No. 22-5236

In the Supreme Court of the United States

GEORGE E. MCFARLAND, PETITIONER

v.

BOBBY LUMPKIN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION
(CAPITAL CASE)

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Our Constitution protects not just a criminal defendant's right to effective counsel but his right to *choose* his counsel. Seeing a potential conflict between those rights, the judge presiding over George McFarland's capital-murder trial appointed an experienced criminal lawyer to assist McFarland's chosen counsel, who appeared to be in ill-health and potentially ill prepared. Texas's appellate courts concluded that this arrangement adequately protected McFarland's Sixth Amendment rights. They also concluded that McFarland had received counsel at all constitutionally mandated stages of the proceeding. Because McFarland's claims were adjudicated on the merits in state court, a federal court may not grant habeas relief unless the petitioner can demonstrate that the state court's decision was "contrary to, or involved an unreasonable application of," this Court's clearly established precedent. 28 U.S.C. § 2254(d)(1). The questions presented are:

1. Whether it was an unreasonable application of this Court's decision in *United States v. Cronic*, 466 U.S. 648 (1984), to reject McFarland's claim that the intermittent napping of his chosen, retained lawyer constructively denied him of counsel given that his court-appointed attorney provided, active, zealous, and constitutionally effective counsel at every stage of the trial.

2. Whether it was an unreasonable application of this Court's Sixth Amendment precedent to conclude that McFarland had no right to counsel at a lineup that occurred before the filing of any formal charge, complaint, indictment, or arraignment.

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BRIEF IN OPPOSITION

In November 1991 George McFarland shot Kenneth Kwan during a robbery of Kwan's grocery store and left him to bleed to death on the floor with his wife helplessly looking on. An eyewitness watched McFarland shoot Kwan, and she later identified McFarland as the shooter in both a photo array and in a live lineup. McFarland also boasted about the crime to his nephew, going so far as to flash the fruits of the robbery—a brand new car and a bundle of cash. After his nephew later told police about this encounter, McFarland was arrested and subsequently charged with capital murder.

McFarland chose to hire an elderly lawyer in declining health to represent him during his capital-murder trial, and he continued to stick with that lawyer as retained counsel despite the repeated inquiries of the trial judge. Out of an abundance of caution, the trial judge

appointed Sanford Melamed, an experienced defense attorney, to assist McFarland's lawyer. That decision proved prescient: McFarland's chosen attorney did little to prepare the case for trial, shifted most of the trial work to Melamed, and even napped intermittently during trial. Still, McFarland refused to fire him. Melamed, in contrast, spent months preparing for trial where he effectively functioned as lead counsel, filing all the defense's motions, questioning the majority of witnesses, and addressing the jury in opening and closing argument. Despite Melamed's efforts, the jury ultimately found McFarland guilty and sentenced him to death.

For the last thirty years, McFarland has asked state and federal courts to undo that jury verdict based (in part) on the performance of his retained counsel. Every court to consider his arguments has rejected them. This Court should do the same.

As to the first issue raised in the current petition, the Fifth Circuit correctly held that the Antiterrorism and Effective Death Penalty Act precludes habeas relief on McFarland's claim that he was constructively denied counsel under this Court's decision in *United States v. Cronic*, 466 U.S. 648 (1984), which was fully litigated and resolved on the merits by the state courts. *Cronic* includes a "narrow" and "infrequently" applicable exception to this Court's traditional two-step inquiry for determining ineffectiveness of counsel and permits a "presumption of ineffectiveness" when defense counsel is appointed under circumstances under which no competent counsel could provide assistance (for example, when an attorney is appointed the day of trial). *Florida v. Nixon*, 543 U.S. 175, 190 (2004). The Texas Court of Criminal Appeals (TCCA) concluded that McFarland's circumstances did not fall within this narrow rule because Melamed—who had months to prepare—provided competent,

zealous, constitutionally effective counsel. This was not just objectively reasonable but correct. McFarland nonetheless attempts to manufacture a split of authority between the Fifth Circuit's decision and a single decision of the Sixth Circuit. But McFarland ignores material factual distinctions between the two cases—not least of which is that counsel in the Sixth Circuit case was appointed minutes before trial. That this is the best McFarland can do demonstrates that there is no divergence among the lower courts about how to apply *Cronic* and that the Fifth Circuit's decision should be affirmed on the merits.

As to the second question presented—that McFarland was entitled to habeas relief because he was denied counsel during a police lineup—this Court's review is likewise unwarranted. As an initial matter, vehicle problems abound: the principal case that McFarland claims the Fifth Circuit ignored had not been issued at the time of the last state-court decision, so the TCCA could not have unreasonably applied it; and the identification of which McFarland complains was separately admissible through either the eyewitness's photo-array identification or her independent recollection of the crime itself. McFarland's claim is also meritless. This Court has never held that the right to counsel attaches when a police officer files an affidavit attached to an arrest warrant—as opposed the filing of a formal charge, complaint, indictment, or arraignment—which is fatal to McFarland's efforts to overcome AEDPA's relitigation bar.

Ultimately, McFarland identifies no genuine circuit split worthy of review, no error to correct, and no way to avoid several vehicle problems. His petition should be denied.

STATEMENT

I. The Murder of Kenneth Kwan

A. The robbery and shooting

Kenneth Kwan ran a grocery store in Houston with his wife, Shirley. ROA.1461.[1] Twice a week, Kwan went to the bank with James Powell, the store's security guard, to cash his customers' payroll checks. ROA.1462-63; ROA.1471. At around noontime on November 15, 1991, Kwan and Powell returned from the bank with $27,000 cash in a bank bag. ROA.1467; ROA.1471; ROA.1597; ROA.1615; ROA.1661. As they pulled up to the store, McFarland was sitting close by, a trash bag in one hand, the other hidden beneath some towels—not an unusual sight given the launderette next door. ROA.1439; ROA.1479; ROA.1481. But when Kwan left his car, McFarland jumped up and started towards him. ROA.1480. Realizing he was about to be robbed, Kwan sprinted towards the store. ROA.1484. Powell, focusing on Kwan, lost sight of McFarland. ROA.1486. Powell was carrying a shotgun, but before he could take any action, he felt a gun—McFarland's—pressed against his head. ROA.1483; ROA.1486. McFarland told him to "[d]rop the gun .... If you don't, I'll blow your God-damned brains out." ROA.1487. Powell complied. ROA.1487.

Without saying another word, McFarland fired two shots at Kwan, who had made it to the entrance of the store. ROA.1488; ROA.1617; ROA.1668. A masked accomplice followed Kwan in. ROA.1618. McFarland yelled at the accomplice to "get the bag, get the bag." ROA.1495; ROA.1669. As Shirley Kwan watched, the accomplice shot her husband several more times with a revolver. ROA.1617-18. McFarland's accomplice picked up the bank bag and ran out, leaving Kwan to bleed to death on the floor. ROA.1465.

[1] "ROA" refers to the Fifth Circuit's electronic record on appeal.

Shirley stayed with Kenneth, calling his name as she waited for an ambulance. ROA.1604. She followed him to the hospital. ROA.1468. He died before she could return to his side. ROA. 1468. He had been shot five times. ROA.1640.

B. The eyewitness, the informant, and the arrest

Carol Bartie, a friend and customer of the Kwans, watched the shooting unfold from her car in the store parking lot. ROA.1662; ROA.1666. When police arrived at the scene, Bartie, "still scared and nervous," told officers "[i]t all happened so fast" that she "d[id]n't think that [she] w[ould] be able to identify either one of the guys who robbed the store." ROA.1686-87. Not long after, however, in a photo lineup, Bartie recognized and identified McFarland—who had made no attempt to hide his face during the robbery—as the killer. ROA.1483; ROA.1679-80.

Days after the shooting, Craige Burks, George McFarland's nephew, called the local Crime Stoppers hotline. ROA.1558-59. He recounted to officers how his uncle had taken him for a drive in a brand-new car the night of the shooting. ROA.1549; ROA.1552-53; ROA.1573. During the car ride, McFarland boasted to his nephew how he and two other men had "robbed [a] Chinese guy." ROA.1554-55. For his part, McFarland said he had "pulled a pistol on a security guard and shot the dude, the Chinese guy." ROA.1554-55. McFarland showed Craige "a bundle of money." ROA.1556.

On January 2, 1992, a magistrate judge issued a warrant for McFarland's arrest. ROA.3923. The next day, after McFarland's arrest, Bartie again identified him as the unmasked shooter—this time at a live lineup. ROA.1683; ROA.1688. At the time of the lineup,

an arrest warrant had issued, ROA.3923, but McFarland was not charged with capital murder by way of a formal felony complaint until two days later, January 4, 1992. ROA.5291. He was brought before a magistrate for arraignment on January 5. ROA.5293.

The Harris County prosecutor convened a grand jury, which heard from Craige Burks and his father Walter Burks, among others. ROA.3926; ROA.3945. The grand jury indicted McFarland for capital murder in March. ROA.5204.

II. The Trial

A. Defense counsel's months of pre-trial preparation

Rather than accept court-appointed counsel, McFarland chose to retain a 72-year-old defense attorney named John Benn. ROA.2140; ROA.5124. The trial court harbored some doubts about Benn's ability to take on the case alone, but McFarland insisted on sticking with Benn. ROA.4292. To ensure that McFarland had constitutionally adequate counsel, the trial court appointed Sanford Melamed to serve as second chair in early April—just weeks after McFarland's indictment. *Ex parte McFarland*, 163 S.W.3d 743, 750, 759-60 (Tex. Crim. App. 2005) (*McFarland III*); ROA.5297.

1. At the time of his appointment, Melamed had been practicing for 14 years as a criminal-defense attorney. ROA.4351. Although this was his first capital trial, he had been appointed or retained in over 600 felony cases and over 200 misdemeanor cases in Harris County. ROA.4351. That included at least 23 felony jury trials and 9 misdemeanor jury trials. ROA.4351-52. Outside of the county, he had worked on another 100 criminal cases including another 10 criminal jury trials. ROA.4352.

Still, Benn and McFarland were none too pleased. McFarland refused to sign the order appointing counsel, but he did not seek to have Melamed removed and later acknowledged

that Melamed served as his attorney. ROA.2141-42; ROA.4268; ROA.5297. Benn would not meet with Melamed when he was first appointed. ROA.2153.

2. Melamed got to work immediately and—with the trial court's encouragement—"took it upon [himself] to do everything that [he] thought was necessary" to prepare for trial. ROA.2153; ROA.2164; ROA.4354. Making his way through the State's file, Melamed amassed extensive notes in his small cursive. ROA.2152; ROA.4270; *see* ROA.230. Because it was Melamed's "experience that State's witnesses will invariably be told by the prosecution not to voluntarily cooperate with defense counsel," he concluded it was a better use of the defense's limited resources to investigate other potential leads. ROA.3975. He met with his client several times to discuss the case and potential witnesses. ROA.2154. He also hired an investigator, trying to work within the $600 allotted by the court for investigation fees. ROA.3975. The investigator reviewed the ballistics report, visited the Kwans' store, arranged for pictures of the scene, and searched for additional eyewitnesses in the adjoining strip mall and nearby buildings. ROA.4278-79. The investigator was unable to find any new witnesses and could not locate the potential witnesses McFarland had suggested. ROA.2151; ROA.4361. McFarland and Melamed discussed calling other witnesses, but McFarland "did not wish to subpoena" them. ROA.2151. The two men also decided against calling Walter Burks, whom they had considered using to undermine Craige Burks's expected testimony. ROA.2159-60.

Because Melamed had not tried a capital case before, he "spent the better part of the summer studying up on capital murder law." ROA.4291; ROA.4263. He received guidance from three colleagues who were experienced capital-defense attorneys, shadowing them and spending several days watching them try capital-murder cases. ROA.4263-64. He read

the leading capital-defense treatise "and as many cases as [he] could." ROA.4263. He developed a trial strategy. ROA.4298-99. With his colleagues' assistance and Benn's approval, Melamed drafted and filed at least 36 motions in furtherance of that strategy, "including a discovery motion, motions for investigator fees, a motion to suppress identification evidence, five motions in limine, eight special requested charges and three special requested punishment charges." ROA.5127; see ROA.5283. As Melamed later put it, "I filed every motion I could possibly think of." ROA.2166. Many were granted. E.g., ROA.5304; ROA.5317; ROA.5325; ROA.5354; ROA.5361; ROA.5369; ROA.5372; ROA.5375; ROA.5378; ROA.5381; ROA.5384; ROA.5390; ROA.5415; ROA.5427; ROA.5439; ROA.5443.

3. In early June, Melamed became concerned about Benn's readiness in the event McFarland was convicted, and the trial proceeded to the punishment phase. ROA.4282. Unable to reach Benn, Melamed asked McFarland about potential mitigation witnesses. ROA.4282-83. McFarland told Melamed not to contact his relatives. ROA.4339. Melamed prepared anyway, researching the extraneous offenses the State intended to present at the second phase of trial, and investigating as necessary "any witnesses associated with those extraneous offenses." ROA.4370; ROA.2164. Throughout, Melamed worked on the assumption that Benn "would not do anything" and "prepared as if [he] was going to do the whole trial." ROA.2166.

The assumption was well-placed. Benn did little more than review the State's file "two or three" times, talk with McFarland on a number of occasions, and "brief[] a few points of law on evidence." ROA.2168-69; ROA.2173. As trial approached, the court asked McFarland "two or three" more times if he wanted to continue with Benn as his attorney. ROA.4294. McFarland said he did, and the court honored that decision. ROA.4293.

B. Voir dire and the trial itself

1. Voir dire began in mid-July and lasted two weeks. ROA.583; ROA.4288. Melamed had worked with his capital-defense colleagues to prepare. ROA.4285. He examined the "greater portion" of prospective jurors, consulting with McFarland and Benn to determine how to proceed as to each juror. ROA.4268; ROA.4288. It was during voir dire that "Benn's physical appearance" began "to deteriorate." ROA.3977. He "seemed like a man who was not in good health." ROA.3977. And he grew tired as the hearings drew out into the afternoon, napping a few times. ROA.3977; ROA.4305. Again, the trial court asked McFarland "if he did indeed want to stick with Mr. Benn." ROA.4364. McFarland said he did, never expressing dissatisfaction with Benn until after he was convicted. ROA.4364-65.

There was a 10-day break between voir dire and trial. ROA.3977. Melamed used the time to further develop his theory of the case and further familiarize himself with the procedure for the punishment phase. ROA.3977.

2. At the start of trial, it became clear that Melamed's summer had been put to good use: he realized on the first or second day that "Benn would shift most of the work to [him]." ROA.2163. Still, Melamed was "prepared to do the whole trial." ROA.2164. His opening statement to the jury reflected his case theory: that McFarland had been incorrectly identified as the shooter, and that McFarland lacked sufficient intent to kill Kwan to sustain a capital-murder charge. ROA.1434-35; ROA.3977-78.

Melamed cross-examined the majority of the State's fourteen witnesses at the guilt-innocence phase; Benn only three. ROA.1424-25; ROA.1608. Although the trial record offers scant details, Benn's napping "seemed to worsen as the trial progressed." ROA.3978. And Benn would not tell Melamed which of them would cross-examine a witness until

shortly before it was time to question that witness. ROA.4366; ROA.4378. But Melamed had prepared before trial to cross-examine every witness. ROA.2166; ROA.4366-67. And he paid attention to each witness's testimony as if he was going to have to cross-examine him or her—regardless of what Benn had told him beforehand. ROA.4379.

3. The State's evidence included testimony from Mrs. Kwan, Powell, customers who were at the store at the time of the shooting, Bartie, and Craige Burks. The defense chose to rest without presenting its own evidence. ROA.1690. McFarland does not challenge his attorneys' decision not to call witnesses but instead focuses on the impact of Bartie and Craige's testimony.

Based on her experience "living through th[e] robbery," Bartie said without "any doubt in [her] mind" that McFarland was the man she "saw that carried th[e] bag," disarmed Powell, "and shot at Kenneth Kwan." ROA.1681; ROA.1683. In advance of Bartie's testimony, Benn said he would take the cross-examination. ROA.2166. Benn was active during the direct examination, responding to inquiries from the court. *E.g.*, ROA.1680; ROA.1684. On cross-examination, Bartie admitted she had not seen Kwan get hit. ROA.1686. Benn impeached her with her earlier statement that she would be unable to identify the shooter, ROA.1686-87, and with the passage of time between the robbery and her two positive identifications of McFarland. ROA.1687-88.

Craige Burks also took the stand, following an unsuccessful attempt by Melamed to exclude his testimony. ROA.1543-46. Craige recounted how McFarland had boasted about the shooting and shown him a stack of money. ROA.1554-56. Melamed performed the cross-examination, eliciting from Craige concessions that he had received a reward for his call to Crime Stoppers; that the State had agreed to reduce the charges in an unrelated case in

exchange for his testimony; that he had admitted to other criminal conduct before the grand jury; that he had once been committed to a psychiatric institution because of a mental illness; and that police had not arrested the accomplices Craige said McFarland had named. ROA.1565-75.

At the close of the State's case, Melamed moved for a directed verdict, which was denied. ROA.1691. Melamed raised additional objections to the jury charges. ROA.1698-1700.

After the court charged the jury, the State offered its closing arguments, ROA.1701, followed by both Benn and Melamed. Benn focused on the absence of forensic evidence and on inconsistencies between the eyewitness's statements. ROA.1718-20. He also argued that Craige's testimony and Bartie's identification were unreliable. ROA.1720-22. Melamed made similar points and repeated the theme from his opening statement: that there was reasonable doubt McFarland caused or intended to cause Kwan's death. ROA.1723.

The jury retired. ROA.1747. It found McFarland guilty of capital murder the same day. ROA.1747; ROA.5205.

4. At the punishment phase, the State presented evidence that mere months before he killed Kenneth Kwan, McFarland had "robbed two Wal-Mart employees in the store parking lot as they returned from the bank with over $5,000 in cash." ROA.341. "One of the victims identified" McFarland "as the man who put a machine gun to his head," "demanded the money," and shot at another victim who was pursuing McFarland and an accomplice. ROA.341. Just two days after the Wal-Mart armed robbery, the State showed, McFarland both placed a gun to a man's back and (in a separate incident) had been arrested for fighting. ROA.341. Melamed was the only defense attorney to cross-examine the State's punishment-phase witnesses. ROA.1750; ROA.1798-99.

Unlike during the merits phase, the defense presented three mitigation witnesses. ROA.1799-1800. Melamed led the direct examination for each of them. ROA.1799-1800. To show that McFarland would not pose a future threat in the prison environment, the defense called a Harris County jail employee to testify how McFarland "had not been involved in any disciplinary incidents while in custody for th[e] murder." ROA.341. The defense also called McFarland's "supervisor at a paper company," who "testified that [McFarland] was a good worker during his five-year employment." ROA.341. And McFarland's wife testified that they "had two children and that he had always been good to her." ROA.341.

Again, after motion practice, both defense attorneys offered closing remarks. ROA.1941. Melamed downplayed the Wal-Mart testimony and McFarland's criminal record. ROA.1959-64. He repeated his theory of the case that McFarland had not intended to cause Kwan's death. ROA.1964-66. He reminded jurors that McFarland had a family, and "ask[ed] . . . for mercy." ROA.1967. Benn, who spoke only briefly, emphasized that killing McFarland "[wa]s not going to bring back the life of another man." ROA.1969. The jury unanimously resolved all special issues against McFarland. ROA.1981. The court sentenced McFarland to death. ROA.1982.

III. Direct Appeal and State Habeas Proceedings

A. Direct appeal

Two months later, McFarland's appellate counsel moved for a new trial based on ineffective assistance of trial counsel. ROA.2174. Expressing dissatisfaction with Benn for the first time, McFarland and his wife gave evidence, as did Melamed and Benn. ROA.2113-14. The trial court denied the motion. ROA.2177.

Appellate counsel appealed to the TCCA, the State's court of last resort for criminal matters, raising "thirty-four points of error in his original brief and thirty-five points of error in a supplemental brief." *McFarland v. State*, 928 S.W.2d 482, 494 (Tex. Crim. App. 1996) (per curiam) (*McFarland I*). The TCCA overruled all points of error, including his current Sixth Amendment claims based on ineffective-assistance and an allegedly unconstitutional lineup. *Id.* at 499-507, 511-12. That court also rejected a closely related claim—hinted at but not squarely raised in the petition—that McFarland's "'Constitutional right to counsel of his choice' was violated when the trial court appointed Melamed to assist retained-counsel Benn." *Id.* at 508 & n.23. The court "f[ound] it somewhat ironic that appellant complain[ed] of Melamed's participation after his numerous complaints of Benn's alleged incompetence." *Id.*

This Court denied McFarland's petition for a writ of certiorari. *McFarland v. Texas*, 519 U.S. 1119 (1997) (*McFarland II*).

B. State-habeas review

McFarland then filed a state-habeas application which raised many of the same arguments as the direct appeal. ROA.4412; ROA.4747. The application included a 1997 affidavit in which Craige Burks said he did "not recollect giving" the testimony reflected in the court transcript, "nor d[id] [he] presently believe [he] so testified." ROA.3983. A few years later, while the habeas application was still pending, the State obtained two new affidavits from Craige Burks. Burks explained that he did not know the 1997 document McFarland's lawyers had asked him to sign was a recantation. ROA.2216. And he never told them his trial testimony was untrue. ROA.2216-17. He also said McFarland, McFarland's wife, and one of McFarland's friends had pressured Burks to testify that he had "lied at trial." ROA.2214.

McFarland's counsel sought an evidentiary hearing, which the state-habeas trial court granted as to Sanford Melamed. ROA.4254; ROA.4954. The parties then submitted proposed findings of fact and conclusions of law. The court largely adopted the State's proposals but included handwritten amendments. ROA.5124; 5144-45; ROA.5170.

Under Texas law, these findings were reviewed as of right by the TCCA. Tex. Code Crim. Proc. art. 11.071, §11. Following two rounds of supplemental briefing, and "[a]fter reviewing the evidence, the trial court's Findings of Fact, and the applicable law," the TCCA "den[ied] relief" on all grounds sought by McFarland, including the ineffective-assistance claims pressed here. *McFarland III*, 163 S.W.3d at 748-49.

IV. Federal Habeas Litigation

McFarland timely filed a petition for a writ of habeas corpus in the district court for the Southern District of Texas, ROA.19, listing a host of claims including the *Cronic* and unconstitutional-lineup claims presented here. The district court denied relief, concluding that McFarland had not overcome AEDPA's relitigation bar. ROA.479. McFarland sought and received a certificate of appealability from the Fifth Circuit regarding the district court's determination of (among other things) his current claims. *McFarland v. Davis*, 812 F. App'x 249, 249-50 (5th Cir. 2020) (per curiam) (*McFarland IV*).

After a round of briefing and argument, the Fifth Circuit affirmed the district court's denial of habeas relief. *McFarland v. Lumpkin*, 26 F.4th 314, 319-23 (5th Cir. 2022) (per curiam) (*McFarland V*). As relevant to this petition, the Fifth Circuit rejected McFarland's *Cronic* claim, concluding that McFarland had not shown that the TCCA's decision was "contrary to or an unreasonable application of clearly established Supreme Court precedent." *Id.* at 320. The court explained that it was "aware of no case where a sleeping co-counsel

alone triggers *Cronic*'s presumption of prejudice" and that "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." *Id.* at 320. The Fifth Circuit also rejected McFarland's claim that his Sixth Amendment rights were violated when he was identified during a police lineup without counsel present. *Id.* at 321-22. The court reasoned that McFarland's right to counsel had not yet attached at the time of the lineup, since only an arrest warrant had issued—not a formal felony complaint. *Id.* at 322. Thus, once again, McFarland failed demonstrate that the TCCA's decision was "contrary to or an unreasonable application of Supreme Court precedent." *Id.*[2]

McFarland thereafter filed a petition for panel rehearing and petition for rehearing en banc, which the Fifth Circuit denied without so much as a vote. Pet.App.45.

REASONS FOR DENYING THE PETITION

I. McFarland's *Cronic* Claim Does Not Warrant this Court's Review.

McFarland's *Cronic* claim does not merit this Court's review. In *Strickland v. Washington*, 466 U.S. 668 (1984), this Court announced the now familiar two-part, performance-prejudice inquiry for determining whether an accused has been denied his Sixth Amendment right to counsel due to the allegedly defective assistance of an attorney. In *Cronic*, which was decided the same day as *Strickland*, this Court identified three circumstances in which a court may pretermit the two-step *Strickland* inquiry and instead presume prejudice "without inquiring into counsel's actual performance or requiring the defendant to show the effect it had on the trial." *Bell v. Cone*, 535 U.S. 685, 695 (2002). *First*, "and '[m]ost

[2] The Fifth Circuit separately denied relief for McFarland's claims under *Strickland* and *Brady*, 26 F.4th at 320-21, 322-23, which McFarland does not press before this Court.

obvious' was the 'complete denial of counsel . . . at 'a critical stage'" of the trial. *Id.* at 695 (quoting *Cronic*, 466 U.S. at 659).[3] *Second*, prejudice is presumed "if 'counsel entirely fails to subject the prosecution's case to meaningful adversarial testing.'" *Id.*at 696. And *third*, "in cases like *Powell v. Alabama*, 287 U.S. 45 (1932), where counsel is called upon to render assistance under circumstances where competent counsel very likely could not, the defendant need not show that the proceedings were affected." *Id.* (citing *Cronic*, 466 U.S. at 659-62).

To be clear, *Cronic* does not entirely do away with either element of a *Strickland* claim. Instead, *Cronic* and its progeny recognize that there are "circumstances" where it is "so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *Id.* at 695 (quoting *Cronic*, 466 U.S. at 658-59). But this Court has cautioned that *Cronic*—and particularly the third category of *Cronic*—is "a narrow exception" to *Strickland* and observed that situations where the "surrounding circumstances [will] justify a presumption of ineffectiveness" will only "infrequently" arise. *Nixon*, 543 U.S. at 190 (alteration original).

The petition points to nothing that justifies the costs to the State of litigating—or to the Court of deciding—how *Cronic* should be applied to this particular case. The TCCA applied *Cronic* and concluded that the circumstances of McFarland's representation did not

[3] Although not framed as such, McFarland's Sixth Amendment lineup claim is effectively a category one *Cronic* claim.

fall within any of the three categories where the court may presume prejudice from allegedly ineffective counsel.[4] The Fifth Circuit agreed, finding that the TCCA's resolution of this claim was not contrary to or an unreasonable application of *Cronic* or its progeny, thus precluding habeas relief under ADEPA's relitigation bar, 28 U.S.C. § 2254(d)(1). McFarland cannot justify this Court's intervention by pointing to a circuit split that does not exist or re-raising the same meritless arguments that have now been rejected by every court in the state and federal system—including this one on direct review.

A. There is no conflict of authority over *Cronic*'s application.

McFarland's chief argument for review is that the Fifth Circuit's analysis of his *Cronic* claim "directly conflicts with" the Sixth Circuit's twenty-year-old decision in *Hunt v. Mitchell*, 261 F.3d 575 (6th Cir. 2001). Pet. 18-19. He contends (at 19) that whereas the Sixth Circuit in *Hunt* held that a "failure to examine the surrounding circumstances [of a defendant's representation] was contrary to or an unreasonable application" of *Cronic*, the Fifth Circuit held that it was permissible for a state court to "ignore the circumstances surrounding the representation." But McFarland mischaracterizes these decisions to create a split that does not exist. That McFarland must resort to such tactics to find even a shallow, one-to-one circuit split demonstrates that this Court's intervention is not necessary at present: the lower courts know how to apply *Cronic*.

1. In *Hunt* the Sixth Circuit held that a *Cronic* violation was established where a defendant's lawyer "was appointed minutes before trial and, as a result, had no opportunity

[4] Even apart from prejudice the TCCA also found that Melamed's representation met the standard of competence required by the Constitution. *McFarland III*, 163 S.W.3d at 753-59. McFarland conspicuously does not challenge that conclusion here.

to consult with [the defendant] or prepare a defense." 261 F.3d at 580. Indeed, the defendant was not able to "consult[] with his lawyer *even once* before the start of voir dire," and the trial judge refused to give freshly appointed counsel even "ten minutes to confer with his client to discuss the possibility of entering into a plea agreement." *Id.* at 583. As a result, "counsel was required to proceed to voir dire without ever discussing the case with his client and without conducting any discovery or independent investigation of the facts." *Id.*

These are almost the exact same facts as *Powell*, where the defendants were forced to stand trial six days after they were indicted, which this Court held did not provide them with "a fair opportunity to secure counsel of [their] own choice." 287 U.S at 53. Further, the appointment of counsel that was attempted by the trial court in *Powell* "was either so indefinite or so close upon the trial as to amount to a denial of effective and substantial aid in that regard." *Id.* Under those circumstances, in other words, "the likelihood that any lawyer, even a fully competent one, could provide effective assistance [wa]s so small that a presumption of prejudice [wa]s appropriate." *Cronic*, 466 U.S. at 659-60.

Unsurprisingly, the Sixth Circuit in *Hunt* reversed a district court's decision denying habeas relief. It held that the state court's conclusion that there was no *Cronic* violation rested on the "factually inaccurate and legally irrelevant" holding that the defendant "failed to preserve his objection to the trial court's last-minute appointment of counsel." *Hunt*, 261 F.3d at 582. Absent that error, the state court "could not reasonably have" rejected the *Cronic* claim—particularly in the light of "[t]he egregious circumstances surrounding the trial court's appointment of counsel." *Id.* at 582-84.

Here, by contrast, Melamed had *months*, not mere days, to prepare for trial—which he put to good use by studying the leading capital-defense treatise and relevant cases, shadowing and consulting with experienced capital defense lawyers, preparing and filing numerous pre-trial motions, and developing a two-pronged trial strategy, *McFarland III*, 163 S.W.3d at 754.

2. Because the facts here bear little-to-no resemblance to those in *Hunt*, there is nothing about the Fifth Circuit's decision below that is even remotely inconsistent with *Hunt*. To start, the TCCA denied McFarland's *Cronic* claim on the merits rather than on waiver grounds. *Id.* at 752-53. As a result, this case starts from a different place than did *Hunt*. Moreover, in *Hunt*, the defendant's counsel was appointed mere *minutes before* trial—leaving him no time at all to prepare a defense or even talk to his client. 261 F.3d at 583. Those "egregious circumstances," *id.*, were plainly unconstitutional under this Court's long-established precedent. *See Powell*, 287 U.S. at 53 (six days between indictment and trial was "so close upon the trial as to amount to a denial of effective and substantial aid"). But, again, Melamed was appointed *months before* trial, which he used to full advantage. *See McFarland III*, 163 S.W.3d at 754. Even *Cronic* held that "25 days" was sufficient for "a competent lawyer [to] prepare to defend [that] case." 466 U.S. at 663. The months that were available to Melamed here were thus constitutionally different in kind than the minutes available in *Hunt*. Thus, the TCCA and Fifth Circuit holding that the circumstances of Melamed's representation did provide sufficient time to prepare a defense, see *McFarland V*, 26 F.4th at 321; *McFarland III*, 163 S.W.3d at 754-55, was both squarely within this Court's precedent and constitutionally different in kind than *Hunt*. *See Cronic*, 466 U.S. at 663. That *Hunt* is the most analogous case that McFarland can find in the last twenty years where a court

actually found a *Cronic* violation amply demonstrates that the lower courts are not confused about how *Cronic* should be applied.

To the contrary, a review of the courts' precedent in this area demonstrates that any split of authority is illusory at most. Specifically, the Fifth Circuit case law strongly suggests that had the facts of *Hunt* come before it, the Fifth Circuit would have found a *Cronic* violation. *See United States v. Simpson*, 645 F.3d 300, 309 & n.7 (5th Cir. 2011) (observing that *Powell* stands for the proposition that "it is error if a trial court waits until the eleventh hour to appoint counsel"). Similarly, the Sixth Circuit's precedent reflects that had the facts of this case come before the Sixth Circuit, it would *not* have found a *Cronic* violation. *Cf. Johnson v. Bradshaw*, 205 F. App'x 426, 431 (6th Cir. 2007) (finding no *Cronic* violation where counsel was appointed ten or fifteen days before trial). That the two courts came to two conclusions reflects the two wildly divergent fact patterns—not a split of authority requiring this Court's intervention.

3. McFarland nevertheless maintains (at 19) that the Fifth and Sixth Circuits apply *Cronic* differently, with the Fifth Circuit instructing courts to "ignore the circumstances surrounding the representation" in favor of a "narrow set of facts" and the Sixth Circuit instructing courts to conduct a broader analysis of "the totality of the surrounding circumstances." But the Fifth Circuit's decision did not "ignore[] the circumstances surrounding" Melamed's representation of McFarland, Pet. 19; it merely found those circumstances did not rise to the level of a constructive denial of counsel under *Cronic*. Indeed, presented with both *Strickland* and *Cronic* claims, the Fifth Circuit expressly held that the TCCA did not unreasonably apply *Cronic* precisely "because, at every stage of trial, [McFarland] . . . enjoyed effective assistance *by Melamed*." *McFarland V*, 26 F.4th at 320 (emphasis added).

Each of the circumstances of Melamed's representation that McFarland claims (at 22-26) the Fifth Circuit ignored was mentioned by that court, *id.* at 317-18, and explored in the context of the court's analysis of the since-abandoned *Strickland* claim, *id.* at 320-21. McFarland's fact-bound disagreement with the Fifth Circuit's ultimate resolution of his *Cronic* claim, however, does not mean that its decision conflicts with a fact-bound conclusion by the Sixth Circuit.

B. McFarland's *Cronic* claim is meritless.

Lacking any genuine circuit split, McFarland's petition is merely a request for error correction. But there is no error for this Court to correct: the Fifth Circuit properly held that McFarland has not satisfied AEDPA's relitigation bar because the TCCA reasonably—indeed, correctly—applied *Cronic*.

1. Apart from his claim regarding an unconstitutional lineup conducted without counsel, *see infra* Part II, McFarland does not contend that the Fifth Circuit erred by concluding that the TCCA reasonably applied *Cronic* in its analysis of the first two circumstances where *Cronic* held that prejudice may be presumed. Nor could he.

McFarland was not "complete[ly] .... denied counsel at a critical stage of his trial." *Cronic*, 466 U.S. at 659. Such a circumstance occurs when "counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding." *Id.* at 659 & n.25. But as even McFarland conceded before the TCCA, "he did have the constant, actual and active participation" of Melamed. *McFarland III*, 163 S.W.3d at 753. Nor did McFarland's counsel "entirely fail[] to subject the prosecution's case to meaningful adversarial testing." *Cronic*, 466 U.S. at 659. For that circumstance to arise "the attorney's fail-

ure must be complete," meaning that the defendant's lawyers "failed to oppose the prosecution throughout the . . . proceeding as a whole," not just "at specific points." *Bell*, 535 U.S. at 697. But as the TCCA found, McFarland was provided "constitutionally effective representation" by Melamed, who was a "zealous advocate in the adversarial testing of the prosecution's case." *McFarland III*, 163 S.W.3d at 753.

2. Instead of the first two scenarios articulated by *Cronic*, McFarland relies almost exclusively on the third: "where counsel is called upon to render assistance under circumstances where competent counsel very likely could not." *Bell*, 535 U.S. at 696. He argues (at 17-18) that "the Fifth Circuit did not scrutinize the TCCA's failure to apply *Cronic*'s surrounding circumstances test," and instead "applied a *per se* rule" that a *Cronic* violation may never occur when counsel is physically present in the courtroom and awake.

The Fifth Circuit did not adopt a "*per se*" rule that *Cronic* is inapplicable whenever a defendant's lawyer is merely awake and present in the courtroom. Instead, the court found *Cronic* inapplicable "because, at every stage of [the] trial," McFarland "enjoyed effective assistance by Melamed." *McFarland V*, 26 F.4th at 320. Because the Constitution does not guarantee a defendant representation by *multiple* lawyers, Melamed's constitutionally effective performance meant Benn's performance was constitutionally immaterial. *See id.* Or, as the TCCA put it, McFarland "had two attorneys" and "was never without counsel;" "[h]ad Mr. Benn been the sole attorney, [McFarland's] Sixth Amendment right to counsel might well have been denied under *Cronic*. But[] Mr. Benn was not his sole attorney." *McFarland III*, 163 S.W.3d at 753.

Because the Fifth Circuit was "aware of no case where a sleeping co-counsel *alone* triggers *Cronic*'s presumption of prejudice," it rightly held that the TCCA's rejection of the

Cronic claim was not "contrary to or an unreasonable application of" any precedent of this Court. *McFarland V*, 26 F.4th at 320 (emphasis added). Indeed, to this day, McFarland has pointed to no case from this Court where constitutionally ineffective performance by one lawyer was a basis to overturn a conviction where the defendant received constitutionally effective representation by a *different* lawyer. That failure is dispositive: "[g]iven the lack of holdings from this Court," that prejudice is presumed when one lawyer provides effective counsel while co-counsel naps "it cannot be said that the state court 'unreasonab[ly] appli[ed] clearly established Federal law.'" *Carey v. Musladin*, 549 U.S. 70, 77 (2006) (quoting 28 U.S.C. § 2254(d)(1)) (alterations original).

3. The Fifth Circuit's decision was not just a reasonable application of AEDPA's relitigation bar, 28 U.S.C. § 2254(d)(1)—it was also an affirmatively correct application of the *Cronic* decision. *Cronic* is designed to gauge the "effect of [attorney] conduct on the reliability of the trial process" and to root out situations "that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *Cronic*, 466 U.S. at 658. But those concerns are not implicated where, as here, one of the defendant's lawyers *did* supply constitutionally effective counsel. Under *that* circumstance—the provision of constitutionally effective counsel by one lawyer—there is no basis to question the "reliability of the trial process" or presume, without more, that co-counsel's conduct "prejudice[d] the accused." *Id.* As the Fifth Circuit pointed out, McFarland offered no case establishing a contrary proposition. *McFarland V*, 26 F.4th at 320. He has not done so in this Court either.

There is no merit to McFarland's contrary insistence (at 17, 22) that the Fifth Circuit and TCCA misapplied *Cronic* by "fail[ing] to inquire into the circumstances surrounding

the representation of physically present counsel," here Melamed. Both the Fifth Circuit and the TCCA did so. In the context of both courts' *Cronic* analysis, they concluded that Melamed provided constitutionally effective counsel to McFarland notwithstanding Benn's napping. *See McFarland V*, 26 F.4th at 320; *McFarland III*, 163 S.W.3d at 753. Nor was this a passing comment or *ispe dixit*: though not pressed here, McFarland pressed *Strickland* claims *against Melamed's representation* at each stage of the trial—pre-trial investigation, cross-examination during the guilt-innocence phase, and sentencing. *See McFarland V*, 26 F.4th at 320-21; *McFarland III*, 163 S.W.3d at 753-59. As a result, those courts presumably heard McFarland's best objections to Melamed's performance before concluding that his performance was, in fact and in law, constitutionally effective. Accordingly, there can be no argument that the Fifth Circuit or the TCCA misapplied *Cronic* by "ignor[ing]" the "circumstances surrounding the representation." Pet. 17, 22.

4. Effectively, McFarland asks this Court to incorporate a watered-down version of *Strickland* through the third category of *Cronic*. This can be seen most clearly in how McFarland addresses (at 22-26) fact issues about his counsel's performance that the state courts resolved against him in the context of his *Strickland* claims and that he now asserts collectively establish a violation of *Cronic*. As an initial matter, those factual findings are presumed correct, absent "clear and convincing evidence" rebutting them, 28 U.S.C. § 2254(e)(1), which McFarland does not even try to provide. Thus, McFarland cannot escape the conclusion that Melamed's representation—standing alone—satisfied the Sixth Amendment standard set out by this Court. And he cannot point to a single precedent of this Court applying *Cronic*'s third category—the paradigmatic example of which is *Powell*, 466 U.S. at 52-53—to examine one attorney's performance when another satisfies *Strickland*. The

absence of such caselaw is fatal under AEDPA, and this Court need not grant review to say so.

II. McFarland's Sixth Amendment Lineup Claim Does Not Warrant this Court's Review.

This Court's review is also not justified to review McFarland's second argument (at 26-36) that the Fifth Circuit erred by concluding that he could not overcome AEDPA's relitigation bar regarding his claim that a police lineup during a period of time between his arrest and his arraignment should not have been conducted without counsel present. This case is a poor vehicle for exploration of McFarland's Sixth Amendment claim, which is in any event meritless.

A. This case is a poor vehicle for exploring McFarland's Sixth Amendment lineup claim.

This case is an exceptionally flawed vehicle for exploring McFarland's Sixth Amendment lineup claim for at least two independent reasons.

1. As an initial matter, the law that McFarland asserts the Fifth Circuit ignored was not clearly established for AEDPA purposes at the relevant time. To overcome AEDPA's relitigation bar, McFarland must identify "clearly established Federal law, as determined by the Supreme Court of the United States," that was applied by the state court unreasonably or in a manner contrary to that precedent. 28 U.S.C. § 2254(d)(1). But "clearly established law as determined by this Court 'refers to the holdings . . . of this Court's decisions *as of the time of the relevant state-court decision.*'" *Yarborough v. Alvarado*, 541 U.S. 652, 660-61 (2004) (quoting *Williams v. Taylor*, 529 U.S. 362, 412 (2000)) (emphasis added). Thus, this Court "look[s] for 'the governing legal principle or principles set forth by the

Supreme Court *at the time the state court renders its decision*." *Id.* at 661 (quoting *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003)) (emphasis added).

These basic principles erect an insurmountable hurdle for McFarland here. The thrust of McFarland's Sixth Amendment lineup claim is that the Fifth Circuit's decision is inconsistent with *Rothgery v. Gillespie County*, 554 U.S. 191 (2008). Pet. 26-36. But *Rothgery* was not clearly established law "as of the time of the relevant state-court decision." *Yarborough*, 541 U.S. at 661. After all, the state-habeas trial court rejected the Sixth Amendment lineup claim in October 2003, ROA.5157-58, and the CCA denied McFarland habeas relief in May 2005, *McFarland III*, 163 S.W.3d at 748-49. But this Court did not decide *Rothgery* until June 2008, more than three years later. Because *Rothgery* was not clearly established federal law at the time of the state court's decision for purposes of AEDPA's relitigation bar, the Fifth Circuit could not have applied it to McFarland's Sixth Amendment lineup claim without running afoul of the non-retroactivity principles of *Teague v. Lane*, 489 U.S. 288 (1989) (plurality op.), *see Edwards v. Vannoy*, 141 S. Ct. 1547, 1554-55 (2021). So, McFarland can hardly fault (at 33) the Fifth Circuit for "ignor[ing]" *Rothgery*: that is what this Court—and ultimately Congress—told it to do.

Recognizing this difficulty, McFarland argues (at 33) that *Rothgery* did nothing more than "reaffirm" earlier precedents of this Court, namely *Brewer v. Williams*, 430 U.S. 387 (1977), and *Michigan v. Jackson*, 475 U.S. 625 (1986). But McFarland did not argue in either his state, ROA.4459-66, or federal, ROA.110-17, habeas petition that the CCA misapplied *Brewer* or *Jackson*. Instead, his arguments centered on a since-abandoned factual challenge about the nature of an affidavit attached to arrest warrant under Texas law. *See* ROA.111 (arguing in federal habeas petition that the state habeas court's "determination

[of the facts] was thus objectively unreasonable" under "28 U.S.C. § 2254(d)(2)"); ROA.4461-64.

Moreover, *Rothgery* did far more than merely "reaffirm" previously established Sixth Amendment rules: it applied them in a new context to decide "whether Texas's article 15.17 hearing marks" the initiation of adversary judicial criminal proceedings, thus triggering the right to counsel. 554 U.S. at 198. This Court said "yes," and it is that specific holding—not *Brewer*'s more generalized holding that "the right to counsel attaches at the initial appearance before a judicial officer," *id.* at 199—that McFarland's petition asks this Court to extend here by keying the initiation of adversary proceedings to efforts to obtain an arrest warrant. Nor can McFarland rely on the more general rule established in *Brewer* because "[a]pplying a general standard to a specific case can demand a substantial element of judgment." *Yarborough*, 541 U.S. at 664. And "[t]he more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations." *Id.* Thus, this Court does not permit clearly established federal law to be defined at a high level of generality for the purposes of AEDPA. *See Nevada v. Jackson*, 569 U.S. 505, 512 (2013) ("By framing our precedents at such a high level of generality, a lower federal court could transform even the most imaginative extension of existing case law into 'clearly established Federal law'" and "defeat the substantial deference that AEDPA requires").[5]

2. Even if McFarland were right that *Rothgery* was clearly established law (and he is not), Bartie's eyewitness identification would be admissible. The state court held that, regardless of any Sixth Amendment violation at the lineup, Bartie's in-court identification was

[5] Regardless, McFarland fails to articulate a meritorious claim under the more specific holding of *Rothgery*. *Infra* at 29-32.

admissible because her "ability to identify appellant had an origin independent from the pre-trial procedure." *McFarland I*, 928 S.W.2d at 508; ROA.5157. This Court has held that in-court identifications are permissible despite an unconstitutional lineup identification when the State establishes "by clear and convincing evidence that the in-court identifications were based upon observations of the suspect other than the lineup identification." *United States v. Wade*, 388 U.S. 218, 239-40 (1967); *see McFarland I*, 928 S.W.2d at 508 (citing *Garcia v. State*, 626 S.W.2d 46, 53 (Tex. Crim. App. 1981)). The TCCA found that the State made this showing because "Bartie testified that her in-court identification of appellant was based on her 'living through the robbery,' not the pre-trial line-up." *McFarland I*, 928 S.W.2d at 508; *see* ROA.5140.

McFarland ignores this ruling. In the district court, he asserted there was no clear and convincing evidence because in her initial statement to the police Bartie incorrectly estimated McFarland's height and weight. ROA.443-45. But before the lineup, Bartie recognized McFarland's face in a photo array. ROA.1677-79. At a hearing on a motion to suppress her in-court identification, she testified that she "remembered [his] face from the robbery both when she later identified him in the photo spread and when she identified him in court." ROA.5140. McFarland's disagreement as to the CCA's weighing of the evidence is "precisely the sort of second-guessing of a state court decision . . . that is precluded by AEDPA." *Cavazos v. Smith*, 565 U.S. 1, 8 n.* (2011) (per curiam).

B. McFarland's Sixth Amendment lineup claim is meritless.

Even if this case were a proper vehicle for considering McFarland's Sixth Amendment lineup claim, his argument lacks merit. At a bare minimum, the Fifth Circuit properly concluded that the state courts' rejection of this claim was not based upon an unreasonable application of, or contrary to any, Sixth Amendment precedent. *See* 28 U.S.C. § 2254(d)(1).

1. In *Rothgery*, this Court expounded upon its previously established rule that "the right to counsel attaches at the initial appearance before a judicial officer," applying it to hearings pursuant to Texas Code of Criminal Procedure, article 15.17. 554 U.S. at 199. As the Court explained, such a hearing is generally the accused's initial appearance before a judicial officer, and it "combines the Fourth Amendment's required probable-cause determination with the setting of bail, and it is the point at which the arrestee is formally apprised of the accusation against him." *Id.* at 195. The Court concluded that the right to counsel attached to such an "initial appearance" because the defendant is "taken before a magistrate, informed of the formal accusation against him, and sent to jail until he posted bail." *Id.* at 199. As the Court explained, "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." *Id.* at 202.

Thus, *Rothgery* clarified that the right to counsel attaches at the time of the first "formal judicial proceedings," *id.* at 209, and 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" is such a formal judicial proceeding, *id.* at 213.

The Fifth Circuit's decision is fully consistent with *Rothgery*. As discussed, in *Rothgery*, this Court held that the right to counsel attached when a defendant was brought before a magistrate for an arraignment at an article 15.17 hearing. *Id.* at 213. But in this case, the Fifth Circuit held that McFarland's "Sixth Amendment right to counsel had not attached at the time of [the] lineup," precisely because he had *not* "been taken before a magistrate judge for an Article 15.17 hearing" or otherwise had a "formal complaint or indictment" filed against him prior to that lineup. *McFarland V*, 26 F.4th at 322. Far from in conflict, the two decisions are perfectly harmonious.

2. McFarland nevertheless maintains (at 34-35) that his right to counsel attached before the police lineup, when an affidavit identifying him as the perpetrator of the Kwan murder was attached to an arrest warrant that was presented to a magistrate judge. *See* ROA.3923-25. But McFarland points to no precedent of this Court holding that an accused's right to counsel attaches at the time an officer seeks an arrest warrant, or that submission of an affidavit seeking an arrest warrant marks "the initiation of adversary judicial criminal proceedings." *Rothgery*, 554 U.S. at 198. To the contrary, this Court has acknowledged that it has "never held that the right to counsel attaches at the time of arrest," *United States v. Gouveia*, 467 U.S. 180, 190 (1984)—which, by definition, requires an agent of the State to have concluded there was probable cause for arrest. And *Rothgery* certainly does not hold as much: the Court expressly stated that it was "not asked to extend the right to counsel to a point earlier than formal judicial proceedings" like the article 15.17 hearing at issue there. 554 U.S. at 209. That necessarily dooms McFarland's Sixth Amendment claim under ADEPA's relitigation bar: "[g]iven the lack of holdings from this Court . . . it cannot be said that the state court 'unreasonab[ly] appli[ed] clearly established Federal law,'" by denying

McFarland's Sixth Amendment claim. *Carey*, 549 U.S. at 77 (quoting 28 U.S.C. § 2254(d)(1)) (alterations original).

If anything, *Rothgery* refutes McFarland's argument that the right to counsel attaches upon submission of an affidavit in support of an arrest warrant. *Rothgery* held that arraignment marks the start of adversary judicial proceedings because "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." *Id.* at 202. But a proceeding involving the submission of an affidavit to secure an arrest warrant has none of these characteristics, as the defendant is neither present nor informed of the charge. (Indeed, he has not been charged at that point.) McFarland suggests (at 35) that the only relevant factor is that a document is filed before a judge accusing a defendant of a crime. Not so: "the right to counsel exists to protect the accused during trial-type confrontations with the prosecutor." *Gouveia*, 467 U.S. at 190. A proceeding to secure an arrest warrant, however, is in no sense a "trial-type confrontation[] with [a] prosecutor." *Id.* At that point in time it is the Fourth Amendment's probable-cause and particularity requirements that protect the defendant. *See Manuel v. City of Joliet, Ill.*, 137 S. Ct. 911, 917-20 (2017); *Albright v. Oliver*, 510 U.S. 266, 271-274 (1994) (plurality op.).

Finally, McFarland briefly argues (at 35-36) that the Fifth Circuit's decision "resurrected" an argument, rejected in *Rothgery*, that "the prosecution's awareness is required before the Sixth Amendment right to counsel attaches." He reasons (at 36) that, by pegging the start of adversary proceedings to his arraignment, initiated by a prosecutor, rather than to than the filing of an affidavit seeking an arrest warrant, filed by a peace officer, the Fifth

Circuit has endorsed the proposition that "prosecutorial awareness" is required. But nothing about the court's analysis turned on the job title of the individual who initiated the proceedings: it turned on the nature of the proceedings themselves. *See McFarland V*, 26 F.4th at 322 (reasoning that an arrest-warrant affidavit was not a "formal complaint," "indictment" or "Article 15.17 hearing"). Accordingly, there is no merit to McFarland's argument that the Fifth Circuit's decision endorses a prosecutorial-awareness test for determining the applicability of the Sixth Amendment's right to counsel.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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