for the sentencing phase, it was too late to investigate or prepare. ROA. 4560. As a result, the defense provided only fifteen minutes of testimony during the sentencing phase, and called only three witnesses, offering the jury a sparse picture of McFarland's background. ROA.1922–39. Without any preparation for sentencing beyond reading the State's file, Melamed cross-examined ten of the State's 18 witnesses. Benn, whose sleeping grew worse and more persistent throughout the sentencing phase, did not cross-examine a single witness. One juror "kept waiting for the defense to put on some evidence that would provide [her] with a reason not to vote on the special issues in such a way that the death penalty would result[,]" but "[t]he defense never did present any meaningful evidence,

and because of what the prosecutor presented [she] felt [she] had no choice but to vote for the death penalty." ROA.196.

C. The State's Trial Evidence

The State outlined its theory of the case as follows: after Kwan and Powell arrived at the scene, McFarland, unmasked and holding a trash bag, began walking toward them. ROA.1431–34. McFarland rushed past Kwan, grabbed and disarmed Powell, then turned and shot Kwan. ROA.1432–33. According to the State, an unidentified second man, who was wearing a mask, assisted McFarland by taking the bag containing the money. ROA.1433. With no physical evidence linking McFarland to the crime, the State's case relied on testimony from two witnesses: McFarland's nephew, Craige Burks, whose testimony of McFarland's alleged confession was directly contradicted by the grand jury testimony of Craige's uncle, Walter Burks,[5] ROA.145–46, and Bartie, an HPD employee whose account of the crime directly contradicted multiple eyewitness accounts from inside the store, *McFarland v. Texas*, 928 S.W.2d 482, 494 (Tex. Crim. App. 1996).

The first linchpin of the State's case was Craige's allegation that McFarland had admitted to committing the Kwan murder in both Craige's and Walter's presence. However, in addition to inconsistencies with his own and Walter's grand jury testimonies,[6] Craige was testifying subject

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[5] We refer to Craige Burks and Walter Burks by their first names to avoid confusion. Note that, as discussed *infra*, despite Walter's grand jury testimony, in which he testified that this alleged confession—one of the two evidentiary pillars on which the State's case rested—never took place, he was not called as a witness.

[6] Craige's trial and grand jury testimony differed regarding (1) where and when he heard McFarland's alleged confession, (2) his motivation for coming forward, and (3) what McFarland allegedly said (including whether McFarland had allegedly admitted to shooting Kwan or whether McFarland identified another party, Albert Harris, as the shooter). For example, Craige testified at trial that he, his brother Cedric, and Walter were in a car when McFarland told them McFarland had shot Kwan. ROA.1553–54. But Craige told the grand jury that McFarland had told him about it in Walter's house, and that McFarland had said that Harris, not McFarland, had shot Kwan. ROA.173–74. Aside from inconsistencies with his own prior testimony, Craige's account differed from that of another party who testified in front of the grand jury: his uncle Walter. As Walter testified by affidavit, if Walter had been called to testify at trial, he would have said that the

to a plea deal that would reduce his then-current sentence for an aggravated robbery from the possibility of more than 30 years to a mere five years.[7] *See generally* ROA.1565–68. Craige also had a financial motive: he admitted during trial that he knew he could get money from calling Crime Stoppers about McFarland's alleged involvement, and that he did, in fact, receive $900 from Crime Stoppers for his testimony. ROA.1565. Additionally, Craige would later admit in an April 24, 1997 sworn affidavit ("1997 Affidavit") that Detectives Shirley and Stephens, who at times were accompanied by Assistant District Attorney Kate Dolan, made "numerous visits…to [his] mother's house" before Craige was arrested on robbery charges. ROA.3983. These visits to Craige's mother persisted even after Craige was incarcerated and continued until he testified against McFarland at trial. *Id*. Even more critically, in the 1997 Affidavit, Craige ultimately recanted his trial testimony—and admitted that he never talked with McFarland "prior to the date of [his] testimony regarding the murder of Kenneth Kwan or the November 15, 1991 robbery." ROA.3982. Because neither Benn nor Melamed ever tried to contact Craige before the trial, they failed to discover important information that could have impeached the credibility of a key prosecution witness.

The second linchpin of the State's case was Bartie's eyewitness identification of McFarland, a form of evidence known to be highly unreliable and the leading cause of wrongful convictions.[8] Like Craige's testimony, Bartie's trial testimony also contradicted her prior

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conversation Craige testified to never took place, and that McFarland never admitted to participating in any robbery to him, nor to anyone else in his presence. *See* ROA.200.

[7] Neither Benn nor Melamed brought the inconsistencies between Craige's trial and grand jury testimony to the jury's attention despite having access to a transcript of Craige's grand jury testimony. ROA.190. Nor did they call Walter to dispute Craige's account. *See* ROA.200. Melamed failed to elicit the details of Craige's plea deal during cross-examination.

[8] *See, e.g.*, *Perry v. New Hampshire*, 565 U.S. 228, 244–45 (2012) (accepting the "fallibility" of eyewitness identifications based upon studies "showing that eyewitness misidentifications are the leading cause of wrongful convictions") (internal citations omitted); *Sturgeon v. Quarterman*, 615 F. Supp. 2d 546, 571 (S.D. Tex. 2009).

statements. At trial, Bartie testified that Kwan was *inside* the store before the shooting began and that the shooter fired "[s]traight into the door that was closed," ROA.1667, whereas her police statement claimed Kwan was "going into the store" and the shooter "fired two shots into the store." ROA.132. Bartie's description of the shooter to the police also called into question her identification of McFarland at the lineup. At the crime scene, she told police that the man with the plastic bag was "in his mid to late 30's," and "about 5'7'' to 5'8''." ROA.133. McFarland, however, is at least 6 feet tall. ROA.4328–29; *see also* ROA.1599. Further, according to the testimony of other eyewitnesses at the scene, the shooter wore a ski mask, casting more doubt on Bartie's identification of McFarland as the shooter.[9]

D. Appeal and State Habeas Corpus

In McFarland's direct appeal, he asserted, *inter alia*, that because he never waived his right to counsel, the pre-trial lineup identification and resulting in-court identification were inadmissible. The Texas Court of Criminal Appeals ("TCCA") affirmed McFarland's judgment on February 21, 1996. *McFarland v. State*, 928 S.W.2d 482 (Tex. Crim. App. 1996). The court's denial of McFarland's lineup claim was based on the finding that "[a]t the time of his lineup, no complaint or indictment had been filed against appellant." *Id.* at 507.

In state habeas proceedings, McFarland argued, *inter alia*, that he was actually or constructively denied counsel at his trial under *Cronic*. *See generally* ROA.4787–803. On August 15, 2003, the trial court held an evidentiary hearing limited to Melamed's role and performance. ROA.4254. At the hearing, Melamed testified to the difficulties in communicating with Benn.

[9] Eyewitnesses Lupe Jiminez and Larry Davis told police that the shooter was unidentifiable because he wore a ski mask. ROA.1599; ROA.1618. Benn failed to challenge Bartie on Jiminez and Davis' statements, the contradictions between her trial testimony and the statements she gave the police, and the discrepancies between the description she gave police of the shooter and McFarland's actual physical attributes. Despite Melamed's awareness of these discrepancies, *see* ROA.4348–49, he did nothing because it was not his "place" to "second-guess" Benn, ROA.4318; ROA.4331, let alone correct him.

ROA.4283–85; ROA.4308. Melamed testified that his co-counsel arrangement with Benn was such that he was there "by agreement to subordinate myself to Benn and not to do anything to override him." ROA.4304; ROA.4330. Melamed also noted that Benn visibly "sle[pt] during the afternoon" and that the bailiff would try to kick Benn in the foot to wake him up. ROA.4320–21.

On November 17, 2004, the TCCA entered an order setting for additional briefing McFarland's Sixth Amendment ineffective assistance of counsel claims. ROA.4142–43. From the evidence developed in the state post-conviction proceeding, McFarland argued "that Melamed was appointed and served under circumstances which made it impossible for him to provide effective assistance, even if he had the inclination or experience to do so." ROA.3854. On May 18, 2005, the TCCA issued a published opinion denying McFarland's *Cronic* allegations. *McFarland,* 163 S.W.3d at 743. Instead of honoring *Cronic*'s requirement that a court evaluate whether the circumstances permit functional representation, the TCCA adopted a *per se* rule that there can be no *Cronic* claim where one trial lawyer is awake. *Id*. at 753. Although the TCCA laid out some of the circumstances of Melamed's appointment and relationship with Benn and McFarland in its opinion, it did not mention or analyze any of these circumstances when rejecting the claim.

E. Federal District Court

On November 17, 2005, McFarland filed a petition for a writ of habeas corpus in the federal district court (the "Petition"). The Petition highlighted several grounds of relief, including violations of: (1) McFarland's Sixth Amendment rights, due to the constructive denial of counsel at trial (the "*Cronic* Claim"); and (2) McFarland's Sixth Amendment rights, due to his lack of counsel at a post-accusation police lineup (the "Lineup Claim"). *See* ROA.19; ROA.24–40; ROA.77–84.

On April 2, 2019, the district court simultaneously denied both the Petition and a certificate of appealability ("COA"). *See* Appendix 2 at 19–20. As to the *Cronic* Claim, the district court endorsed the *per se* rule applied by the TCCA that "Melamed's active presence in the courtroom removes this case from the strict confines of *Cronic* jurisprudence." Appendix 2 at 6. The district court also denied McFarland's Lineup Claim by holding that "[t]he state court's rejection of this claim was not unreasonable because the arrest warrant did not trigger the guaranty of McFarland's right to an attorney." Appendix 2 at 18.

F. Fifth Circuit

McFarland filed an application for a COA in the Fifth Circuit. *See* Petitioner-Appellant's Application for Certificate of Appealability and Brief in Support, *McFarland v. Davis*, No. 19-70011 (5th Cir. Feb 3, 2020). The Fifth Circuit granted McFarland's COA application on, *inter alia*, the issues described herein. *See* Appendix 3.

On appeal, and as to the *Cronic* Claim, McFarland argued that the district court should have concluded that the TCCA decision was contrary to or an unreasonable application of *Cronic* because it applied a rule—that the mere active presence of a lawyer at trial satisfies the Sixth Amendment right to counsel—that rendered the circumstances of the representation legally irrelevant to such a *Cronic* analysis. Brief of Appellant at 30–31. McFarland argued that this rule entirely negated the third *Cronic* test. *Id*.

As to the Lineup Claim, McFarland argued that the district court should have concluded that the TCCA decision was contrary to or an unreasonable application of this Court's clearly established Sixth Amendment jurisprudence about when the right to counsel attaches. Specifically, he argued that those cases established that the right to counsel attached when an accusation filed with a judicial officer prompted restrictions on McFarland's liberty. *See* Br. of Appellant at 59.

The Fifth Circuit affirmed the district court's denial of federal habeas relief. *See* Appendix 4. On his *Cronic* Claim, the court below *sub silentio* rejected McFarland's argument that the TCCA's application of a rule rendered the circumstances of the representation legally irrelevant, instead finding that the state court decision was not contrary to or an unreasonable application of clearly established Supreme Court precedent because it was "aware of no case where a sleeping co-counsel alone triggers *Cronic's* presumption of prejudice" and "McFarland cannot show that his counsel failed to function in any meaningful sense because, at every stage of trial, he also enjoyed effective assistance by Melamed." Appendix 4 at 7. Like the state court, the Fifth Circuit did not engage with or analyze the circumstances under which the totality of the putative representation was being afforded.

On his Lineup Claim, the Fifth Circuit held that McFarland "cannot show that the TCCA's finding that his arrest warrant was not a formal criminal complaint giving rise to his right to counsel was contrary to or an unreasonable application of Supreme Court precedent." Appendix 4 at 12.

McFarland thereafter filed a Petition for Rehearing *En Banc*, arguing that the panel's decision on the *Cronic* Claim conflicted with clearly established U.S. Supreme Court precedent by failing to recognize the legal relevance of the "surrounding circumstances" of the putative representation, and thus failing to consider whether the TCCA's decision was contrary to *Cronic* for this reason. *See* Petitioner-Appellant's Petition for Rehearing *En Banc*, *McFarland v. Davis*, No. 19-70011 (5th Cir. March 16, 2022) ("Pet. Panel Rehearing Petition"). The same day, McFarland filed a Petition for Panel Rehearing related to, *inter alia*, the panel's disposition on appeal of the Sixth Amendment Lineup Claim. In his petition, McFarland argued that the panel's conclusion misapprehended the clearly established Sixth Amendment law regarding when the right to counsel attaches. *See* Pet. Panel Rehearing Petition.

On March 29, 2022, the Fifth Circuit denied the *En Banc* and Panel Petitions. *See* Appendix 5.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT CERTIORARI TO DECIDE WHETHER, ON THE CONSTRUCTIVE-DENIAL-OF-COUNSEL CLAIM, CLEARLY ESTABLISHED LAW REQUIRES INQUIRY INTO WHETHER THE SURROUNDING CIRCUMSTANCES MADE IT SUFFICIENTLY UNLIKELY THAT ANY LAWYER COULD PROVIDE EFFECTIVE ASSISTANCE

In *United States v. Cronic*, 466 U.S. 648, this Court held that, where a Sixth Amendment claimant alleges actual or constructive denial of counsel ("*Cronic* claim"), prejudice is presumed in three scenarios: (1) when the accused is denied the presence of counsel at a critical stage; (2) when counsel entirely fails to subject the prosecution's case to meaningful adversarial testing; and (3) when counsel is present but has been called upon to render assistance under circumstances that make it unlikely any lawyer could provide effective assistance. *See Cronic*, 466 U.S. at 659–60. At issue here is the third scenario.

28 U.S.C. § 2254(d) ("Section 2254(d)") bars relitigation of claims decided on the merits in state court, unless (as relevant here) that state decision was contrary to or unreasonably applied clearly established Supreme Court law. 28 U.S.C. § 2254(d)(1). At the time the TCCA decided McFarland's *Cronic* Claim, clearly established law required inquiry into the circumstances surrounding the representation. Accordingly, McFarland argued in his state habeas petition that he was deprived of counsel under *Cronic* because of the circumstances of his representation. ROA.4792; ROA.4796. The petition and post-hearing briefing described those circumstances in detail—including Melamed's complete lack of autonomy and the lawyers' failure to communicate—that should warrant a presumption of prejudice under *Cronic*. ROA.4792–93. *See also* ROA.3885–89 (post-hearing briefing).

The TCCA's decision on McFarland's *Cronic* Claim addressed only the first *Cronic* test, examining whether he was "denied counsel at a critical stage" in light of the Fifth Circuit's decision in *Burdine v. Johnson*, which held that counsel sleeping through a significant portion of the trial results in constructive denial. 262 F.3d 336, 338 (5th Cir. 2001) (citing *Cronic*, 466 U.S. at 659). The court limited its analysis to the impacts of Benn's sleeping and determined, without any inquiry into the circumstances surrounding the representation, that Melamed's mere "awake, active, and zealous" presence in the courtroom was sufficient to rule out a *Cronic* violation. *McFarland*, 163 S.W.3d at 753. The court therefore concluded that prejudice could not be presumed, and that no Sixth Amendment violation occurred. *Id*. at 760.

The Fifth Circuit holding that the TCCA reasonably applied *Cronic* creates a split with the Sixth Circuit. In the Sixth Circuit, a state-court decision is contrary to or unreasonably applies *Cronic* when a state court fails to inquire into the circumstances surrounding the representation of physically present counsel. The Court should resolve the conflict by confirming that clearly established law requires state courts to examine the circumstances surrounding putative representation when allegations are made that those circumstances constructively denied counsel to the accused.

A. The Fifth Circuit Applied a *Per Se* Rule That When Counsel Is Physically Present and Awake, No *Cronic* Violation Can Occur

The Fifth Circuit imposed the relitigation bar to McFarland's *Cronic* Claim because it determined that the state decision was neither contrary to nor an unreasonable application of *Cronic* because the appeals court was "aware of no case where a sleeping co-counsel alone triggers *Cronic*'s presumption of prejudice" and "at every stage of trial, [McFarland] also enjoyed effective assistance by Melamed." Appendix 4 at 7. As with the district court before it, the Fifth Circuit did not scrutinize the TCCA's failure to apply *Cronic*'s surrounding circumstances test, instead

focusing entirely on the presence of a second, conscious attorney in the courtroom. Had the Fifth Circuit done so, it should have concluded that the TCCA's decision was contrary to *Cronic*, that the exception to the relitigation bar contained in Section 2254(d)(1) was therefore present, and that plenary federal review of McFarland's *Cronic* Claim should have occurred.

B. The Fifth Circuit's *Per Se* Rule Conflicts with Sixth Circuit Law Requiring Inquiry into Surrounding Circumstances

The Fifth Circuit's sole focus on the TCCA's finding regarding Benn's sleeping, and consequent failure to scrutinize whether the rule the TCCA applied was contrary to *Cronic*, directly conflicts with jurisprudence of the Sixth Circuit. In *Hunt v. Mitchell*, 261 F.3d 575, 584 (6th Cir. 2001), the trial court had hastily arraigned and appointed counsel and refused to give counsel ten minutes to consult with the defendant regarding strategy. When a *Cronic* claim was raised, the Ohio Court of Appeals applied *Cronic* with an unreasonably narrow focus. In that case, the state court focused on the "fact" that Hunt failed to object to his attorney's last-minute appointment, rather than the circumstances surrounding the representation. *Hunt*, 261 F.3d at 582 (citing *State v. Hunt*, No. 69658, 1996 WL 502151, at *3 (Ohio App. Ct. Sept. 5, 1996)).

Undertaking an assessment of whether an exception to the relitigation bar was present in the case, the Sixth Circuit observed, *inter alia*, that "[i]n attempting to apply *Cronic* to the case at bar, the Ohio Court of Appeals failed to…look to the circumstances surrounding the appointment of Hunt's counsel to determine whether it was unlikely that even a fully competent lawyer could have provided effective assistance." *Hunt*, 261 F.3d at 582. In short, the Sixth Circuit recognized that an analysis of the circumstances of the representation is clearly established law under *Cronic*. The court in *Hunt* ultimately concluded that, had the state court properly applied *Cronic* through an examination of "[t]he egregious circumstances surrounding the trial court's appointment of

counsel," it would have found that the case required a presumption of prejudice under *Cronic*. *Hunt*, 261 F.3d at 583–84.

In *Hunt*, as in McFarland's case, putative counsel was awake and active in the courtroom. In both cases, the state courts focused on a narrow set of facts, rather than the totality of the surrounding circumstances of putative representation, to find that *Cronic* had not been violated. However, the Sixth Circuit found that the Ohio Court of Appeals' failure to examine the surrounding circumstances was contrary to or an unreasonable application of clearly established federal law under Section 2254(d)(1). The Fifth Circuit, on the other hand, effectively held the opposite: that it was not contrary to or an unreasonable application of *Cronic* to adopt a *per se* rule and ignore the circumstances surrounding the representation.

C. The Court Should Resolve the Conflict and Hold That Clearly Established Law Requires Courts to Inquire into The Surrounding Circumstances When Determining Whether a Constructive Denial of Counsel Occurred

1. *Cronic* Clearly Establishes That a Constructive Deprivation of Counsel Can Occur Even When Counsel Is Present in The Courtroom

In addition to the actual denial of counsel at a critical stage and counsel's failure to subject the prosecution's case to adversarial testing, *Cronic* held that constructive denial of counsel can occur even when counsel is present and willing to act in the courtroom. Regarding the third situation, the *Cronic* Court elaborated:

> Circumstances…may be present on some occasions when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial.

Cronic, 466 U.S. at 659–60. *See also Strickland v. Washington*, 466 U.S. 668, 685 (1984) ("An accused is entitled to be assisted by an attorney, whether retained or appointed, *who plays the role necessary to ensure that the trial is fair*.") (emphasis added).

The *Cronic* rule builds on prior Supreme Court jurisprudence recognizing circumstances under which a Sixth Amendment violation can occur even when counsel is present at trial. *See, e.g.*, *Herring v. New York*, 422 U.S. 853, 857 (1975) ("More specifically, the right to the assistance of counsel has been understood to mean that there can be no restrictions upon the function of counsel in defending a criminal prosecution in accord with the traditions of the adversary factfinding process that has been constitutionalized in the Sixth and Fourteenth Amendments."); *Avery v. Alabama*, 308 U.S. 444, 446 (1940) ("[T]he denial of opportunity for appointed counsel to confer, to consult with the accused and to prepare his defense, could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel"); *Powell v. Alabama*, 287 U.S. 45, 57 (1932) (where counsel enrolled on the first day of trial, "the circumstance lends emphasis to the conclusion that during perhaps the most critical period of the proceedings against these defendants, 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, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself").

In fact, *Cronic* itself applies the "surrounding circumstances" test. In that case, the Court was not presented with the questions of whether the accused had been denied counsel at a critical stage, or whether counsel failed to subject the prosecution's case to meaningful adversarial testing. The question in *Cronic* was whether the circumstances of the representation—for which the Court analyzed a list of five factors considered by the Tenth Circuit Court of Appeals— "provide[d] a basis for concluding that competent counsel was not able to provide [defendant] with the guiding hand that the Constitution guarantees." *Cronic*, 466 U.S. at 663. Although the Court ultimately

found that the circumstances of that case did not amount to a Sixth Amendment violation, *see id*. at 663–66, it nevertheless provided a model for how this analysis must be conducted when such allegations are made—a model that other courts have correctly applied, and which the TCCA in McFarland's case did not.

For example, in *Hunt*, after finding that the state court unreasonably applied *Cronic* under Section 2254(d)(1) by failing to examine the surrounding circumstances, the Sixth Circuit conducted its own examination under this *Cronic* test, finding that the following circumstances resulted in a *Cronic* violation: (1) Hunt's case "fell through the cracks" of the criminal justice system, remembered only when the prosecution realized it had one day left to take his case to trial or risk dismissal; (2) counsel was appointed the day of trial; and (3) the trial court asked Hunt to waive his right to a speedy trial and refused to give him 10 minutes to discuss his options with counsel. *Hunt*, 261 F.3d at 584. Like Melamed, Hunt's counsel was awake and present through the entirety of Hunt's trial; and like Melamed, Hunt's counsel was hamstrung by the circumstances surrounding the representation (in his case, his last-minute appointment).

Similarly, in *Rickman v. Bell*, 131 F.3d 1150 (6th Cir. 1997) (a pre-AEDPA case), while the Sixth Circuit first found that counsel failing to investigate the case and communicate with the defendant was not enough to create a presumption of prejudice, it went on to conduct a deeper analysis of the circumstances of the representation, and determined that counsel "combined a total failure to actively advocate his client's cause with repeated expressions of contempt for his client for his alleged actions." 131 F.3d at 1157. It was only after this "thorough review of the record and consideration of the circumstances" that the Court determined that counsel had effectively abandoned the defendant's interests, which was egregious enough to warrant a presumption of prejudice. *Id*. at 1157.

Various other courts have similarly conducted this analysis correctly.[10]

2. The Surrounding Circumstances of Representation in McFarland's Case Resulted in a *Cronic* Violation

It is undisputed that Benn neglected McFarland's case and then slept through substantial parts of the trial. It is also undisputed that the trial court became aware of the problem and that, instead of confronting the problem openly and directly, the trial court surreptitiously met with and inserted a second lawyer into the case without McFarland's knowledge or consent. However, in focusing solely on Melamed's "active" presence in the courtroom, the TCCA and Fifth Circuit ignored that the circumstances surrounding the representation were such that any lawyer would have been incapable of providing McFarland with effective assistance of counsel. These circumstances were highly unusual, if not unprecedented, and support a finding of constructive denial of counsel under *Cronic*:

First, and likely due to the circumstances, the trial court gave Melamed instructions that he was to make no decisions independently from Benn and McFarland. *See McFarland*, 163 S.W.3d at 750. The instruction prevented Melamed from exercising any autonomy as McFarland's legal agent, and effectively turned him into Benn's legal assistant. Accordingly, Melamed did "not do anything to [a]ffect the case without seeking [Benn's] prior approval." ROA.4558. This meant that Melamed "felt [he] couldn't [ ] take responsibility for preparing the trial strategy." ROA.4880.

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[10] *See, e.g.*, *State v. Trotter*, 609 N.W.2d 33, 38–42 (Neb. 2000) (extending *Cronic*'s "surrounding circumstances" test to find a presumption of prejudice due to appellate counsel's failure to perfect a criminal appeal as requested by client); *State v. Heath*, 588 S.E.2d 738, 740 (Ga. 2003) (acknowledging *Cronic*'s "surrounding circumstances" test as independent basis to find a presumption of prejudice).

In addition to the Sixth Circuit, several other circuits (including the Fifth Circuit in another case) have recognized that *Cronic* provides three distinct tests for determining whether prejudice can be presumed and a finding of actual or constructive denial of counsel found. *See, e.g.*, *Hooks v. Workman*, 606 F.3d 715, 724 (10th Cir. 2010); *Bartee v. Quarterman*, 339 F. App'x 429, 438 (5th Cir. 2009); *Musladin v. Lamarque*, 555 F.3d 830, 838 (9th Cir. 2009); *Ditch v. Grace*, 479 F.3d 249, 255 (3rd Cir. 2007); *Glover v. Miro*, 262 F.3d 268, 275 (4th Cir. 2001).

Melamed testified of this arrangement, "[t]here was obviously a conflict between subordinating myself to Mr. Benn and doing anything." ROA.4355. This kind of restriction on autonomy would render any lawyer incapable of providing effective assistance. *See Herring*, 422 U.S. at 857; *see also Taylor v. Illinois*, 484 U.S. 400, 418 (1988) (noting that "the lawyer has—and must have—full authority to manage the conduct of the trial," otherwise "[t]he adversary process could not function effectively").

Second, Benn and Melamed had virtually no communication before trial and there was almost no coordination of investigation or trial strategy. Benn never told Melamed what Melamed's role would be before or during trial, nor otherwise divided responsibilities between them. Melamed understood only that Benn would assume responsibility for (at least) examining witness Bartie and preparing a mitigation case. ROA.4558. Thus, when *voir dire* began, Melamed and Benn had no shared understanding about strategy. ROA.4285. When testimony began, Melamed knew only that he would not be examining Bartie. But as for the State's other 31 witnesses, he did not know, and was therefore precluded from making meaningful preparation. ROA.4558.[11]

Third, Melamed performed without any meaningful input from McFarland, as McFarland was suspicious of the trial court's surreptitious appointment. Because the court solicited and

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[11] Melamed would later testify that he was "prepared as if [he] was going to do the whole trial." ROA.3976. But this aspirational remark is belied by the record. For example, Melamed also testified that, because he had been instructed "not to make any decisions in the case without first seeking the approval of Benn," ROA.4556, he "felt [he] couldn't take responsibility for preparing the trial strategy." ROA.3976. Feeling unable to prepare the trial strategy, unable to make any decisions without Benn's permission, and with "virtually non-existent" contact between Benn and Melamed before the trial, ROA.3976, any efforts Melamed made to "prepare" for the "whole trial" were futile.

Indeed, Melamed would later caveat his remarks on "prepar[ing]…to do the whole trial" by noting that he "had never before been involved in a capital case or a trial where the State would call 31 witnesses[,]" and that if he and Benn had communicated, he could have focused more on, *inter alia*, cross-examinations. ROA.3976 (noting that "there [were] no cross-examination outlines" in his file).

appointed Melamed without McFarland's consent, Melamed was unable to forge the lawyer-client relationship essential to defense in a capital case. ROA.4374. Melamed was keenly aware that he was appointed without consent, and, accordingly, that McFarland distrusted him. ROA.4556. He testified that "[t]his situation was awkward and added to my resolve to make sure I didn't step on Benn's toes by asserting myself in the case without his prior approval." *Id*. McFarland would speak with Melamed in the courtroom, *but not about the capital charge*. ROA.2142. McFarland gave *Benn* the names of witnesses to speak to on the capital charge, but he did not give Melamed names. ROA.2142. McFarland never considered Melamed his lawyer on the capital case – he described Melamed as representing him only "in the courtroom."[12] ROA.2142.

Fourth, Benn, despite sleeping heavily during the trial, examined witnesses in the case, including one of the State's only two witnesses to implicate McFarland in the offense, Carolyn Bartie. Bartie was the State's last witness at the merits phase. A lawyer who has made no preparation for trial and who has slept through prior testimony cannot subject the State's case to *meaningful* adversarial testing even when he is subsequently conscious and examining witnesses. Whenever Benn took a witness, Melamed's presence—no matter how awake, active, and zealous—could not cure the gaps in Benn's knowledge from his sleeping and sheer unpreparedness.

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[12] To the extent that the Panel ascribed any blame to McFarland for this breakdown in the attorney-client relationship, *see* Appendix 4 at 3, while Benn's incompetence may have been obvious to Judge Shaver, or later, Melamed, McFarland (a layperson) could not meaningfully judge Benn's competence or vitality in the courtroom, or predict that Benn would neglect the matter. *See Cuyler v. Sullivan*, 446 U.S. 335, 344 (1980) ("The vital guarantee of the Sixth Amendment would stand for little if the often uninformed decision to retain a particular lawyer could reduce or forfeit the defendant's entitlement to constitutional protection."). Despite Judge Shaver and Melamed meeting at least once (without McFarland present) to discuss their concerns about Benn, neither ever made their concerns known to McFarland. *See* ROA.4294. Further, it was Benn's duty not to accept representation he was not competent to handle, *see* Tex. Disciplinary R. Pro. Conduct 1.01(a) (Including Amendments Effective Jan. 31, 2022), and it was also Benn's duty not to neglect a matter on which he had accepted representation. *See* Tex. Disciplinary R. Pro. Conduct 1.01(b)(1). From McFarland's point of view, despite exercising his right to retain his own attorney, the Court subverted his uninformed refusal to accept another lawyer by appointing one anyway – and no one explained why. McFarland, a layperson with no legal knowledge or experience, could not be expected to accurately judge the competency of his lawyer from his location in a jail cell. Even if he were mistaken in his judgment about whom to trust, he is still entitled to counsel as guaranteed by the Sixth Amendment.

Fifth, Benn completely neglected to prepare for—and then slept through—the sentencing phase. As Benn took responsibility for McFarland's mitigation case, the result was that no preparation of a mitigation case occurred before trial. Melamed ultimately may have been "active" in presenting a meager amount of mitigation evidence that was readily available to him at the last minute, but he was unprepared to do so, because he understood that Benn was doing it. ROA.4558–60. Melamed—who had never before tried a capital case—conducted no investigation into the extraneous offenses the State put the defense on notice they would present, but instead merely read the State's file. ROA.2164–65; ROA.4334–35; ROA.4338. He testified this was because he "had no independent access to other information." ROA.2165.

Finally, Melamed fundamentally believed his role to be a limited one. Even at the point that trial began, he operated under the assumption that Benn was going to "shoulder the bulk of responsibility at trial." ROA.4559. He testified his role was to "back up" retained counsel and not to make strategic decisions about how to defend the case. ROA.4791. He testified it was not his "place" to do things like ensure that *voir dire* questioning was thorough, ROA.4291, or that the State's critical witness was effectively impeached, ROA.4318. And, most detrimentally, he testified it was not his "place" to protect McFarland's Sixth Amendment right to counsel by seeking to remove Benn from the case, even after he became "alarmed." ROA.4293; ROA.4318. The strongest evidence that Melamed was not meaningfully functioning as McFarland's counsel is that Melamed made no contemporaneous record of Benn's neglect and sleeping. Melamed did not even think about doing anything to correct any "egregious failure" of Benn's, because, as he testified, "it was [Benn's] case and I was not to do anything." ROA.4330–31.

Under these circumstances, "the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without

inquiry into the actual conduct of the trial." *Cronic*, 466 U.S. at 659–60. Melamed testified in the state post-conviction proceeding, "if someone appointed me God to say this person should have another lawyer, I would have done it…I tried to make the best of the situation and do what I could." ROA.4307. The "situation" referred to by Melamed here is precisely the surrounding circumstances that neither the state nor any of the lower courts have examined to date. Absent reversal of the Fifth Circuit's decision, which has created a split with the Sixth Circuit, no court ever will.

II. THE COURT SHOULD GRANT CERTIORARI TO CORRECT THE FIFTH CIRCUIT'S RULE THAT A "FORMAL CRIMINAL COMPLAINT" IS REQUIRED FOR THE RIGHT TO COUNSEL TO ATTACH UNDER THE SIXTH AMENDMENT

The Court should grant certiorari to correct the Fifth Circuit's continued misapplication of clearly established Sixth Amendment law about when the right to counsel attaches. In the published opinion in McFarland's case, the Fifth Circuit resurrected—albeit in shorthand—the same rule about prosecutorial awareness being necessary for the right to counsel to attach that this Court rejected in a case arising from the same state (Texas) and circuit in *Rothgery*, 554 U.S. at 199 n.9 (holding, in no uncertain terms, that "[w]hat counts [in determining when the right to counsel attaches] is that the complaint filed with the magistrate accused [the subject] of committing a particular crime and prompted the judicial officer to take legal action in response"). In reviewing McFarland's Lineup Claim, the Fifth Circuit was required to follow *Rothgery* and its earlier Sixth Amendment jurisprudence and failed to do so.

On January 2, 1992, police officer W.I. Stephens filed a sworn affidavit with Magistrate Judge Mary Bacon accusing McFarland of intentionally and knowingly committing aggravated robbery and murder. ROA.136–37. The affidavit constituted a complaint under Texas statutory

law.[13] "A complaint is a sworn affidavit charging the commission of an offense and serves as the basis for an arrest warrant." *Huynh v. State*, 901 S.W.2d 480, 481 n.3 (Tex. Crim. App. 1995) (citing Tex. Code Crim. Proc. Ann. arts. 15.03, 15.04, 15.05).

That same day, Magistrate Judge Mary Bacon determined probable cause existed to believe McFarland had committed the offense and issued an arrest warrant for him. ROA.135. The warrant determined that a "[c]omplaint in writing, under oath, had been made" by Stephens; judged that the complaint "stat[ed] facts and information in my opinion sufficient to establish probable cause" for arrest; and ordered any peace officer to "bring before me" the person "accused in said affidavit for the offense of aggravated robbery and murder." *Id*.

Police arrested McFarland the next morning, January 3. Although he had already been accused in a sworn complaint that a magistrate judge determined established probable cause to believe he committed the crime, the police placed McFarland in a lineup without securing a waiver of his Sixth Amendment right to have counsel present that same day. ROA.3131; ROA.3727; ROA.3129. A police lineup occurring after the initiation of adversarial judicial criminal proceedings is a critical stage of the proceeding. *Moore v. Illinois*, 434 U.S. 220, 228 (1977).

On January 4, a second complaint was filed. ROA.5291. Peace officer Shirley was the affiant, and it was signed and filed by an Assistant Harris County District Attorney. *Id*. On January

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[13] An "affidavit made before the magistrate [ ] is called a 'complaint' if it charges the commission of an offense." Tex. Code Crim. Proc. Ann. art 15.04. A complaint is sufficient if it states the "name of the accused;" "show[s] that the accused has committed some offense against the laws of the State, either directly or that the affiant has good reason to believe, and does believe, that the accused has committed such offense;" states the time and place "of the commission of the offense;" and is signed by the affiant. Tex. Code Crim. Proc. Ann. art 15.05. In the sworn affidavit, Stephens named George Edward McFarland; stated he had "reason to believe, and do believe," that McFarland intentionally and knowingly committed the offense of aggravated robbery and murder; described the basis of his belief; stated the time and place of the commission of the offense; and alleged the acts were "AGAINST THE PEACE AND DIGNITY OF THE STATE." ROA.136–37.

6, McFarland was taken before a magistrate for an "article 15.17 hearing." As this Court has previously written of an article 15.17 hearing in Texas:

> Texas law has no formal label for this initial appearance before a magistrate, which is sometimes called the "article 15.17 hearing[;]" it 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.

Rothgery, 554 U.S. at 195 (internal citations omitted).

McFarland alleged in state trial and appellate courts and the federal courts below that (1) the filing of the complaint and issuance of the arrest warrant initiated an adversarial judicial criminal proceeding against him; (2) the initiation of the adversarial judicial criminal proceeding caused his right to counsel to attach before the police lineup occurred; (3) McFarland did not waive his right to counsel before being placed in the lineup; and (4) no counsel for McFarland was present at the lineup. *See* Appendix 4 at 10–11; *McFarland*, 928 S.W.2d at 507.

On direct appeal in 1996, McFarland specifically argued that the filing of the January 2 complaint with a magistrate judge that prompted the judge to issue an arrest warrant commanding a peace officer to bring him before her initiated adversarial judicial proceedings against him, causing his right to counsel to attach. *McFarland*, 928 S.W.2d at 507. The state court recognized that the right attached when adversarial judicial proceedings begin, but in analyzing the case, wrote the January 2 complaint sworn to by Stephens out of existence. Indeed, it operated under the false understanding that "no complaint or indictment had been filed against [McFarland]" at the time the lineup occurred. *Id*.

In federal court, McFarland argued that the state court decision was based on an unreasonable determination of the facts—the failure to acknowledge the existence of a complaint filed on January 2—or was contrary to or unreasonably applied clearly established Sixth Amendment law related to when the right to counsel attaches. In rejecting McFarland's arguments

below, the Fifth Circuit entirely ignored this Court's decision in *Rothgery*, 554 U.S. at 191, a case of especially high relevance because it applied established Sixth Amendment law to facts arising out of the same state from which McFarland's case arose. Because the decision below cannot be reconciled with *Rothgery*, and because *Rothgery* was decided specifically to correct the Fifth Circuit's misapplication of Sixth Amendment law that was at the time contrary to this Court's clear precedent, the Court should grant certiorari and summarily reverse.

A. *Rothgery* Applied Clearly Established Sixth Amendment Law to Correct the Fifth Circuit's Mistaken View That Prosecutorial Awareness of an Accusation or Complaint Is Required Before the Right to Counsel Will Attach.

In *Rothgery*, this Court applied established law to correct the Fifth Circuit's mistaken application of the Sixth Amendment right to counsel in a case arising out of a Texas criminal proceeding. *Rothgery* reiterated that the right attaches when an accusation—of whatever kind—is filed with a judicial officer that prompts arraignment and restrictions on the accused's liberty to facilitate the prosecution. *Rothgery*, 554 U.S. at 207. Because this case also arises out of Texas, the facts of *Rothgery*, and the lower court decisions leading up to it, are particularly salient and will be discussed.

On July 15, 2002, Texas police officers arrested the *Rothgery* petitioner on suspicion of being a felon in possession of a firearm, a felony offense. 554 U.S. at 195. Unlike McFarland, Rothgery was arrested without prior complaint or issuance of an arrest warrant. *Id*. After arrest, Tex. Code of Criminal Procedure article 14.06 required the arresting officer to have Rothgery taken before a magistrate without delay, who "shall immediately perform the duties described in Article 15.17 of this Code." Tex. Code Crim. Proc. art. 14.06(a).

At the article 15.17 hearing, the arresting officer submitted a sworn "Affidavit of Probable Cause" that described the facts supporting the arrest and "'charged that Rothgery committed the offense of unlawful possession of a firearm by a felon—3rd degree felony.'" *Rothgery*, 554 U.S.

at 196 (cleaned up). At the hearing, a magistrate judge found probable cause "for the arrest [of the individual accused]" in the affidavit. *Id*. Although Rothgery had made a request for appointment of counsel, he was not provided one. *Id*. Six months later, a grand jury indicted him for the felony offense, and the court finally appointed counsel to him at that time. *Id*. at 196–97.

After ultimate dismissal of the charges, Rothgery sued the county in federal court, alleging a violation of his right to counsel for the delay in appointing him one. *Id*. at 197. The county moved for summary judgment on the ground that Rothgery's right to counsel had not attached before the indictment issued. *Id.* at 197–98. Rothgery, in response, "argue[d] that the probable-cause affidavit is a complaint under Texas law that initiated adversary judicial proceedings against him." *Rothgery v. Gillespie Cnty., Tex.*, 413 F. Supp. 2d 806, 812 (W.D. Tex. 2006), *aff'd*, 491 F.3d 293 (5th Cir. 2007), *vacated*, 554 U.S. 191 (2008), *and vacated*, 537 F.3d 716 (5th Cir. 2008). Relying on Fifth Circuit precedent, *McGee v. Estelle*, 625 F.2d 1206, 1208 (5th Cir. 1980), the district court granted summary judgment for the county, holding that the right to counsel had not attached by the filing of the probable cause affidavit, because there was no evidence of prosecutorial awareness of the accusation or article 15.17 hearing at that time.

The Fifth Circuit affirmed. It reasoned that the right to counsel had not attached by the filing of the probable cause affidavit or article 15.17 hearing because:

- it was undisputed that the relevant prosecutors were not aware of or involved in Rothgery's arrest or appearance before the magistrate on July 16, 2002, *Rothgery*, 491 F.3d at 297;
- 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*.; and
- Rothgery provided no reason why the officer's acts should be imputed to the prosecutor's office or should be interpreted to signal that Rothgery was opposed by the prosecutorial forces of the state, *id*.

With respect to Rothgery's argument that the probable cause affidavit constituted a criminal complaint under Texas law that initiated an adversarial proceeding against him, the Fifth Circuit held it was "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," because the answer was "uncertain." *Rothgery*, 491 F.3d at 300.

Instead, that court looked to "the specific circumstances of this case and the nature of the affidavit filed." *Id.* In this regard, the court observed that the affidavit indicated it was filed for the sole purpose of establishing probable cause and that a form given to Rothgery by the magistrate at the Article 15.17 hearing had indicated that charges "will be filed," not that they had concurrently been filed with the magistrate. *Id.* The Fifth Circuit observed that the use of the word "charge" in the probable cause affidavit arguably weighed in Rothgery's favor, but concluded that, "even as a complaint," it would be "insufficient to formally charge Rothgery with the felony" in the absence of evidence of prosecutorial awareness: "Without any evidence to indicate that the affidavit actually served to initiate the prosecution…we conclude that the filing of the affidavit was part of the investigatory process, serving solely to validate the [warrantless] arrest without committing the state to prosecute." *Id.*

This Court granted certiorari and reversed the Fifth Circuit in an 8-1 decision. With respect to the Fifth Circuit's position that prosecutorial awareness of the filing of a complaint or of an appearance before a magistrate controlled, the Court clarified that its established precedent "left *no room* for the factual enquiry the Court of Appeals would require" in that regard. *Rothgery*, 554 U.S. at 206 (emphasis added). Specifically, the Court rejected the Fifth Circuit's conclusion that the right to counsel in Texas attaches only upon the filing of a "formal complaint"—*i.e.*, one with

specific prosecutorial involvement—and instead made clear that "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 (citing *Moran v. Burbine*, 475 U.S. 412, 429, n.3 (1986)).

Indeed, "under the federal standard, 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." *Rothgery*, 554 U.S. at 207. By the time such an accusation is filed with a judicial officer who makes a finding of probable cause, "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." *Id*.

The Texas county in *Rothgery* attempted to argue that a rule "unqualified by prosecutorial involvement" would inexorably lead to the conclusion that Texas had "'statutorily committed to prosecute every suspect arrested by the police,' given that 'state law requires an article 15.17 hearing for every arrestee.'" *Id*. at 209. This Court responded succinctly: "The answer, though, is that the State has done just that, subject to the option to change its official mind later." *Id*. at 209–10.

Finally, the *Rothgery* Court noted that the Fifth Circuit had refrained from adjudicating "whether the arresting officer's formal accusation would count as a 'formal complaint' under Texas state law." *Rothgery*, 554 U.S. at 199 n.9. The Fifth Circuit had "rightly acknowledged . . . 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.'" *Id.* In short, a state court's interpretation of state law does not control a federal court's determination of when the constitutional right to counsel attaches. 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."[14] *Id*.

B. The Fifth Circuit's Published Decision In This Case Ignored *Rothgery* And Resurrects Its Misapplication Regarding the Right To Counsel, Warranting Correction

In its published decision below, the Fifth Circuit ignored this Court's decision in *Rothgery*, which, like McFarland's case, also arose in Texas. Notwithstanding that the court below was applying the relitigation bar to a 1996 state court decision which pre-dated *Rothgery*,[15] *Rothgery* made clear that it was treading no new Sixth Amendment ground. Instead, the decision "merely reaffirm[ed] what [the Court has] held before." *Rothgery*, 554 U.S. at 213; *see also id*. at 211 (the Court's Sixth Amendment decisions relied upon in *Rothgery* were "clear" about when the right to counsel attaches); *id*. at 206 (decisions in *Brewer v. Williams*, 430 U.S. 387 (1977), and *Michigan v. Jackson*, 475 U.S. 625 (1986), left "no room" for court to ignore accusations that prompt judicial action which do not involve prosecutors). Certiorari is therefore warranted to bring this case in line with *Rothgery* and this Court's prior Sixth Amendment jurisprudence and to correct the Fifth Circuit's continued misapplication of clearly established Sixth Amendment law in a capital case.

In its decision below, the Fifth Circuit observed that the TCCA held on direct appeal that its own cases "ha[d] not distinctly identified the point at which formal adversarial proceedings have begun." Appendix 4 at 11 (quoting *McFarland*, 928 S.W.2d at 507). In so observing, the court below did not discuss, acknowledge, or cite anywhere in its published decision, this Court's

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[14] Justice Alito wrote a concurring opinion joined by Chief Justice Roberts and Justice Scalia. Each fully joined the majority opinion, and Justice Alito wrote separately only to "elaborate on my understanding of the term 'attachment' and its relationship to the Amendment's substantive guarantee of "the Assistance of Counsel for [the] defence." *Rothgery*, 554 U.S. at 214. Specifically, Justice Alito understood "attachment" as determining "when the right may be asserted," *id*., not when a state must actually appoint counsel. "Texas counties need only *appoint* counsel as far in advance of trial, and as far in advance of any pretrial 'critical stage,' as necessary to guarantee effective assistance at trial." *Id*. at 218 (emphasis supplied).

[15] *See* 28 U.S.C. § 2254(d).

decision in *Rothgery*. While *Rothgery* did not create new Sixth Amendment law, it left no room for the Fifth Circuit's conclusions below and its failure to ascertain correctly whether the state court decision was contrary to or unreasonably applied clearly established Sixth Amendment law.

The Fifth Circuit observed that "[a] formal complaint or indictment had yet to be filed against McFarland at the time of the lineup, nor had he been taken before a magistrate judge for an [a]rticle 15.17 hearing." Appendix 4 at 11–12. In concluding that the state court's decision was not contrary to this Court's precedent, the Fifth Circuit reasoned that McFarland's Sixth Amendment claim failed, because "he cannot show that the TCCA's finding that his arrest warrant was not a formal criminal complaint giving rise to his right to counsel was contrary to or an unreasonable application of Supreme Court precedent." *Id*. The Fifth Circuit's determination ignores *Rothgery*'s express conclusion that by its statutes the State of Texas had chosen to commit itself to prosecute every person it arrests, subject only to revising that decision later. The Fifth Circuit also effectively blessed the state court's treatment of clearly established Sixth Amendment law that this Court already rejected in *Rothgery*.

The only factual distinction between this case and *Rothgery* is that McFarland was arrested pursuant to a warrant that issued upon the filing of a complaint against him by a peace officer before his arrest and article 15.17 hearing. This distinction is irrelevant to the outcome. Indeed, the Sixth Amendment's touchstones of accusation and judicial involvement—including a judicial finding that a "[c]omplaint, in writing, under oath, has been made" and that such complaint was sufficient to establish that probable cause existed to believe McFarland had committed a felony offense—occurred even *earlier* in this case than it had in *Rothgery,* in which the sworn complaint and judicial finding of probable cause all occurred during the article 15.17 hearing, after police had arrested Rothgery without a warrant.

The fact that McFarland had not yet been placed before a magistrate for an article 15.17 hearing at the time the lineup occurred is immaterial. Rather, per *Rothgery* and the clearly established Sixth Amendment law on which it relied, "[w]hat counts is that the complaint filed with the magistrate accused [the individual] of committing a particular crime and prompted the judicial officer to take legal action in response." *Rothgery*, 554 U.S. at 199 n.9. In this case, a complaint filed with a magistrate judge accused McFarland of committing a particular crime, and the complaint prompted the judicial officer to take legal action—issuing an arrest warrant commanding peace officers to bring McFarland before her—in response. The accusation, in short, prompted the article 15.17 hearing and "restrictions on the accused's liberty to facilitate the prosecution."[16] *Id.* at 207.

The Fifth Circuit's published decision in this case applies the same flawed reasoning that it applied in *Rothgery—i.e.*, that the prosecution's awareness is required before the Sixth Amendment right to counsel attaches—and that this Court rejected in that case. By failing to follow *Rothgery* and this Court's prior Sixth Amendment jurisprudence, the Fifth Circuit effectively sanctioned the state court's failure to acknowledge the January 2 complaint filed by peace officer Stephens—as well as the judicial action prompted by that accusation—and its treatment of that complaint as "not a formal complaint." In doing so, the Fifth Circuit effectively resurrected its requirement of prosecutorial awareness in evaluating McFarland's Sixth

[16] McFarland's case is also factually indistinguishable from *Moore*, 434 U.S. at 220, a unanimous decision of this Court. Although not a case from Texas, *Moore* was decided well before the state court decided McFarland's direct appeal, and McFarland relied upon it before the state court. In *Moore*, police arrested the accused and held him overnight pending preliminary hearing to determine whether he should be bound over to the grand jury and to set bail. *Moore*, 434 U.S. at 222. The next day, a police officer accompanied the victim to the hearing and had her "sign a complaint that named petitioner as her assailant." *Id.* At the hearing, the complainant was asked to, and did, identify the accused as the assailant. *Id.* at 222–23. As in this case, the court of appeals in *Moore* reached the wrong result by misidentifying when adversarial judicial criminal proceedings had begun, finding that the right to counsel had not attached at the hearing because the accused had not yet been indicted. *Id.* at 228. This Court corrected that erroneous view: "The prosecution in this case was commenced…when *the victim's* complaint was filed in court." *Id.* (emphasis added).

Amendment claim. Indeed, the only difference between a "formal complaint," as the Fifth Circuit used that term, and the complaint filed with the judiciary by peace officer Stephens on January 2, is prosecutorial awareness, which was not required for McFarland's Sixth Amendment right to counsel to attach.

Likewise, to the extent the state court only recognized the document filed on January 4 as a complaint because it was signed and filed by an Assistant Harris County District Attorney, the state court applied the exact same rule rejected in *Rothgery* as contrary to *Brewer*, 430 U.S. at 387, and *Jackson*, 475 U.S. at 625. This Court held in *Rothgery* that its decisions in *Brewer* and *Jackson* "left no room" for a court, when making the Sixth Amendment attachment decision, to ignore accusations that prompt judicial action – even if those actions do not involve prosecutors. *Rothgery*, 554 U.S. at 206. Both *Brewer* and *Jackson* predate the Texas state court decisions at issue here, and in which the courts ignored McFarland's January 2 complaint solely because it lacked prosecutorial involvement. Per *Rothgery*, both *Brewer* and *Jackson* required the Fifth Circuit to hold that a state court decision issued after those cases were decided and that requires prosecutorial awareness before the right to counsel can attach is one that is contrary to, or an unreasonable application of this Court's clearly established Sixth Amendment cases.

CONCLUSION

For the foregoing reasons, the Court should either summarily reverse the Fifth Circuit's judgment and remand with instructions to the lower courts to give meaningful consideration to McFarland's *Cronic* and Lineup Claims or grant certiorari to address and correct the lower court's persistent misapplication of *Cronic* and when the Sixth Amendment right to counsel attaches.

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