No. 22-5236

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

PETITIONER'S REPLY BRIEF

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THIS IS A CAPITAL CASE

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George E. McFarland files this reply in response to the Director's response opposing review (the "Response").

I. FACTUAL INACCURACIES IN THE DIRECTOR'S RESPONSE

In opposing the relief McFarland seeks, the Director distorts the factual record in a number of important respects. McFarland addresses below those inaccuracies that are most relevant to the questions before the Court.[1]

A. McFarland Cannot Be Blamed for the Constitutional Violations He Suffered at Trial.

Throughout the Response, the Director endeavors to shift responsibility for the failure to provide McFarland a fair trial from the State to McFarland. In doing so, the Director effectively argues that McFarland forfeited his constitutional right to counsel when he retained attorney John Benn to represent him. The Director's position is indefensible and should be rejected.

First, this Court has recognized that "the appropriate [*Cronic*] inquiry focuses on the adversarial process, not on the accused's relationship with his lawyer as such."[2] *United States v.*

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[1] In an attempt to portray McFarland as a callous killer undeserving of relief, the Response invokes inflammatory—and unproven—facts surrounding both the crime and the trial. For example, the Response states as fact that Carolyn Bartie, an eyewitness, identified McFarland as the killer because he allegedly "had made no attempt to hide his face during the robbery," Response at 5, but the record is replete with conflicting testimony. *See*, *e.g.*, ROA.1599-1601; ROA.1618 (testimony from prosecution witnesses inside the store stating that the perpetrator who shot Kwan wore a ski mask and was not identifiable). The Response also references as established fact an unrelated and unadjudicated offense that the prosecution presented during the sentencing phase. *See* Response at 11. Although there are many examples of the Director's distortion of the facts, this Reply focuses solely on the facts that are directly relevant to McFarland's Petition for a Writ of Certiorari (the "Petition").

[2] Although an accused's relationship with his lawyer, "as such," is not the focus of *Cronic*, it does have some relevance to the *Cronic* inquiry here, given the very unique circumstances at issue—*i.e.*, the trial court's insertion of a *second lawyer* into the case without the consent of the accused. The highly unusual manner in which the second lawyer, Melamed, was inserted into the case created a circumstance under which it was unreasonable to expect that the lawyer could form a meaningful lawyer-client relationship with the accused. *See Cronic*, 466 U.S. at 659-60. As set forth more fully herein and in the Petition, the record is clear that,

Cronic, 466 U.S. 648, 657 n.21 (1984). Thus, a court should "attach no weight to either [the accused's] expression of satisfaction with counsel's performance at the time of his trial, or to his later expression of dissatisfaction." *Id*. Although McFarland retained Benn and objected to the court inserting a court-appointed lawyer into his case, McFarland did not express satisfaction with Benn's representation during the trial or at any point thereafter.

Second, the Court has already recognized that the decision to retain a particular lawyer is an "often uninformed" one that should not "reduce or forfeit the defendant's entitlement to constitutional protection." *Cuyler v. Sullivan*, 446 U.S. 335, 344 (1980). McFarland, a lay person, cannot be charged with knowledge of Benn's incompetence to represent him adequately.[3]

Third, the Director's attempt to portray McFarland as meaningfully satisfied with Benn's representation—to the point he allegedly "insisted on sticking with Benn," Response Br. at 6—distorts the record. Of all the actors in the courtroom, McFarland was the person most blindsided by Benn's dereliction of his legal duties to McFarland. McFarland was confined in jail before trial and therefore had limited access both to his counsel and to information about what his retained counsel was—or, in this case, was not—doing to prepare.

A few months after the case began, the trial court concluded that Benn was not competent to handle the trial and was neglecting the matter. *See* ROA.4265-66. Instead of holding an *ex parte* hearing with McFarland in attendance and issuing a show cause order to Benn regarding his competency to handle the matter, the trial judge secretly undertook to insert a lawyer (Melamed)—

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given those circumstances, McFarland did not trust Melamed and thus there was no meaningful attorney-client relationship between them.

[3] The record reflects that McFarland was also indigent at the time of trial. ROA.549; accordingly, there is no reason to expect—despite the Director's contrary suggestion—that he had any meaningful choice with respect to his representation.

who had never before tried a capital case—into the case as second chair. ROA.4256; ROA.5297. McFarland first learned about this "appointment" when Melamed, unannounced, visited McFarland in a courtroom holding cell and implored him to sign a legal form requesting his own appointment. ROA.2136. Melamed spoke to McFarland outside the presence of McFarland's retained counsel, *id*., sowing the seeds of distrust between McFarland and Melamed. Based on this unsolicited (and unethical) approach—and the fact that the trial judge neither informed McFarland of his concerns about Benn nor attempted to remove Benn from the case—McFarland believed he had little choice but to rely on his retained counsel.[4] ROA.4294.

The Director's suggestion that McFarland should have taken initiative to remove or replace Benn during the trial, Response Br. at 6-7, is also baseless. The record is clear that even Melamed—despite understanding before trial that Benn likely was not competent to handle it—was surprised to learn *after trial began* that Benn would shift most of the responsibility for the trial to Melamed and would regularly sleep during the course of the trial. ROA.4560; ROA.4332-40 (Melamed realized *during* the trial that he "was on [his] own"). Given the trial court's (and Melamed's) failure to advise McFarland about their concerns about Benn's competence, it is unreasonable to expect that McFarland, as a lay person, should have had the foresight—or the

[4] As McFarland has explained, Petition for a Writ of Certiorari at 7, the trial court had other alternatives available to it to protect McFarland from his uninformed decision to hire Benn. While an accused has a right to counsel of choice, courts nevertheless are permitted to refuse counsel of choice where necessary to enforce the ethics of the legal profession or to ensure a fair trial. *Wheat v. United States*, 486 U.S. 153, 159 (1988) ("The Sixth Amendment right to choose one's own counsel is circumscribed in several important respects."). *See also id*. at 160 ("Federal courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them."). The trial court's critical decision to allow Benn to remain in place—and effectively handcuff Melamed to him, *Ex parte McFarland*, 163 S.W.3d 743, 750 (Tex. Crim. App. 2005)—ultimately created a circumstance where it was unlikely that McFarland could receive effective representation. *Cronic*, 466 U.S. at 660-61.

financial wherewithal—to replace his own trial counsel. Moreover, the guilt phase of trial (*i.e.*, the first time that McFarland as a lay person could first meaningfully assess Benn's performance), lasted just two days. By then, it was too late for McFarland to retain competent counsel. By contrast, it would *not* have been too late for the trial judge to stop the trial and rectify the ongoing violation of McFarland's constitutional rights – which the trial judge was required to do under the circumstances here. *See Wheat*, 486 U.S. at 160. However, based on his apparent belief that the Constitution did not require that McFarland's counsel be awake at trial, the trial judge did not do so.[5]

B. Melamed Could Not Provide Effective Representation As a Subordinate to Benn.

The Director also attempts to portray Melamed as having actually prepared as if he was going to handle the whole trial. Response Br. at 8. While Melamed may have understood as a practical matter that Benn was unlikely to have the competence or inclination to do so, Melamed's testimony makes clear that the extraordinary constraints under which he operated would have thwarted any lawyer's ability to provide effective representation at trial.[6]

First, the trial court handcuffed Melamed from the beginning of his representation by instructing him not to do anything without McFarland's (and Benn's) consent. *Ex parte McFarland*, 163 S.W.3d at 750. This arrangement strikes right to the heart of the adversary process

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[5] Indeed, as the trial judge later declared in a press interview: "The Constitution says everyone's entitled to the lawyer of their choice, and Mr. Benn was their choice. The Constitution doesn't say the lawyer has to be awake." Henry Weinstein, *A Sleeping Lawyer and a Ticket to Death Row*, L.A. Times (July 15, 2000), https://www.latimes.com/archives/la-xpm-2000-jul-15-mn-53250-story.html.

[6] Melamed's testimony is also clear that he *had not prepared at all* for the punishment phase of trial, given his understanding that Benn would take responsibility for that phase—and by the time Melamed understood that Benn would not do so, it was too late to prepare in any meaningful way. ROA.4558.

in terms of Melamed's ability to represent McFarland effectively. *See Taylor v. Illinois*, 484 U.S. 400, 418 (1988) ("The adversary process could not function effectively if every tactical decision required client approval.").

Second, the record reflects that the constraints significantly impaired Melamed's representation. He did not, as the Director claims, "g[e]t to work immediately." Response Br. at 7. After Melamed's appointment in April, he took no action on the case for two months beyond reviewing the State's file, because Benn would not meet or communicate with him about the case. ROA.4265. After secretly meeting with the trial court judge about Benn's neglect of the case—outside McFarland's presence—Melamed undertook some limited preparation a few weeks before trial began, but continued at all times to take the constraints imposed on his autonomy seriously.

For example, Melamed prepared some pretrial motions—all of which were basic, boilerplate motions requiring little effort or capital trial experience, ROA.5302; ROA.5382-83—but even for those, Melamed waited to file until he could meet in person with Benn to seek approval.[7] Per Melamed, "[h]aving Benn review the motions, which he did in a cursory manner, was in keeping with my decision to not do anything to effect the case without seeking his prior approval." ROA.4558.

Third, Melamed's pre-trial "preparation" was plainly insufficient for the defense of a capital case. It consisted of reviewing the State's file, having an investigator spend a few hours—months after the crime occurred—looking for new eyewitnesses (none were found), and reviewing available ballistics evidence. ROA.4165-66; ROA.4558. The investigator was never directed to

[7] Melamed filed pretrial motions on June 23 and July 13, 1992—both of which were days on which pretrial settings had been scheduled and on which Benn was required to appear, thus providing the only opportunity for Melamed to try to obtain Benn's approval. ROA.5302; ROA.5383.

interview persons identified by any counsel, including witnesses known to have relevant information.[8] ROA.4557.

Ultimately, Melamed walked into trial without having coordinated any aspect of the case with Benn and believing that Benn would handle the bulk of the trial. Melamed had no idea what Benn's theory of the case was, how Benn would question witnesses, or what his own role would be at the trial—except that he was to remain subordinate to Benn. ROA.4560. Melamed's cursory preparation was undertaken as a backup emergency plan—a "Plan B"—which would turn out to be the putative representation McFarland received at his capital trial. Moreover, because Melamed believed Benn had taken responsibility for preparing a mitigation case, this apparent Plan B included no such preparation. *Id*. It is impossible to reconcile the types of circumstances that are conducive to effective legal representation with those that, as here, caused an accused's putative lawyer to declare under oath that, "if someone appointed me God to say this person should have another lawyer, I would have done it." ROA.4307.

II. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE A CONFLICT OF AUTHORITY IN THE CIRCUIT COURTS ABOUT WHETHER *CRONIC* CLEARLY ESTABLISHES THAT A COURT MUST DECIDE WHETHER THE CIRCUMSTANCES OF THE REPRESENTATION MADE EFFECTIVE REPRESENTATION UNLIKELY.

A. A Conflict of Authority in the Circuit Courts Exists.

The Director argues that there is no conflict of authority over *Cronic's* application. In doing so, the Director purports to distinguish the Sixth Circuit decision in *Hunt v. Mitchell*, 261 F.3d 575 (6th Cir. 2001), on the facts. Response Br. at 18. But the conflict between the circuits

[8] Melamed's failure to conduct a meaningful investigation was not due to any limitation on investigative services available to him. To the contrary, as Melamed later testified, "Judge Shaver [the trial court judge] made it clear that we would have some additional funds available." ROA.4277.

relates specifically to an issue of *law*: whether it is contrary to or an unreasonable application of *Cronic* for a state court adjudicating a *Cronic* claim to look only to the physical presence and consciousness of counsel at trial, and to disregard the circumstances surrounding the representation. *See* Petition for a Writ of Certiorari at 18.

Because he is otherwise unable to challenge *Hunt's* application here, the Director invokes the timing of the decision in *Hunt* to suggest that there is no real conflict here. Response Br. at 17. *See also id*. at 19–20 ("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."). As an initial matter, there is no question that *Hunt* remains good law. But the Director's position is flawed for a more fundamental reason: *Cronic* claims premised on the circumstances of representation are rare, not common. It is not surprising, then, that the Director fails to offer any authority for the proposition that the lower courts "are not confused about how *Cronic* should be applied" in circumstances like those before this Court. Response Br. at 19-20. Indeed, one need only review the Fifth Circuit's decision below, which serves as a prime example of this very type of "confusion"—*i.e*., by deeming the awake and active presence of a lawyer in the courtroom to be a sufficient legal basis for a state court to dispense of *Cronic* allegations. *Cf. Cronic*, 466 U.S. at 659–60 ("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.").

Finally, the Director suggests that the Fifth Circuit would have arrived at the same decision as *Hunt* if confronted with the same facts. Response Br. at 20. But the Fifth Circuit did not decide

the merits of McFarland's *Cronic* allegations. Instead, it found that the state court decision was not contrary to and did not involve an unreasonable application of *Cronic*. In this regard, the same premise that the Texas state court used to dispose of McFarland's *Cronic* allegations—*i.e.*, that the presence of an "awake, active, and zealous" lawyer precludes relief on any *Cronic* allegations—also would have sufficed to dispose of the allegations presented in *Hunt*. *See Ex parte McFarland*, 163 S.W.3d at 753 n.22 (no *Cronic* violation where one lawyer was "awake, active, and zealous"); *McFarland v. Lumpkin*, 26 F.4th 314, 320 (5th Cir. 2022) ("We are aware of no case where a sleeping co-counsel alone triggers *Cronic's* presumption of prejudice."). It follows, then, that if presented with the facts of *Hunt* (in which counsel was present and awake, but was hastily appointed shortly before trial, *Hunt*, 261 F.3d at 584), the Fifth Circuit would have deemed the above-referenced principle—as it did in McFarland's case—to be "not contrary to or an unreasonable application of clearly established Supreme Court precedent." *Id*. The Fifth Circuit would thus no doubt have deemed the *Hunt* applicant's *Cronic* claim barred under Section 2254(d), just as it did in McFarland's case. Because the outcome of *Hunt* would almost certainly have been different had that case been presented to the Fifth Circuit, the conflict among circuits is real and substantial.

B. McFarland's *Cronic* Allegations Establish a Violation of His Sixth Amendment Right to Counsel.

The Director further argues that McFarland's underlying *Cronic* allegations are "meritless." Response Br. at 21–24. However, McFarland has not asked this Court to decide the merits of his *Cronic* claim—primarily because the Fifth Circuit did not address the merits, but instead ruled that the claim was barred under 28 U.S.C. § 2254(d) ("Section 2254(d)"). Thus, the question presented to this Court is whether clearly established law requires an inquiry into the surrounding circumstances of representation. *See* Petition for a Writ of Certiorari at QUESTIONS

PRESENTED. Nevertheless, McFarland's *Cronic* allegations establish a Sixth Amendment violation, as set forth below.[9]

First, although it ultimately affirmed the district court's judgment denying McFarland's *Cronic* allegations based on Section 2254(d), the Fifth Circuit below granted a certificate of appealability under 28 U.S.C. § 2243 to appeal that judgment. Thus, it found McFarland had "made a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), *and* that it was at least debatable whether the district court's procedural disposition applying preclusion pursuant to Section 2254(d) was correct. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000) ("When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling."). Accordingly, the allegations are substantial.

Second, the Director argues that the Fifth Circuit did not adopt a "per se" rule that *Cronic* is inapplicable whenever an accused's lawyer is merely awake and present in the courtroom, but instead found *Cronic* inapplicable "because, at every stage of [the] trial," McFarland "enjoyed effective assistance by Melamed." Response Br. at 22. However, the language the Director quotes relates to the adjudication of a *Strickland* claim, not a *Cronic* claim.[10] Indeed, where, as here, *Cronic* is applicable, *Strickland* will not apply, because prejudice to the accused is presumed. *See, e.g., Darden v. United States*, 708 F.3d 1225, 1228 (11th Cir. 2013) ("The same day the Court

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9 *See also* Brief of Appellant at 31-36.

10 Although McFarland has not sought further review of the Fifth Circuit's disposition of his *Strickland* allegations in this Court, the totality of McFarland's representation, during which his lead counsel persistently and noticeably slept during the trial, was far outside the bounds of effective representation.

adopted the *Strickland* framework, it also made clear in *United States v. Cronic* that *Strickland* doesn't apply where the accused is denied counsel at a critical stage of trial or 'counsel entirely fails to subject the prosecution's case to meaningful adversarial testing.'"); *Hooks v. Workman*, 689 F.3d 1148, 1185 (10th Cir. 2012) ("The Court in *Cronic* set forth 'three situations when *Strickland* does not apply' such that a court may 'presume prejudice without inquiring into counsel's performance.'").

Relevant to *Cronic*, the Fifth Circuit held that the state court decision disposing of the *Cronic* claim was "not contrary to or an unreasonable application of clearly established Supreme Court precedent." *McFarland*, 26 F.4th at 320. The state court decision, in turn, held that a *Cronic* violation could not legally be shown because, as the federal district court characterized it, "Melamed's active presence in the courtroom removes this case from the strict confines of *Cronic* jurisprudence." ROA.480. This principle is incompatible with *Cronic*, which makes clear that a Sixth Amendment violation occurs where the circumstances under which a lawyer represents the accused render it unlikely that any competent lawyer could be expected to afford effective representation. *See Cronic*, 466 U.S. at 659–60. The Fifth Circuit's published decision, in turn, holding that this principle relating to "active presence" is not contrary to *Cronic* conflicts with the Sixth Circuit, is plainly wrong, and merits review and correction by this Court to ensure uniformity within the lower courts.[11]

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[11] The Director's attempt to invoke 28 U.S.C. § 2254(e)(1) is misplaced. Response Br. at 24. First, the Fifth Circuit affirmed the denial of McFarland's *Cronic* allegations on legal grounds, not factual grounds. Whether or not the state court decision was contrary to federal law is a question of law. *See Williams v. Taylor*, 529 U.S. 362, 405 (2000) ("[A] state-court decision is contrary to this Court's precedent if the state court arrives at a conclusion opposite to that reached by this Court on a question of law."). Second, Section 2254(e)(1) has no legal relevance unless and until plenary review of the merits is before the federal court. The lower courts disposed of these allegations by applying Section 2254(d) preclusion, and therefore did not consider the merits as such.

III. THE COURT SHOULD GRANT CERTIORARI AND REVERSE THE FIFTH CIRCUIT'S INCORRECT APPLICATION TO MCFARLAND'S LINEUP CLAIM OF THIS COURT'S CLEARLY ESTABLISHED SIXTH AMENDMENT PRINCIPLES

A. McFarland's Sixth Amendment Lineup Allegations are Properly Before this Court.

The Director argues that this case is a "poor vehicle" for exploring McFarland's Sixth Amendment lineup allegations. Response Br. at 25–28. In doing so, the Director largely conflates so-called "vehicle" problems with substantive arguments. There are no impediments to this Court's answering whether the Fifth Circuit has continued to impose a requirement regarding prosecutorial awareness in deciding whether adversarial proceedings have begun. This issue is squarely before the Court.

The Director first argues the Fifth Circuit did not ignore clearly established law because this Court's decision in *Rothgery v. Gillespie County*, 554 U.S. 191 (2008) was not yet available at the time the state court issued its decision. Response Br. at 25–26. Such an argument is baseless, as *Rothgery* simply applied already-existing clearly established law at the time it was decided – *i.e.*, as set forth in *Brewer v. Williams*, 430 U.S. 387 (1977), and *Michigan v. Jackson*, 475 U.S. 625 (1986).[12] Response Br. at 26.

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[12] The Director further argues that McFarland did not argue in his state habeas application that the CCA had misapplied *Brewer* or *Jackson*. McFarland presented the Sixth Amendment violation as a point of error in his direct appeal to the CCA, citing, *inter alia*, *Brewer*. ROA.2573–83. McFarland was not required to present the issue again in state habeas, or to "exhaust" in the state habeas proceeding an argument that the state court decision on direct appeal denying the claim was contrary to or an unreasonable application of clearly established federal law.

The Director also argues that McFarland did not argue in his federal habeas application that the CCA had misapplied *Brewer* or *Jackson*. However, there was no legal briefing at the district court level; rather only pleadings were filed. McFarland specifically requested oral argument because "there are significant questions relating to the constitutionality of his arrest, conviction, sentence and representation" and "oral argument would assist the Court in resolving the legal and factual issues presented by Petitioner and Respondents." ROA.402–

The Director argues, however, that *Rothgery* did "far more" than apply clearly established rules of law because it "applied them in a new context." Response Br. at 27. In so arguing, the Director deliberately blurs the important distinction between legal principles and the *application thereof*. But clearly established legal principles do not lose their status as such when the principles are applied to a different set of facts. Accordingly, the Director's suggestion that no clearly established federal law on this point existed before *Rothgery* is wrong.

The Director further argues that McFarland's reliance on a "general rule" is misplaced, because "applying a general standard to a specific case can demand a substantial element of judgment." Response Br. at 27 (citing *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). According to the Director, "the more general the rule, the more leeway courts have in reaching outcomes in case-by-case determination[]," so "general rules" cannot be considered clearly established law. Response Br. at 27. However, despite the Director's purported characterization, the fact that adversarial proceedings are initiated *when an accusation is filed with a judicial officer that prompts judicial action* is demonstrably not a "general rule." To the contrary, it is a specific rule, one which *Rothgery* recognized leaves "no room" for a court to ignore accusations from actors that prompt judicial action, even in cases where the accusations do not involve prosecutors. *Rothgery*, 554 U.S. at 211. Chief Justice Roberts, joined by Justice Scalia, wrote a concurring opinion in *Rothgery*, stating they believed the *Rothgery* outcome was "controlled by" *Brewer* and *Jackson*.[13]

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04. The district court denied the request and subsequently summarily denied the claim on legal grounds. ROA.469.

[13] The Director further argues that, even if *Rothgery* applied clearly established Sixth Amendment law, Bartie's in-court identification of McFarland after the uncounseled lineup nevertheless would be admissible. Response Br. at 27–28. In addition to being incorrect on the merits, the Director's argument is beside the point, as the lower courts preempted the issue by holding that the state court decision was not contrary to or an unreasonable

B. McFarland's Lineup Allegations Establish a Sixth Amendment Violation.

The Director argues that McFarland's Sixth Amendment lineup allegations are "meritless." Response Br. at 3. These arguments are irrelevant here, as McFarland has not asked this Court to decide the merits of his Sixth Amendment lineup allegations. In any event, the Director is incorrect on the merits, as set forth below.[14]

As with McFarland's *Cronic* allegations, the Fifth Circuit granted a certificate of appealability under 28 U.S.C. § 2243 to appeal the district court's judgment denying McFarland's Sixth Amendment lineup allegations. Thus, it found that McFarland had "made a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), as to both the underlying Sixth Amendment allegations and the district court's procedural disposition applying preclusion pursuant to Section 2254(d), *Slack*, *supra*, at 484. Accordingly, the allegations are substantial.

The Director contends that the Fifth Circuit's decision is "fully consistent" with *Rothgery*. Response Br. at 30. Characterizing *Rothgery* as holding "that the right to counsel attaches at the time of the first 'formal judicial proceedings,'" Response Br. at 29, the Director argues the decision below was correct under *Rothgery* because McFarland 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." Response Br. at 30. *Rothgery*, however, rejected the State's argument that this type of "formal complaint"—*i.e.*, in Texas, one signed by a prosecutor—was a prerequisite to initiation of adversarial proceedings.

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application of clearly established Sixth Amendment law regarding when the right to counsel attached. Accordingly, while McFarland believes that Bartie's in-court identification in fact would be required to be excluded, under the facts of his case, reversal of his conviction would be required even if it remained admissible.

[14] *See also* Brief of Appellant at 57-60.

Moreover, the fact that the *Rothgery* Court recognized the Article 15.17 hearing as the point at which adversarial proceedings began *in that specific case*, does not change the fact that adversarial proceeding in McFarland's case began, at minimum, with judicial action taken on the filing of the January 2, 1992 complaint against him.[15] Rather, the Article 15.17 hearing was the point at which adversarial proceedings began in *Rothgery*, because that is where the accusation by law enforcement was made with the judicial officer, which in turn prompted judicial action and restrictions on *Rothgery's* liberty. Up to that point in *Rothgery*, no criminal accusations prompting judicial action had been made. McFarland's facts are different, but the same clearly established legal principle applies: "What counts is that the complaint filed with the magistrate accused Rothgery of committing a particular crime and prompted the judicial officer to take legal action in response." *Rothgery*, 554 U.S. at 199 n.9; *see also id*. at 207 ("[U]nder 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 . . . .") (internal citations omitted).[16] In McFarland's case, the accusation that prompted judicial action—*i.e*., the January 2, 1992 complaint—occurred before the Article 15.17 hearing.

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15 On January 2, 1992, Sergeant Bill Stephens filed a sworn complaint against McFarland, accusing McFarland of committing the crime, and commencing the criminal proceeding against McFarland. ROA.1996. He also sought an arrest warrant. ROA.1996. A Harris County judge issued the arrest warrant on the same day, accusing McFarland of committing the crime. ROA.1995. On January 3, 1992, McFarland was arrested and placed in a lineup without counsel, the rights to which he refused to waive. ROA.3131; ROA.3727; ROA.3129.

16 The Director's reliance on *United States v. Gouveia*, 467 U.S. 180 (1984) is also misplaced. Among other things, *Gouveia* concerned when counsel was required to be appointed, not when the right to counsel attached and thus is inapposite here. *See Rothgery,* 554 U.S. at 208-09 (rejecting relevance); 213–18 (Alito, J., concurring and noting distinction).

The Director attempts to obscure the issues by suggesting (incorrectly) that McFarland's Sixth Amendment claim is predicated solely on his *arrest*. Response Br. at 30. But, as previously noted, McFarland's Sixth Amendment right to counsel attached when the January 2, 1992 complaint was filed with a judicial officer accusing him "of committing a particular crime and prompt[ing] the judicial officer to take legal action in response." *Rothgery*, 554 U.S. at 199 n.9. It was not until the next day—January 3, 1992—that McFarland was arrested and placed in a lineup without counsel. ROA.3131; ROA.3727; ROA.3129.

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.

Dated: November 14, 2022

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