

No. \_\_\_\_\_

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In The  
**Supreme Court of the United States**

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MICHAEL D. GOODWIN,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

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**On Petition For A Writ Of Certiorari  
To The United States Court Of Appeals  
For The Fifth Circuit**

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**PETITION FOR A WRIT OF CERTIORARI**

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Date: December 27, 2019

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## **QUESTION PRESENTED**

Whether an attorney's presence as local counsel, for a criminal defendant's re-arrangement and change of plea, yet having no attorney-client relationship with the defendant and refusing to advocate for the defendant, violates the criminal defendant's Sixth Amendment right to counsel.

## **PARTIES TO THE PROCEEDING**

Michael David Goodwin, petitioner on review, was the appellant below.

The United States of America, respondent on review, was the appellee below.

## **STATEMENT OF RELATED CASES**

*USA v. Goodwin*, No. 2:12-CR-00037  
United States District Court for the  
Northern District of Texas  
Judgment entered December 13, 2012

*Goodwin v. USA*, No. 2:14-CV-00091  
United States District Court for the  
Northern District of Texas  
Judgment entered May 26, 2017

*USA v. Goodwin*, No. 17-10706  
United States Court of Appeals for the  
Fifth Circuit  
Judgment entered July 30, 2019

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**PETITION FOR A WRIT OF CERTIORARI**

Petitioner, Michael D. Goodwin petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit in this case.

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**OPINIONS BELOW**

The opinion of the United States Court of Appeals for the Fifth Circuit affirming the judgment of the United States District Court for the Northern District of Texas' denial of Mr. Goodwin's Amended 28 U.S.C. § 2255 Motion is an unpublished opinion.

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**JURISDICTION**

This Court has jurisdiction under 28 U.S.C. § 1254(1). The United States Court of Appeals for the Fifth Circuit entered its judgment on July 30, 2019.

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## **CONSTITUTIONAL AND STATUTORY PROVISIONS**

The question presented implicates the following provisions of the United States Constitution.

*AMEND. VI.:* In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and the district wherein the crime shall have been committed, which district shall have been properly ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have the Assistance of Counsel for his defense.

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## **STATEMENT OF THE CASE**

### **A. Introduction.**

Petitioner, Michael D. Goodwin pled guilty to Count Three of a Superseding Indictment on December 13, 2012. His attorney, Clark W. Holesinger failed to appear for re-arraignment on December 13, 2012. William E. Kelly, III appeared to “stand in” as local counsel. He did not inform the district court of the conflict between his client, Mrs. Goodwin, and Mr. Goodwin, that he had no attorney-client relationship with Mr. Goodwin, and that his legal representation and legal advice was confined to Mrs. Goodwin. He entered a plea agreement, factual resume, and plea supplement as Attorney for Defendant. The plea supplement was

filed under seal. On April 13, 2013, Mr. Goodwin was sentenced to fifty months in prison.

Mr. Goodwin now petitions this Court for a writ of certiorari to the Fifth Circuit Court of Appeals to vacate his conviction as it was obtained in violation of his Sixth Amendment right.

#### **B. Background Facts.**

*On August 15, 2012*, Petitioner, Michael D. Goodwin, was indicted in the Northern District of Texas. Indiana attorneys, Clark W. Holesinger (Holesinger) and co-counsel, David L. DeBoer (DeBoer) entered as counsel for Petitioner. Holesinger hired William E. Kelly, III (Kelly) as “local counsel.”

The Northern District of Texas prescribes local rules to govern the district court’s practice and procedure. Local Rule 57.10 requires local counsel where an attorney appearing in a case does not reside or maintain the attorney’s principal office in the district. Local counsel must be authorized to present and argue a party’s position at any hearing called by the presiding judge and must be able to perform on behalf of the party represented, any other duty required by the presiding judge or local criminal rules of the court.

*On September 12, 2012*, Petitioner, Mrs. Goodwin, and Annette Hastings were charged under a Superseding Indictment. ROA.1673-1696. The Superseding Indictment presents a complex case of Medicaid rules and practices, allegations against Goodwin

Orthodontics, the Petitioner, Mrs. Goodwin, Annette Hastings, Count One, Count Two, Counts Three through Seven, Counts Eight through Twelve, Forfeiture Allegations, and Substitute Assets. *Id.* Petitioner and Mrs. Goodwin maintained their innocence and directed the attorneys to take their case to jury trial. *Id.* Holesinger hired Kelly to represent Mrs. Goodwin.

*On November 8, 2012*, the district court held a Rule 44 [Garcia] evidentiary hearing. ROA.2281-2304. Holesinger and Kelly appeared with Petitioner and Mrs. Goodwin. *Id.* The district court explained the right to effective assistance of counsel and that when one lawyer represents more than one defendant in a case, the lawyer may have trouble representing both adequately and with fairness. ROA.2293, 16-24. “And if that happens, this denies your right to the effective assistance of counsel that you’re guaranteed by the Constitution, and it could have adverse consequences to one or both of you.” *Id.* Having obtained consent of the parties, the district court permitted the joint representation.

“At this time, I will approve the waivers of speedy trial and allow you to go ahead with the same counsel, but as time develops, if there’s any problem – and I’m talking to you too, Counsel – it’s your duty as an officer of this Court to inform the Court if a conflict occurs and there’s a problem in your representing to both of these people, and I expect you to do that.” ROA.2299, 8-14.

The district court granted a continuance for all defendants. Attorney Coats, counsel for Ms. Hastings, commented about the voluminous discovery. “There are right now nine disks. Each contains a great deal of material.” Disk 4 contains eighteen (18) bins. “There’s thousands of pages.” ROA.2303, 2-5.

*On November 16, 2012*, the government, by AUSA Sally Helmer, emailed a plea offer to Kelly, which placed Mrs. Goodwin adverse to Petitioner. ROA.1152, 11-12, 24-25. The plea supplement benefits Mrs. Goodwin if the government determines she provided “substantial assistance” in prosecuting Petitioner. *Id.* Because the plea supplement is to be filed under seal, Petitioner would not know about Mrs. Goodwin’s substantial assistance to the government. *Id.* Kelly did not tell Mrs. Goodwin about the plea offer. ROA.1150, 8-20. Instead, on November 19th, he mailed the superseding information, the plea agreement, and the plea supplement to Holesinger, who was in Indiana. ROA.1152, 24-25; 1153, 8-11; 1527-1537.

Holesinger received the documents on November 26th. *Id.* On November 28th, Holesinger told Petitioner a conflict had developed in the case and from that point forward he would represent only Petitioner and the only counsel for his wife would be Kelly. ROA.1404, 25; 1405, 1-6. Petitioner and Mrs. Goodwin returned to Texas, the first week of December 2012.

*On December 7, 2012*, Kelly called Mrs. Goodwin and Petitioner to his office. ROA.1157, 2-16; 1368, 22-25; 1409, 22-25. Kelly told Petitioner, “Mike, you’ve got

to plead guilty.” ROA.1368, 24-25. Mrs. Goodwin refused and told Petitioner, “You cannot plead guilty. We’re not guilty. I have every evidence to prove that we’re innocent and I don’t want you to do that.” ROA.1369, 1-11. Petitioner asked Kelly what he should do. ROA.1157, 2-16; 1409, 22-25. Kelly told Petitioner he was not his attorney and refused to give him advice. *Id.* Kelly then called Holesinger, who was in Indiana, and handed the telephone to Petitioner. ROA.1157, 17-18. Petitioner and Mrs. Goodwin refused to plead guilty. They had no contact with Kelly after leaving Kelly’s office on December 7, 2012.

*December 13, 2012*, was set as a PreTrial Hearing. ROA.1753-1755. The district court ordered all attorneys and defendants shall be present, on Thursday, December 13, 2012, at 9:30 a.m. and “If all parties are ready for trial and/or a plea agreement has been reached, and no motions or other matters need to be addressed, counsel shall advise the Court *in advance by way of letter* and seek permission to be excused from the pretrial conference.” *Id.* Holesinger had confirmed this PreTrial Hearing in a letter to Petitioner, dated November 26, 2012. ROA.1471.

Petitioner and Mrs. Goodwin, appeared in the district court on December 13, 2012, at 9:30 a.m. for what they believed was the PreTrial Hearing. Holesinger failed to appear. David L. DeBoer failed to appear.

Kelly appeared, alone. He did not inform the district court of the conflict between Mrs. Goodwin and Petitioner, and that he had no attorney-client

relationship with Petitioner, and that his legal representation and legal advice was confined to Mrs. Goodwin. ROA.783-813.

The district court called for re-arraignment and then told Petitioner to listen to the reading of the charge against him. The Superseding Indictment the government read into the record on December 13, 2012 for re-arraignment was substantially different from the Superseding Indictment issued on September 12, 2012.

For re-arraignment, the government, by AUSA Christy Drake, began with “Defendant pleading to Count Three of the Superseding Indictment.” Although not reported on the re-arraignment transcript, the district court took pause for Count Two and questioned the government regarding Count Two. The government, after having searched through several documents, stated, “I’ll omit Count Two and Proceed to Count Three.” The government did not explain this omission. Kelly did not explain the omission. The government then proceeded to Counts Three through Seven. Immediately after reading Count Three, the district court began the plea colloquy.

*Kelly submitted a plea agreement on December 13, 2012.* The plea agreement begins with “Michael David Goodwin, defendant, Clark Holesinger, the defendant’s attorney, and the United States of America (the government) agree as follows.” ROA.2347. The plea agreement concludes with, “Entirety of agreement: This document is a complete statement of the parties’

agreement and may not be modified unless the modification is in writing and signed by all parties.” ROA.2351. Sally Helmer, Special Assistant United States Attorney, signed the plea agreement. ROA.2353. Clark Holesinger did not sign the plea agreement. *Id.* Kelly lined through “CLARK HOLESINGER” as “Attorney for Defendant.” *Id.* Kelly printed and signed William E. Kelly, III, as Attorney for Defendant. The plea agreement is dated December 13, 2012. *Id.*

*Kelly submitted a Factual Resume on December 13, 2012.* The top of the Factual Resume shows pages 2 through 8 were faxed to Kelly from U S Attorney Office FTW 817 252 5455 on 12/12/2012 16:17. ROA.1756. This information is identified on page 6, of the plea agreement under Sally A. Helmer’s signature. Kelly lined through “CLARK HOLESINGER,” as “Attorney for Defendant.” ROA.2352. Kelly printed and signed William E. Kelly, III, Attorney for Defendant, as having witnessed Petitioner’s signature to the document. The factual resume is dated December 12, 2012. ROA.1762.

*Kelly submitted a Plea Agreement Supplement on December 13, 2012.* The plea supplement benefits Petitioner if the government determines he provided “substantial assistance” in prosecuting Mrs. Goodwin. ROA.2353-2354. Because the plea supplement is to be filed under seal, Mrs. Goodwin would not know about Petitioner’s cooperation with the government. *Id.* Accordingly, if Petitioner cooperates against Mrs. Goodwin, she would not know. Sally Helmer, Special Assistant United States Attorney, signed the plea supplement. ROA.2354. Clark Holesinger did not sign

the plea supplement. *Id.* Kelly lined through “CLARK HOLESINGER” as “Attorney for Defendant.” *Id.* Kelly printed and signed William E. Kelly, III, as Attorney for Defendant. The plea supplement is dated December 13, 2012. *Id.*

Kelly spoke only three times throughout re-arraignment and is identified as Mr. Clark. ROA.783-813.

Petitioner intended to withdraw his guilty plea at sentencing on April 9, 2013. Kelly overheard Petitioner rehearsing with Mrs. Goodwin as they were waiting outside the courtroom. ROA.1418, 7-15. He immediately alerted Holesinger and DeBoer. Holesinger advised Petitioner that the judge hated white-collar crime and if he moved to withdraw his plea the judge would sentence him and Mrs. Goodwin to twenty-years in prison. *Id.* Petitioner was sentenced to fifty (50) months in prison. Petitioner asked Holesinger to appeal the conviction. Holesinger refused, stating that he couldn’t because Petitioner just pled guilty. ROA.1418, 8-10.

**C. Petitioner claims Ineffective Assistance of Counsel and Denial of Assistance of Counsel under 28 U.S.C. § 2255.**

*On April 9, 2014*, Petitioner filed a 28 U.S.C. § 2255 Motion directed against Holesinger. ROA.11-37. Petitioner proceeded pro se up to August of 2015. On Jan. 23, 2016, Petitioner, by counsel, moved to amend Petitioner’s 28 U.S.C. § 2255 motion. ROA.366-370.

*On July 6, 2016 and July 7, 2016*, the district court held an evidentiary hearing. Holesinger was produced by writ as he was serving a ten-year federal prison sentence for criminal offenses relating to client victims. ROA.855-870. When questioned about the Texas Medicaid program, in relation to the case, Holesinger testified, “Ma’am after my trouble started, I forgot about everything in my practice but myself. I don’t recall.” ROA.1217, 18-120. Holesinger testified that he did not know why he was not in court on December 13, 2012, and that he did not file a motion to continue the hearing. ROA.1262, 17-18; 1201, 2-3.

Kelly testified that on December 13, 2012, “I was standing in for him.” ROA.1160, 14-22. Kelly testified to “stand in” means to go to the arraignment with Mr. Goodwin and the plea and to make any court appearances requiring an attorney to be with Petitioner and the reason for that was so that Mr. Holesinger would not have to travel from Indiana every time there was a court appearance. ROA.1108, 15-21.

“So I was there to stand beside Dr. Goodwin while he was entering his plea. I was not involved in the decision-making, even though Dr. Goodwin several times asked me, what should I do, and I said, I can’t tell you what to do.” ROA.1167, 22-25.

Kelly testified “But I did not investigate Dr. Goodwin’s involvement because that was not my job. ROA.1136, 22-24. My job as his attorney with Mr. Holesinger was to stand in for Mr. Holesinger as local counsel at particular hearings that I stood in for him.”

*Id.* When questioned whether he challenged any of the allegations relating to the twelve counts, Kelly testified, “ . . . not on behalf of Dr. Goodwin because that was not my role, it was Mr. Holesinger’s role.” ROA.1138, 3-4. When questioned whether he developed any viable defenses for Petitioner, Kelly testified, “No, ma’am, because that was Mr. Holesinger’s job, not mine. I was his stand in at the hearings.” ROA.1147, 14-16. “And it was not my job as the local counsel to advise Dr. Goodwin in terms of what he should do in terms of the merits of the case.” ROA.1158, 3-5. When questioned about knowing Petitioner’s case, coming up with viable defenses, and arguing on behalf of Petitioner, Kelly testified “I never – what you just described, I never had those responsibilities in regards to Dr. Goodwin in this case. Never.” Kelly testified, “I was never involved. ROA.1159, 4-21. There was never any agreement for me to be involved as far as representing Dr. Goodwin on the merits of the case.” *Id.* at 21-23. When questioned about the plea agreement and the factual resume, Kelly affirmed he had nothing to do with them or how they came about. ROA.1166, 17-18.

When questioned if he knew where Holesinger was on December 13, 2012, Kelly affirmed he did not know. ROA.1160, 22-24. When questioned about crossing out Clark Holesinger’s name on the plea agreement and the factual resume, Kelly testified, “Probably, that may have been done in court,” and “Because I think Mr. Holesinger was not there and I was his attorney at the guilty plea so that if any decisions need to be made in terms of, as an example, he says, well, I don’t want to

go through this, or I have a question about something, then I would be able to answer that for him.” ROA.1166, 15-20. When questioned about placing his name on the plea agreement, Kelly testified, “Because I was his attorney for those specific purposes.” ROA.1168, 3-6.

On cross examination by the government, Kelly testified that he firmly absolutely, unequivocally, adamantly believed he protected Petitioner’s constitutional rights at the hearing and that if Petitioner had turned to him and said he was not sure he wanted to do this or had a question he would have called time out and said okay, Your Honor, I need to visit with my client. ROA.1180-1181, 17-25, ROA.1181, 2-7. However, a couple of questions later, Kelly testified that if Petitioner said or indicated to him that he had a reservation then he would have called a time out and asked Judge Robinson to continue the case until he could talk with his lawyer Mr. Holesinger. ROA.1181, 19-22.

In addition to his sworn testimony, Kelly produced an affidavit to confirm that no attorney-client relationship existed between him and Petitioner:

“I was counsel for Patricia Goodwin and did not give legal advice to Dr. Goodwin. I never said the things Dr. Goodwin attributed to me in his affidavit. There were times when Dr. Goodwin would ask my opinion regarding the pros and cons of pleading guilty or going to trial. I would give my opinion, with the caveat that he should consult with his counsel, Mr. Holesinger, for legal advice and that what I

was giving was just that, an opinion, as no attorney-client relationship existed between us. I never gave Dr. Goodwin legal advice on whether or not to plead guilty, proceed to trial, or any other matter, as that was not part and parcel of my duties and responsibilities in this case as local counsel. My legal representation and legal advice was confined to Patricia Goodwin, Dr. Goodwin's wife." ROA.234-235.

When questioned why didn't he clarify to the court that he was not the attorney and then let the Court ask him [Petitioner] if he voluntarily and intelligently waived counsel, Kelly testified, "That never came up." ROA.1173, 5-11. When asked, "Now, when Judge Marylou Robinson . . . indicated to Mr. Goodwin, "Now you can go sit down with your lawyer and talk about it." ROA.1170, 21-25. At any point did you stand up and say, Your Honor, I'd like to make a correction. *Id.* I'm just a stand in. I had no connection with the case. I'm just a stand in for Clark Holesinger. I'm not his attorney. Did you tell her that?" Kelly testified, "That – no, that had already been covered on, I think November the 8th. ROA.1171, 1-5. When questioned about a conflict between Petitioner and Mrs. Goodwin, Kelly testified, "If there was a conflict of interest, in my opinion, or even the appearance of a conflict, then in this particular case I would have called Mr. Holesinger and said, look, I cannot stand in for you with Dr. Goodwin any more. Or talk to him." ROA.1110, 10-20. When questioned about the plea documents he received from the government that created the conflict between

Petitioner and Mrs. Goodwin, Kelly testified, “All I know is that I got my client dismissed.” ROA.1150, 1-20.

*On July 13, 2016*, the district court ordered Petitioner’s Amended 28 U.S.C. § 2255 motion as the controlling pleading. ROA.755-756. Petitioner’s primary claim is that he was wholly without assistance of counsel on December 13, 2012, when he was re-arraigned and entered a plea of guilty, both critical stages of his criminal proceedings. ROA.371-396.

*On March 31, 2017*, the district court issued a report and recommendation to deny Petitioner’s Amended 28 U.S.C. § 2255 motion. As to Petitioner’s primary claim, the district court concluded Petitioner failed to meet his burden that he was completely denied counsel at re-arrangement and Kelly’s presence was sufficient to protect Petitioner’s constitutional rights at the hearing.

The district court confirmed both parties agree re-arrangement is a critical stage. However, the court rejected Petitioner’s argument that he was without counsel for re-arrangement, based on the following: 1) Petitioner’s argument fails to account for his statement at the Rule 44 hearing that Holesinger and Kelly jointly represented him and Mrs. Goodwin; 2) Kelly was with Petitioner for re-arrangement; 3) numerous times throughout the criminal case Petitioner acknowledged Kelly as one of his attorneys, including at the re-arrangement hearing; and 4) Kelly testified that he advised Petitioner of the consequences of

pleading guilty but refrained from advising of the propriety of pleading guilty versus going to trial.

The district court rejected Petitioner's argument that the *Strickland* analysis does not apply to his claim due to Holesinger's absence at re-arrangement. Citing to *United States v. Cronic*, 466 U.S. 659, 104 S.Ct. 2039, 80 L.Ed.2d (1984), the district court asserts that *Cronic* “ . . . deals with the constructive denial of counsel not the absence of counsel.”

The court contends that Petitioner was never totally without counsel because he acknowledged to the Judge that Kelly was his attorney at the re-arrangement and that although Kelly's affidavit limits his representation of Petitioner, Kelly testified and explained the affidavit and his representation as “local counsel” during the evidentiary hearing.

The court explains under footnote 4, “Mr. Kelly's affidavit does not clarify what “responsibilities as legal counsel” he had to Goodwin, but it does confirm the attorney-client relationship. As noted above, those responsibilities did not include advice on whether to accept a guilty plea or proceed to trial, as Mr. Kelly determined such advice would create a conflict of interest for Kelly in advising co-defendant, Patricia Goodwin, regarding her case, and would also create a conflict of interest in representing Mr. Goodwin as local counsel. Mr. Kelly explained during testimony that should the case have gone to trial, he would have represented only Patricia Goodwin and withdrawn from petitioner's case entirely.”

As such, the court accepted Kelly's testimony that as "local counsel" he was present at the re-arrangement to protect Petitioner's constitutional rights and advised Petitioner if he had questions regarding information contained in the plea documents Kelly reviewed with Petitioner. The court also accepted Kelly's testimony that if Petitioner had questions regarding whether to accept the plea he would have contacted Mr. Holesinger or asked the judge to allow Petitioner to contact him, but Petitioner never raised questions and Petitioner understood he could call Holesinger if he had a question.

Petitioner filed numerous objections to the report and recommendation, which Petitioner supported with facts and excerpts of Kelly's sworn testimony. ROA.1027-1068.

*On May 26, 2017, the district court overruled Petitioner's objections, adopted the report and recommendation, and denied the Amended 28 U.S.C. § 2255 Motion. The court entered judgment accordingly, and denied a certificate of appealability. Significant to this case is that the district court's order confirms that Holesinger was not present for Petitioner's re-arrangement.*

#### **D. The Fifth Circuit Court of Appeals.**

*On September 5, 2017, Petitioner petitioned for a Certificate of Appealability. A Fifth Circuit Justice concluded Petitioner made a substantial showing of denial of a constitutional right and that reasonable*

jurists could debate the district court’s rejection of Petitioner’s claim that he was effectively without counsel during his re-arrainment proceeding. Accordingly, the Justice granted Petitioner a Certificate of Appealability (“COA”) on Petitioner’s claim that counsel rendered ineffective assistance by failing to appear at Petitioner’s re-arrainment proceeding. Petitioner’s Fifth Circuit briefing sets forth the facts and legal arguments specific to this issue.

*On July 30, 2019, the Court of Appeals, per curiam, affirmed the district court’s judgment in an unpublished opinion. A closer look at the opinion reveals that the Court changed the COA issue to “. . . whether lead counsel, Clark Holesinger, rendered ineffective assistance by failing to appear at Goodwin’s re-arrainment, sending local counsel, William Kelly, in his stead.” The Court added “lead counsel” and “sending local counsel, William Kelly, in his stead,” which significantly changed the issue for briefing under the Certificate of Appealability.*

Next, citing to *Craker v. McCotter*, 805 F.2d 538 (5th Cir. 1986). the Court of Appeals asserts that “The constructive denial of counsel occurs, however, in only a very narrow spectrum of cases where circumstances leading to counsel’s ineffectiveness are so egregious that the defendant was in effect denied any meaningful assistance at all.”

Relying on the district court’s findings, the Court of Appeals concludes that Kelly provided “some meaningful assistance.” Specifically, that Kelly acted as local

counsel; that the district court credited Kelly's evidentiary hearing testimony explaining their attorney-client relationship; that Petitioner's sworn re-arrangement testimony acknowledged Kelly's representation and expressed satisfaction with it; and that Petitioner's testimony at the Garcia hearing requesting that Kelly and Holesinger jointly represent him and his wife.

The Court of Appeals states that Petitioner made no argument addressing these findings or demonstrating them to be clearly erroneous and that any such findings would be meritless because the district court's findings are corroborated by Kelly's attendance at Goodwin's arraignment; by Kelly's filing of joint pre-trial pleadings on Petitioner's behalf; by Mrs. Goodwin's evidentiary hearing testimony admitting that Kelly represented her and her husband; and that the credited evidentiary hearing and re-arrangement testimony shows that Petitioner reviewed the charges, the plea agreement, and the factual basis with Kelly prior to pleading guilty, and that Kelly was present to address any of Petitioner's questions or concerns, and that Petitioner raised none.

To this, the Court of Appeals concludes that because Petitioner failed to show the district court erred in declining to apply the *Cronic* presumption of prejudice, the *Strickland* analysis applies. Accordingly, Petitioner must show both deficient performance and

resulting prejudice. The Court of Appeals concluded that he could not.

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### **REASONS FOR GRANTING THE PETITION**

“That a person who happens to be a lawyer is present alongside the accused . . . is not enough to satisfy the constitutional command.” *Strickland v. Washington*, 466 U.S. 668, 685 (1984).

This Court should grant certiorari to resolve the question of whether an attorney’s presence as local counsel for re-arrraignment, yet having no attorney-client relationship with the defendant and refusing to advocate for the defendant, violates the criminal defendant’s Sixth Amendment right to counsel.

This Court has not squarely addressed the question presented in this case but the Court of Appeals holding conflicts with the Sixth Amendment to the United States Constitution and with established Supreme Court precedent, namely, *Powell v. Alabama*, 287 U.S. 45 (1932); *Gideon v. Wainright*, 372 U.S. 335 (1963); *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824 (1967); *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *United States v. Cronic*, 466 U.S. 648 (1984); and *United States v. Gonzalez-Lopez*, 126 S.Ct. 2557 (2006).

In addition, Petitioner’s case presents an excellent vehicle for resolving an important constitutional question which affects all criminal defendants, counsel, and

courts prescribing local rules governing practice and procedure.

This Court should grant this petition.

**I. The Court of Appeals held that Kelly provided “some meaningful assistance” to Petitioner, therefore the two-part *Strickland* test applied to Petitioner’s claim.**

**A. The Court of Appeals changed the nature of Petitioner’s claim.**

Petitioner’s argument for a certificate of appealability is that he was wholly without counsel on December 13, 2012, because his attorney, Clark Holesinger failed to appear for re-arrainment and change of plea, which are critical stages of his criminal proceedings at which he has a Sixth Amendment right to counsel. Petitioner’s claim invokes a fundamental right.

The Fifth Circuit granted Petitioner a certificate of appealability “as to Petitioner’s claim that counsel rendered ineffective assistance by failing to appear at Goodwin’s re-arrainment proceeding.” However, the court of appeals addressed the issue as “[w]hether lead counsel, Clark Holesinger, rendered ineffective assistance by failing to appear at Goodwin’s re-arrainment, sending local counsel, William E. Kelly in his stead.”

The Court of Appeals held that Kelly provided Petitioner “some meaningful assistance,” therefore the two-part *Strickland* test applied to the claim of

ineffectiveness. Hence, the Court of Appeals concluded that lead counsel Holesinger was not ineffective for sending Kelly, in his stead, because Kelly provided Petitioner “some meaningful assistance.”

Petitioner’s briefing before the Fifth Circuit argues that the mere physical presence of Kelly for re-arrainment does not meet the constitutional standard of the Sixth Amendment. Further, that his constitutional claim of denial of counsel is a different inquiry of whether counsel provided ineffective assistance. The former mandates that a violation of a criminal defendant’s Sixth Amendment right to counsel occurs and is complete upon deprivation of that right, whereas ineffective assistance of counsel occurs only if counsel’s mistakes caused harm to the defense. *United States v. Gonzalez-Lopez*, 126 S.Ct. 2557 (2006).

The evidentiary record presents no evidence that Holesinger sent Kelly in his stead. Rather, the evidentiary record shows that Kelly testified he did not know where Holesinger was on December 13, 2012, and Holesinger testified he did not know where he, himself, was on December 13, 2012.

Moreover, although the district court confirmed both sides agree re-arrainment is a critical stage and that attorney Holesinger was not present at re-arrainment, the Court of Appeals dispensed with any analysis of Holesinger’s absence at Petitioner’s re-arrainment to determine whether his Sixth Amendment right to counsel was violated. In effect, the Court

of Appeals attached absolutely no constitutional significance to Petitioner’s Sixth Amendment claim.

Rather, the Court of Appeals relied on the district court’s finding that Kelly acted as local counsel, to conclude he provided “some meaningful assistance” to Petitioner. The Court of Appeals then aligned “some meaningful assistance” with that of *Craker v. McCotter*, 805 F.2d 538, 542 (5th Cir. 1986), which circumstances may be distinguished from those of Petitioner. In addition, the Court of Appeals held that Petitioner’s “ineffective assistance claim” fails because he failed to brief any argument that he was prejudiced by Holesinger’s absence.

The Court of Appeals is mistaken. The Court of Appeals misconstrued Petitioner’s claim. In summary, Petitioner’s briefing argues that the Sixth Amendment guarantees the right to assistance of counsel at all critical stages of his prosecution. Petitioner’s briefing argues Petitioner’s primary constitutional claim is denial of assistance of counsel, meaning a complete deprivation of his fundamental right to counsel at re-arraignment and at change of plea. Petitioner’s briefing identifies the district court confirmed that both sides agree that re-arraignment is a critical stage of Petitioner’s criminal proceedings and that attorney Clark Holesinger was not present at the proceeding. Petitioner’s briefing cited to *United States v. Hillsman*, 480 F.3d 333, 335 (5th Cir. 2007), that where counsel for the accused is absent during a critical stage, there is a presumption of prejudice and reversal is automatic. Petitioner’s briefing argues the mere physical presence

of Kelly for re-arrainment proceeding does not meet the constitutional standard of a defendant's Sixth Amendment right to counsel. Petitioner's briefing identifies and argues that a denial of the right to counsel is a different inquiry from whether counsel provided ineffective assistance in that the former mandates that a violation of a criminal defendant's Sixth Amendment right to counsel occurs and is complete upon deprivation of the right, whereas ineffective assistance of counsel occurs where counsel's mistakes caused harm to the defense.

**B. The Court of Appeals misconceived the nature of Petitioner's claim.**

Petitioner's claim is that he was without counsel on December 13, 2012, for re-arrainment because his attorney, Clark Holesinger, failed to appear. Petitioner does not argue that Holesinger made a mistake for failing to appear at re-arrainment. Petitioner argues that he had no lawyer at re-arrainment.

A denial of the right to counsel is a different inquiry from whether counsel provided ineffective assistance. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 147 (2006).

The former mandates that a violation of a criminal defendant's Sixth Amendment right to counsel occurs and is complete upon the deprivation of that right, whereas ineffective assistance of counsel occurs only if counsel's mistakes caused harm to the defense. *Id.* In other words, "a criminal defendant has a constitutional

right to counsel and within that right there is a right to effective assistance of counsel. *Id.*

The Sixth Amendment guarantees the right and due process defines the contours of that right. *Id.*

This Court has uniformly found constitutional error without any showing of prejudice when the defendant's counsel was either totally absent, or prevented from assisting the accused during a critical stage of his criminal proceedings. *United States v. Cronic*, 466 U.S. 648, 659, n. 25 (1984) Prejudice is presumed where a defendant is actually or constructively denied the assistance of counsel at a critical stage of the criminal proceedings. *United States v. Cronic*, 466 U.S. 648, 659, n. 25 (1984). In these types of cases, the Supreme Court has dispensed with the *Strickland* prejudice inquiry. Rather, in cases claiming actual or constructive denial of counsel, the circumstances must be such that they are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified. *United States v. Cronic*, 466 U.S. 648, 658 (1984). Thus, only when surrounding circumstances justify a presumption of ineffectiveness can a Sixth Amendment claim be sufficient without inquiry into counsel's actual performance at trial." *Id.* at 662. In this case, the district court and the Court of Appeals selected circumstances to justify their holdings to deny Petitioner relief, however, scrutiny of the total evidentiary record reveals otherwise.

**C. *Craker v. McCotter* represents a claim of ineffectiveness regarding counsel's errors, which are analyzed under *Strickland***

The Court of Appeals cites to *Craker v. McCotter*, 805 F.2d 538, 542 (5th Cir. 1986) to align Kelly with having provided "some meaningful assistance" to Petitioner. Craker's claim of ineffective assistance of counsel relates to a guilty plea hearing. Craker was charged with forgery. *Id.* at 539. He met with Keith Woodley, an experienced criminal lawyer, who investigated his case and determined a conviction was probable. *Id.* Craker and Woodley discussed a seven-year plea offer and Craker decided to accept. *Id.* However, upon discovery of prior convictions, the State withdrew the original plea offer and instead offered a twenty-year sentence. *Id.* If Craker refused, the State promised to reindict Craker as a habitual offender and seek a mandatory life sentence. *Id.* at 540. According to Woodley, he advised Craker to accept the offer and Craker agreed. *Id.* Woodley had not yet been appointed to represent Craker in the case, however, he expected the court would appoint Woodley and the court intended to do so. *Id.* On the day of Craker's trial, Woodley could not be found. *Id.* The trial court appointed Woodley's partner, Jim Dudley, a civil lawyer with slight knowledge of the case. *Id.* After about ten minutes of conversation with Dudley, Craker pled guilty. *Id.* The state trial judge thoroughly explained Craker his rights and then accepted his plea. *Id.* Craker was sentenced to twenty-years imprisonment. *Id.*

Craker argued ineffective assistance of counsel at his guilty plea hearing. *Id.* The trial court granted relief. *Id.* The criminal court of appeals reversed. *Id.* Craker then sought habeas relief. *Id.* The court of appeals reversed and remanded for reconsideration under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct 2052, 2064, 80 L.Ed.2d 674 (1984), and as part of the inquiry the district court was to determine if Craker's plea was knowing and voluntary. *Id.* The district court determined Craker's plea had not been knowing and voluntary and that his attorney's performance prejudiced Craker. *Id.* To support its finding, the court cited to a more favorable plea Craker received in a later but related forgery prosecution. *Id.* at 541. Keith Woodley represented Craker in that later plea. *Id.* The district court held Craker was prejudiced in the case on appeal by receiving a twenty-year sentence rather than the fifteen-year sentence Woodley bargained for in Craker's later case. *Id.* The district court granted relief. The State appealed. *Id.*

The court of appeals held Craker's ineffective assistance of counsel claim to the test of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). Accordingly, to establish ineffectiveness, Craker must show his attorney's performance was deficient and that the deficient performance prejudiced his case.

The court did not address the counsel's performance because the court agreed Craker failed to establish prejudice within the meaning of Strickland.

The court of appeals relied on the Supreme Court's holding in the case of *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985), which established the showing required to establish prejudice in the context of a guilty plea. The Supreme Court held the *Strickland* test applied to challenges of guilty pleas based on ineffective assistance of counsel. "Prejudice" focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process. "In other words, in order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that but for counsel errors, he would not have pleaded guilty and would have insisted on going to trial."

Applying this test, the court of appeals observed that Craker failed to allege in his petition for relief that had counsel correctly informed him, he would not have pleaded guilty and insisted on going to trial. Because petitioner failed to allege the kind of prejudice necessary under *Strickland*, the court of appeals affirmed the district court's denial of relief.

In the alternative, Craker argued the court should presume prejudice under *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984).

A constructive denial of counsel occurs, however in "only a very narrow spectrum of cases where the circumstances leading to counsel's ineffectiveness are so egregious that the defendant was in effect denied any meaningful assistance at all." *Martin v. McCotter*, 796

F.2d 813, 820 (5th Cir. 1986) (quoting *Chadwick v. Green*, 740 F.2d 897, 901 (11th Cir. 1984)).

The Court of Appeals concluded Craker's case does not fall within the narrow spectrum of *Cronic*. The court determined that although defense counsel was appointed only minutes before the defendant pleaded guilty, counsel's law partner had investigated the case and counsel explained the plea agreement to the defendant and discussed the options with him, including obtaining a continuance to wait for Woodley. *Id.* "Dudley's efforts in conjunction with those of Woodley provided Craker with some meaningful assistance.

**D. Petitioner presents a constitutional claim invoking a criminal defendant's Sixth Amendment right to counsel.**

Petitioner is not arguing that he had a bad lawyer for re-arraignment and guilty plea. He is arguing that he had none at all. In contrast, Craker claimed ineffectiveness regarding counsel's negotiation of a plea agreement, that is counsel's errors. Kelly was not appointed to represent Petitioner on December 13, 2012, for re-arraignment and had no attorney-client relationship with Petitioner. In contrast, the state court appointed Dudley to Craker for the plea hearing. The court held Dudley's efforts in conjunction with those of Woodley provided Craker with "some meaningful assistance." In contrast, Kelly refused Petitioner's request for assistance,

“So I was there to stand beside Dr. Goodwin while he was entering his plea. I was not involved in the decision-making, even though Dr. Goodwin several times asked me, what should I do, and I said, I can’t tell you what to do.” ROA. 1167, 22-25.

**II. Petitioner’s case is worthy of review and presents an excellent vehicle for resolution of the constitutional question because it bears on all defendants, all counsel, and all courts prescribing local rules governing practice and procedure which require local counsel.**

“The Sixth Amendment guarantees that in all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.” It is well established that the accused is entitled to the assistance of counsel not only at the trial itself, but at all “critical stages” of his prosecution, to include all pretrial stages, sentencing, and the appeal process, as they are part of the whole criminal proceeding. *Lafler v. Cooper*, 132 S.Ct. 1376, 1380 (2012). In determining claims of ineffective assistance of counsel, the Courts presume that a lawyer is competent to provide effective assistance. *Strickland v. Washington*, 466 U.S. 668, 669, 104 S.Ct. 2052, 2063-2064, 80 L.Ed.2d 674 (1984). “The burden to demonstrate ineffectiveness rests on the claimant, however, there are circumstances so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified.” *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039,

80 L.Ed.2d 657 (1984). In cases where counsel was either totally absent or prevented from assisting the accused during a critical stage of criminal proceedings, Courts have uniformly found constitutional error without any showing of prejudice. *Id.* at 659, n. 25. To justify a particular stage as ‘critical’ this Court looks to whether the substantial rights of a defendant may be affected during that type of proceeding.

Petitioner’s re-arraignment proceeding affected his substantial rights. Petitioner was facing up to ten (10) years in prison. ROA.2324. Petitioner’s case was complex and involved complex issues. ROA.2308-2335. The superseding indictment read by the government at the re-arraignment proceeding on December 13, 2012, consisted of twenty-four (24) pages of complex Medicaid rules, practices, legal representations and factual representations. ROA.2308-2323. Furthermore, the re-arraignment transcript presents the superseding indictment as a revised version of the superseding indictment that was returned on September 12, 2012. ROA.1673-1696, 2308-2323. Count One was not identified. ROA.2316. Count Two was omitted. ROA.2322. Counts Eight through Twelve and the forfeiture allegation were omitted. ROA.2323. The re-arraignment transcript indicates the government did not provide an explanation for the omitted material and did not provide Petitioner a copy of the revised superseding indictment. ROA.2305.2335.

Petitioner’s attorneys, Clark W. Holesinger and David L. DeBoer failed to appear for re-arraignment

on December 13, 2012. In effect, they abandoned Petitioner.

Kelly was present for re-arrangement, however, he was incompetent to protect Petitioner's constitutional rights during the re-arrangement proceeding. ROA.1101-1185. Kelly had no attorney-client relationship with Petitioner; Kelly's legal representation and legal advice was confined to co-defendant, Mrs. Goodwin whose interests were in conflict with those of Petitioner; Kelly's sworn testimony is that he did not represent Petitioner on the merits of his case; that he was not responsible for knowing the case; and that he was not responsible for arguing on behalf of Petitioner.

More egregious is that Kelly did not inform the Court that he was not Petitioner's attorney, that no attorney-client relationship existed between Kelly and Petitioner, that he knew nothing about Petitioner's case and circumstances, that he could not advise Petitioner regarding the re-arrangement and plea, and that his representation was limited to Mrs. Goodwin. Kelly did not inform the Court of the conflict that arose between Petitioner and Mrs. Goodwin. Furthermore, when the Court advised Petitioner that Petitioner could sit down and go over it with his lawyer, Kelly, again, did not inform the Court that he was not Petitioner's lawyer.

On December 13, 2012, Petitioner had no guiding hand of counsel for re-arrangement.

This Court should intervene in this case to correct an egregious misapplication of *Strickland* to

Petitioner's constitutional claim and to resolve the constitutional question which bears on all criminal defendants, all counsel, and all courts prescribing local rules governing practice and procedure which require local counsel.

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### **CONCLUSION**

Petitioner respectfully pleads the United States Supreme Court grant his writ of certiorari and permit briefing on the issue.

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