No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

CHRISTOPHER ALEXANDER REILLY, PETITIONER

VS.

UNITED STATES OF AMERICA, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Stephen H. Gordon
Court Appointed Counsel
The Gordon Law Firm, P.C.
5820 W. IH-10, Suite 400
San Antonio, Texas 78201
Ph: (210) 531-9700
Fx: (210) 732-0158
E:mail: stephen@thegordonlawfirm.com
Counsel for Petitioner

QUESTIONS PRESENTED

I. WHETHER THE DISTRICT COURT AND COURT OF APPEALS SHOULD HAVE GRANTED A CERTIFICATE OF APPEALABILITY, TO ALLOW DEFENDANT REILLY TO APPEAL THE DISTRICT COURT'S DENIAL OF HIS RIGHT TO AN EVIDENTAIRY HEARING ON ONE OF HIS 28 U.S.C. § 2255 CLAIMS (INEFFECTIVE ASSISTANCE OF COUNSEL FOR LATE FILING OF A MOTION TO SUPPRESS EVIDENCE).

II. WHETHER THE DISTRICT COURT AND COURT OF APPEALS SHOULD HAVE GRANTED A CERTIFICATE OF APPEALABILITY, ALLOWING DEFENDANT REILLY TO APPEAL THE DISTRICT COURT'S DENIAL OF HIS OTHER 18 U.S.C. § 2255 CLAIM (INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO TIMELY FILE A NOTICE OF APPEAL AND FAILURE TO EXPLAIN HIS APPELLATE RIGHTS TO HIM).

LIST OF PARTIES

Pursuant to Sup. Ct. R. 14.1(b), a list of all parties to the proceeding in the court whose judgment is the subject of this Petition is as follows:

1. **Christopher Alexander Reilly,** Defendant-Appellant;
2. **Ashley C. Hoff,** U.S. Attorney;
3. **John F. Bash,** Former U.S. Attorney;
4. **Gregg N. Sofer,** Former U.S. Attorney;
5. **Joseph H. Gay, Jr.** Assistant U.S. Attorney representing Appellee on appeal;
6. **Tracy Thompson,** Assistant U.S. Attorney, who represented Plaintiff-Appellee in the original proceedings and in the 28 U.S.C. § 2255 proceedings in the District Court;
7. **Adam Crawshaw,** Attorney who represented Defendant-Appellant in the original proceedings in the District Court; and
8. **Stephen H. Gordon**, court appointed counsel who represented Defendant-Appellant in the 28 U.S.C. § 2255 proceedings in the District Court and represents him in this Court.

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ON PETITION FOR A WRIT OF CERTIORARI TO

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a Writ of Certiorari issue to review the Judgment below from the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Judgment of the United States District Court for the Western District of Texas appears at Appendix A to this Petition. The Opinion of the United States District Court for the Western District of Texas appears at Appendix B to this Petition. The opinion of the United States Court of Appeals for the Fifth Circuit appears at Appendix C to this Petition and is unpublished.

JURISDICTION

The United States District Court for the Western District of Texas its entered

Judgment & Commitment on Defendant Reilly's original case number SA-17-CR-128-DAE on March 16, 2018. (ROA 157.) The Court had jurisdiction over that case pursuant to 18 U.S.C. § 3231.

Reilly then filed his Petition for Habeas Corpus under case number SA-19-CV-203-DAE on February 28, 2019. (ROA 170.) The District Court entered its Order & Final Judgement denying Reilly's Petition on December 15, 2020. (ROA 562 & 587.) The Court had jurisdiction over this case pursuant to 28 U.S.C. § 2255.

Reilly then appealed to the United States Fifth Circuit Court of Appeals pursuant to 28 U.S.C. § 2255(d) on February 4, 2021, within the prescribed 60-day time period. (ROA 588.) The Court of Appeals decided the case on March 31, 2022. (App'x C). No petition for rehearing was filed in the case.

This Petition for Writ of Certiorari is being filed within the 90-day time frame allowed by law. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides that: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST., AMEND IV.

The Sixth Amendment states that: "in all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense." U.S. CONST., AMEND VI.

18 U.S.C. § 2251(a) makes it illegal for "any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, or who transports any minor in or affecting interstate or foreign commerce, or in any Territory or Possession of the United States, with the intent that such minor engage in, any sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct, shall be punished as provided under subsection (e), if such person knows or has reason to know that such visual depiction will be transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed, if that visual depiction was produced or transmitted using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, including by computer, or if such visual depiction has actually been transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed."

18 U.S.C. § 2252(A)(a)(1) make it illegal for "any person who knowingly mails, or transports or ships using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including

by computer, any child pornography."

18 U.S.C. § 2252(A)(a)(2) makes it illegal for a person who "knowingly receives or distributes—

(A) any child pornography using any means or facility of interstate or foreign commerce or that has been mailed, or has been shipped or transported in or affecting interstate or foreign commerce by any means, including by computer; or

(B) any material that contains child pornography using any means or facility of interstate or foreign commerce or that has been mailed, or has been shipped or transported in or affecting interstate or foreign commerce by any means, including by computer;"

18 U.S.C. § 2252A(a)(5)(B) makes it illegal for any person to "knowingly possesses, or knowingly accesses with intent to view, any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography that has been mailed, or shipped or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in or affecting interstate or foreign commerce by any means, including by computer."

STATEMENT OF THE CASE

1. Background of Facts, Charges & Arrest for Child Pornography

Defendant, Christopher Alexander Reilly was indicted on multiple Counts of Possession of Child Pornography on February 15, 2017. (ROA.35.) These files were allegedly found on a computer hard drive that Reilly had sent out to a company that helps repair and/or recover missing computer files. (ROA.20-21.) Reilly had sent this hard drive to a company called "24-Hour Data" to recover portions of the hard drive which had failed on him. (ROA.20-21.)

Reilly filled out an online form specifying that a certain portion of one of the hard drives was not to be accessed by the company (ironically referred to as the "Recovered" folder). (ROA.237-37.) Reilly also included a hand-written note when he sent the hard drive in, reminding the technicians not to access the "Recovered" folder. (ROA.212, ROA.237.) Reilly also spoke to a technician at 24-Hour Data named Carlos Sandoval and claims that Sandoval specifically promised to honor his instructions not to attempt to access the "Recovered" folder in one of the hard drives. (ROA.236-37.)

Later, Sandoval actually did access the "Recovered" folder and states that he found evidence of child pornography in it. (ROA.237.) Sandoval contacted the police and allowed them to access the folder in the hard drive. (ROA.237-38.) There is a dispute between Reilly and Sandoval as to whether or not Sandoval had the legal right to access this specific folder. (ROA.238-41.)

2. Reilly Hired Attorney Crawshaw, Who Filed an Untimely Motion to Suppress Evidence that Was Denied Without a Hearing

Mr. Reilly hired Attorney Adam Crawshaw to represent him in his case, and Crawshaw filed a Notice of Appearance with the Court on February 2, 2017. (ROA.26.)

The Court entered an "Order Regarding Discovery and Pretrial Motions" on February 22, 2017, requiring all pretrial motions to be filed within 40 days of the date of the Defendant's arraignment. (ROA.45.) The deadline in this Order would apply to any Motion to Suppress Evidence. (ROA.45.)

The Defendant's arraignment was set for February 28, 2017, and so the pretrial motions deadline expired on April 10, 2017. (ROA.41.) Nevertheless, Attorney Crawshaw filed a Motion to Suppress Evidence, along with a Motion for Leave to File Motion to Suppress Evidence on November 13, 2017, some 7 months after the deadline for the filing of said Motion. (ROA.113, ROA.110.) The District Court denied the Motion for Leave to File Motion to Suppress on November 14, 2017, and accordingly did not consider the merits of the constitutional arguments outlined in the Motion to Suppress. (ROA.121.)

The Motion to Suppress argued that it was illegal for Sandoval to access the folder in Reilly's computer that Reilly had specifically said was off limits. (ROA.116-19.) The Motion acknowledged that the "private party search" doctrine was an issue, but ultimately was not determinative of the outcome because

Sandoval's intrusion upon the off-limits folder was not "reasonably foreseeable." (ROA.116-18.) The Motion goes on to argue that the "third party consent to search" doctrine did not apply either, because Sandoval did not have the legitimate authority to access the folder in the first place, and therefore had no right to authorize anyone else to view the folder either. (ROA.117-18.) The Motion further argues that the law enforcement officers who accessed the off-limits folder knew that it was off-limits at the time, because they actually confiscated the hand-written note that Reilly had sent off with the hard drives, forbidding anyone to access said folder. (ROA.118.) Accordingly, the Motion called for suppression of the evidence seized from the off-limits folder, and any other evidence derived from its seizure under the "fruit of the poisonous tree" doctrine (ROA.118-19.)

3. Reilly Pled Guilty and Was Sentenced to 200 Months in Prison

On November 20, 2017, Defendant Reilly agreed to plead guilty and signed a Plea Agreement in the case. (ROA.6.) Said Plea Agreement stated that Reilly agreed to waive virtually all grounds for appeal in his case, with the specific exception of any claims regarding ineffective assistance of counsel and prosecutorial misconduct. (ROA.720, 724-26.) Reilly was convicted of 2 Counts of Possession of Child Pornography on February 26, 2018, and sentenced to 200 months in prison. (ROA.157-58.)

4. Attorney Crawshaw Promised to Visit Reilly to Discuss Appellate Issues, But Never Did So

Attorney Crawshaw visited with Reilly 2 days before his sentencing. (ROA.666, ROA.695.) At that meeting, he promised Reilly that he would come back to visit with him to discuss issues related to his case, including any possible appeal options. (ROA.666, ROA.695-697.) He also promised to bring Reilly some paperwork to sign as well. (ROA.698.) Crawshaw never did visit with Reilly again, and later admitted that he failed to explain any of Reilly's basic appellate rights to him, including the 14-day deadline to file a Notice of Appeal (ROA.695-99, ROA.667-70.) Reilly tried to contact Crawshaw numerous times after his sentence to obtain information about his appellate rights, but was never able to reach Crawshaw. (ROA.667). Eventually, Reilly filed a complaint with the State Bar of Texas regarding Crawshaw's failure to communicate with him. (ROA.217.)

Attorney Crawshaw did not file any direct appeal of the case on behalf of Reilly.

5. Reilly Filed a Motion to Vacate His Sentence Under 28 U.S.C. 2255

Subsequently, on February 28, 2019, Defendant Reilly filed a Motion to Vacate his sentence under 28 U.S.C. § 2255. (ROA.170.) In this Motion, Reilly argued for the suppression of all evidence and dismissal of all charges against him. (ROA.181.) Counsel has now refined this request to argue that his conviction should be overturned, or in the alternative that he should be granted an out of time appeal because Attorney Crawshaw provided him ineffective assistance of counsel (IAC).

Reilly alleges 2 distinct acts in support of his Ineffective Assistance of Counsel claims: (1) Crawshaw's late filing of his Motion to Suppress Evidence; and (2) Crawshaw's failure to properly advise him of his right to a direct appeal of his sentence and failure to file any such appeal. (ROA.173-74.)

This case was assigned to the Honorable District Court Judge David Ezra. Initially, Judge Ezra granted Reilly a hearing on his 2nd claim of Ineffective Assistance of Counsel, but not his 1st claim. (ROA.328-29.) Upon a Motion for Reconsideration, Judge Ezra expanded the scope of the hearing to include both IAC claims. (ROA.367.) Upon further consideration, Judge Ezra then reversed his decision, and restricted the scope of the hearing once again to issues regarding proof of the 2nd claim of Ineffective Assistance of Counsel only. (ROA.465.)

6. The Court Held a Hearing on 1 of Reilly's Claims (Attorney's Failure to File a Notice of Appeal)

Judge Ezra assigned the case to The Honorable Magistrate Judge Elizabeth S. Chestney. (ROA.330.) Upon agreement of the parties, Judge Chestney conducted the hearing by video-conference on September 17, 2020. (ROA. 450.) The hearing was generally limited to Reilly's ineffective assistance of counsel claim regarding Crawshaw's failure to file a Notice of Appeal. Defendant Reilly called 3 witnesses on his behalf, including himself, his friend Bo Carrington, and his former Attorney Adam Crawshaw. (ROA.664-713.) The Assistant United States Attorney

cross-examined each of these witnesses, but did not call any independent witness of their own. (ROA.676-713.)

After the hearing, the Magistrate Judge prepared a Report detailing her findings. (ROA 545-561). Based on the testimony in the record, Judge Chestney made the following findings:

a. Mr. Crawshaw failed to consult with Reilly in any meaningful way about filing an appeal.

b. Mr. Crawshaw admitted that he never informed Reilly of the time limits associated with filing an appeal, any possible remaining avenues for appeal in light of the appeal waiver in his plea agreement, and the pros and cons of attempting to pursue any appeal.

c. Although Mr. Crawshaw discussed the right to appeal in the context of reviewing his plea agreement, Mr. Crawshaw conceded that he never spoke with Reilly about the appeals process after sentencing or made any effort to ascertain whether Reilly wanted to appeal.

d. Mr. Crawshaw admitted that he failed to visit Reilly after sentencing as promised.

(ROA 575.)

7. The District Court Denied the Motion to Vacate and Request for Certificate of Appealability

Despite all the above findings the Magistrate Judge's Report recommended that Reilly's IAC claims be denied. (ROA.532.) The District Court agreed and adopted the Report. (ROA.562). In doing so, it denied Reilly's § 2255 motion (ROA.586.) In addition to denying Reilly's § 2255 motion, the court denied him a Certificate of Appealability (COA), "find[ing] that [he] has failed to make a substantial showing of the denial of a constitutional right[.]" (ROA.586-87.)

8. Reilly Appealed to the Fifth Circuit, and They Denied His Certificate of Appealability As Well

Counsel for Reilly filed a Notice of Appeal of the Order in the District Court. (ROA.588.) The Fifth Circuit Court of Appeals refused his Application for Certificate of Appealability. (Appendix C). Reilly now asks this Court to grant him a Certificate of Appealability and files this Brief in support.

REASONS FOR GRANTING THE PETITION

I. This Court Should Grant Reilly a Certificate of Appealability Because Reasonable Jurists Could Debate Whether His 28 U.S.C. § 2255 Motion Should Have Been Resolved Differently.

On February 26, 2018, Reilly was sentenced to 200 months in prison. (ROA.157-58.) On February 28, 2019, he filed a motion challenging his sentence under 28 U.S.C. § 2255, arguing that he received Ineffective Assistance of Counsel on 2 separate issues. (ROA.170). The District Court denied Reilly's motion and also denied him a Certificate of Appealability. (ROA.586-87). Subsequently, the Fifth Circuit Court of Appeals also denied his Application for Certificate of Appealability (COA). (App'x C). Because reasonable jurists could debate whether Reilly's motion was resolved correctly, the Court should grant him a COA.

A. To Obtain a Certificate of Appealability, Reilly Must Show That Jurists of Reason Would Find the District Court's Resolution of His § 2255 Motion Debatable or Wrong.

To appeal the denial of a § 2255 Motion, a defendant must obtain a Certificate of Appealability. 28 U.S.C. § 2253(c)(1)(B). "If the district judge has denied the certificate, the applicant may request a circuit judge to issue it." Fed. R. App. P. 22(b)(1).

A Certificate of Appealability shall issue when the defendant makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

Under this standard, a defendant must "show that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (*rev'd on other grounds).*

This debatability determination is a "threshold inquiry" that does not require—or even permit—full consideration of the ultimate merits of the claim. *Id.* at 336–38. "[A] court of appeals should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief." *Id.* at 337. "Indeed, a claim can be debatable"—and thus warrant issuance of a COA—"even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Id.* at 338. Thus, "where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.* at 338 (cleaned up).

B. Reasonable Jurists Could Debate Whether or Not Reilly Had Proven His First Claim for Ineffective Assistance of Counsel (IAC), or Was at Least Entitled To a Hearing on The Claim.

As noted above, the District Court not only denied Reilly's first claim of Ineffective Assistance of Counsel, it did not even grant him a hearing on the issue

so that he could fully develop the record on this point. It is instructive to note the District Court debated with itself whether or not such a hearing was necessary, as Judge Ezra initially denied such a hearing; then granted it; then denied it again. (ROA.328-29, ROA.367, ROA.465.) Presumably Judge Ezra would qualify as a "reasonable jurist", and his decision to grant the hearing at one point shows the possibility that this issue "should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 336.

Even without the benefit of the opportunity to develop a full record in this case, Counsel believes that he has made a substantial showing that Crawshaw provided IAC to Reilly by filing his Motion to Suppress too late. Certainly, there is no legitimate legal strategy justification for Crawshaw's failure to file said Motion to Suppress on time, nor did Crawshaw provide any such rationale during the evidentiary hearing. (ROA.693-713.)

In some cases, there may be a good reason not to file a Motion to Suppress at all, but once a determination is made to file it, then it must be done in a timely manner. *See* Fed. R. Crim Pro. 12(c)(2). If an attorney has not made the decision to 100% rule out the filing of said Motion, then they must ask for an extension of the pretrial motions deadline to keep that option open in the future. *See* Fed. R. Crim Pro. 12(c)(2). It may be understandable for a defense attorney to assume that a reasonable District Court Judge will allow them the opportunity to file a late

Motion if new evidence comes to light after the deadline has expired. However, it is a dangerous practice to automatically make that assumption.

Counsel spelled out all the arguments in favor of Reilly's IAC claim in the numerous pleadings filed at the District Court level. (ROA.343, ROA.370, ROA.403, ROA.443, ROA.473.) These pleadings document the proper standard for proving an IAC claim in the context of an attorney's failure to timely file a Motion to Suppress Evidence.

II. Ineffective Assistance of Counsel Standards

A. 2-Step Inquiry

The basic principles of proving up an Ineffective Assistance of Counsel claim were first spelled out by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). The Court outlined a 2-step approach. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that he or she was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. *Id* at 687. Second, the defendant must show that the deficient performance "prejudiced" the defense. *Id*.

1. Counsel's Representation Fell Below and "Objective Standard of Reasonableness"

In conducting its analysis of the 1st prong, the Court explained that "When a convicted defendant complains of the ineffectiveness of counsel's assistance, the

defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id* at 687-88

The Court elaborated on several factors a Judge should consider when analyzing whether counsel's behavior met that standard of reasonableness:

> Representation of a criminal defendant entails certain basic duties. Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest. *See Cuyler v. Sullivan, supra,* at 346. From counsel's function as assistant to the defendant derive the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution. Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process. *See Powell v. Alabama,* 287 U.S. at 68-69.

Id at 688.

Of particular importance in this case is the requirement that counsel "advocate the defendant's cause", and "keep the defendant informed of important developments in the course of the prosecution." These duties are at the heart of Defendant Reilly's complaints about his prior counsel's performance, and why he wanted to appeal his conviction.

The *Strickland* Court also explained what types of inquiry may be necessary to determine if counsel's performance was ineffective, or the result of sound trial strategy:

> [A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts

> or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.

Id at 690.

Reilly specifically directed the District Court to the "acts of omissions" made by Attorney Crawshaw with respect to his failure to timely file a Motion to Suppress Evidence, or a timely Motion to Extend Time to file a Motion to Suppress before the deadline had expired. Reilly has also pointed to his prior attorney's "omissions" in terms of failing to advise him of the facts that: (1) the deadline for filing a Motion to Suppress had already passed; (2) Crawshaw had to file a Motion for Leave to File Motion to Suppress; and (3) that the Motion for Leave to File Late was denied. (ROA.667-70, ROA.695-97.) All of these failures "to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution" amount to independent examples of ineffective assistance of counsel claims. *Id* at 688.

2. There is a "Reasonable Probability" That but for Counsel's Errors, The Result Would Have Been Different

In regard to the 2nd prong of the S*trickland* analysis, "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Id* at 694. Reilly has clearly met that burden,

If Reilly's previous attorney had filed his Motion to Suppress on time, he would have at least had *the opportunity* for the Judge to hear the Motion on the merits. Therefore, we know for a fact the results of the Motion to Suppress proceeding would have been automatically different – there would have at least been a proceeding in the first place. That does not necessarily mean Reilly would have won his Motion, but it does mean that the Motion would have at least been given its due consideration. In ensuring that his Motion was heard, Crawshaw would have been fulfilling his "duty to advocate the defendant's cause" and "render the trial a reliable adversarial testing process." In failing to do either, he provided ineffective assistance of counsel.

In turn, that Motion to Suppress evidence may have actually been successful, resulting in suppression of the main evidence used to obtain a search warrant. If the Motion had been successful, that would have also made the proceedings turn out different. In fact, the suppression of evidence could have led to a completely different outcome of the entire case, as it could have also led to the suppression of Reilly's later confession as the "fruit of the poisonous tree." *See Wong Sun v. United States*, 371 U.S. 471, 488 (1963); *United States v. Wilson*, 36 F.3d 1298, 1306 (5th Cir. 1994)). Taken as a whole, these possibilities are sufficient to "undermine confidence in the outcome of the case."

III. District Court's Rationale for Denying First IAC Claim

The District Court appears to have denied Reilly's request for a hearing and his IAC claim because it believed that he was required to prove the following elements, and was not able to do so:

(1) a suppression motion would have been meritorious;

(2) his counsel's failure to file one was objectively unreasonable (the "performance" prong); and

(3) but for his counsel's deficient performance in that regard, he would not have pleaded guilty (the "prejudice" prong). *United States v. Ratliff*, 719 F.3d 422 (5th Cir. 2013) (*citing Ward v. Dretke*, 420 F.3d 479, 487-88 & n. 19 (5th Cir. 2005)). (ROA.580.)

As to the 1st prong of the Court's analysis, Counsel believes that there is a meritorious claim to be made, based upon the fact that at least some of the searches and seizures of his computer equipment were done without a warrant. Counsel bases his belief on the fact that warrantless searches are presumptively unreasonable, and it does not appear to Counsel that any of the standard warrant exceptions apply. *See, e.g.*, *Groh v. Ramirez*, 540 U.S. 551, 572 (2004); *Katz v. United States*, 389 U.S. 347, 357 (1967); *Payton v. New York*, 445 U.S. 573, 583 (1980); *United States v. Whalen*, 388 F.3d 161, 164 (5th Cir. 2004). Furthermore, the burden is always on the government to prove one of these exceptions. *Whalen*, 388

F.3d at 164; *United States v. Lage*, 183 F.3d 374, 380 (5th Cir. 1999); *United States v. Berick*, 710 F.2d 1035, 1037 (5th Cir. 1983).

The only possible warrant exceptions that could reasonably apply in Reilly's case might be the "private party search" doctrine (*see Walter v. United States*, 447 U.S. 649, 655 (1980); *United States v. Paige*, 136 F.3d 1012, 1017 (5th Cir. 1998)); or the "third party consent to search" doctrines. *See Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990); *United States v. Runyan*, 275 F.3d 449, 457 (5th Cir. 2001). However, Counsel does not believe the government could have met all the elements of either of those doctrines' exceptions, and it would be their burden to do so at a hearing.

As noted above, Attorney Crawshaw addressed the merits of the "private party search" and the "third party consent to search" doctrines in his Motion to Suppress Evidence, and explained why neither applied in Reilly's case. (ROA.113.) Reilly had given Sandoval explicit instructions not to access the "Recovered" folder, and Sandoval ignored his instructions. (ROA.116-19.) Reilly argued that it was not "reasonably foreseeable" to him that Sandoval would just completely ignore his written and verbal instructions, and access the file against his wishes. (ROA.116.)

The District Court has determined that the private search doctrine does apply, and that Reilly's suppression claim would automatically fail because of it (ROA.581-83.) The Court failed to address Crawshaw's specific arguments that the private search doctrine did not apply because Sandoval's intrusion into the off-

limits folder was not "reasonably foreseeable" to Reilly. The Court only provides a blanket statement that "the cases Reilly relies on in arguing that the search was not reasonably foreseeable do not extend to the facts of this case." (ROA.583.) (The Court did not address the potential "third party consent to search" exception). The Court concluded that "[b]ecause a suppression motion would have been meritless, Reilly did not suffer prejudice" effectively determining that the 1st prong of its analysis automatically eliminates the 3rd prong. (ROA.584.)

As the Motion to Suppress explained "consideration must be given to whether the activities of the home's occupants or the circumstances within the home at the time of the private search created a risk of intrusion by the private party that was reasonably foreseeable. *See United States v. Oliver*, 630 F.3d 397, 406 (5th Cir. 2011) (citing *Paige*, 136 F.3d at 1020) (emphasis in *Oliver*). If a private party's initial intrusion was not reasonably foreseeable, the owner's reasonable expectation of privacy will survive, and the subsequent police search of the owner's private property will indeed activate the Fourth Amendment. *Id* at 407.

Reilly maintains that it was not reasonably foreseeable to him that Sandoval would ignore his instructions not to access the "Recovered" folder, even though he had told him not to do so: (1) in the online form he filled out; (2) in the handwritten note he included in the hard drive; and (3) in the phone conversation he had with Sandoval. (ROA.116-18.) Reilly also had the right to rely on specific government statutes that forbid a person to engage in unauthorized access to a person's

computer files without their explicit permission. *See* TEX. PENAL CODE §16.20 ("A person commits an offense if the person: (1) intentionally intercepts, endeavors to intercept, or procures another person to intercept or endeavor to intercept a wire, oral, or electronic communication"); § 33.20 (a) ("A person commits an offense if the person knowingly accesses a computer, computer network, or computer system without the effective consent of the owner.").

Even if the "private party search" doctrine did apply, there may still have been a way for Crawshaw to challenge its application in this case. This doctrine only applies "where the subsequent police search is limited in scope to the private party's search." *See United States v. Bomengo,* 580 F.2d 173, 175-76 (5th Cir.1978) (police search subsequent to private citizen search is not violative of Fourth Amendment "so long as the view is confined to the scope and product of the initial search"); *United States v. Jenkins,* 46 F.3d 447, 457 (5th Cir.1995). Because of Crawshaw's inaction, Reilly never got a chance to have a hearing to cross-examine Sandoval and the police as to the scope of their respective searches.

A private party search can also be challenged if the private party is actually acting as an agent of the government when he or she conducts the initial search. *See United States v. Paige*, 136 F.3d 1012, 1017 (5th Cir.1998)*; United States v. Barth*, 26 F. Supp 929, 935 (W.D. Texas 1998) (unpublished). To be classified as government action, (1) the government must know of or acquiesce in the intrusive conduct, and (2) the private party must intend to assist law enforcement in

conducting the search. *Paige* at 1017*; see also United States v. Blocker,* 104 F.3d 720, 725 (5th Cir.1997). The Court's Order summarily dismissed this possibility because Reilly has not yet produced any such evidence of government collusion. (ROA – pp. 21-22). However, Reilly's attorney was never given the chance to develop any such potential evidence through cross-examination of Sandoval because he never obtained a hearing in the first place.

Although the burden of proof is on the government to justify a warrantless search, the Court's analysis instead puts the burden on Reilly to explain why the private search doctrine does not apply. Furthermore, the Court's analysis seems to require that Reilly definitively prove his Motion to Suppress would have been successful, not just meritorious. In doing so, it generally indulges in every presumption in favor of the government, all without the benefit of even offering Reilly a hearing to cross-examine the parties who may provide additional favorable information to support his theory of the case. The Court's analysis also seems to conflate the standard for granting a Motion to Suppress with the standard for granting a mere hearing on an IAC claim related to the failure to file a timely Motion to Suppress. That standard is much more relaxed.

IV. Proper Standard for Determining if a Defendant is Entitled to a Hearing on a 28 U.S.C. 2255 Motion

A. Court Must Grant a Hearing Unless the Record "Conclusively" Shows No Entitlement to It.

The standard for determining if a defendant is entitled to a hearing on his claims is much more relaxed. As the Fifth Circuit explained in *United States v. Bartholomew*, 974 F.2d 39, 41 (5th Cir. 1992): "A motion brought under 28 U.S.C. § 2255 can be denied without a hearing only if the motion, files, and records of the case conclusively show that the prisoner is entitled to no relief." *United States v. Auten*, 632 F.2d 478 (5th Cir.1980)(emphasis added); *accord Friedman v. United States,* 588 F.2d 1010, 1014-15 (5th Cir.1979); *see also* 28 U.S.C. § 2255 (2000). *See generally Machibroda v. United States,* 368 U.S. 487, 494-96 (1962); *United States v. Alanis*, 88 Fed. Appx 15 (5th Cir. 2000) (unpublished).

The Court in *Alanis* goes on to explain further that:

> The determination of whether to conduct a hearing on a § 2255 motion involves two steps. . . .
>
> First, the court examines whether the record *conclusively* negates the factual predicates asserted in support of the motion. *Id.*
>
> If not, the court next determines whether the movant would be entitled to relief if his factual allegations are true. If he would be entitled to relief, then the district court must conduct a hearing to ascertain the validity of the movant's factual assertions.

Id at 19 (emphasis added).

In *Alanis*, the Court determined that based upon the evidence in the record, they could not *conclusively* rule out the facts alleged in support of the defendant's Motion to Suppress. *Id.* Therefore, Alanis was entitled to a hearing on the issue. Reilly should also be afforded the same opportunity, as the facts as he has alleged them have not been "conclusively" negated by the facts on the record.

B. A Defendant is Not Required to "Conclusively" Prove the Ultimate Success of His IAC Claim to Obtain a COA.

It is also important to remember that for purposes of granting a Certificate of Appealability, the debatability determination is a "threshold inquiry" that does not require—or even permit—full consideration of the ultimate merits of the claim. *Miller-El,* 537 US at 336–38. "[A] court of appeals should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief." *Id.* at 337. This reminder is important, because the District Court based its decision to deny Reilly a hearing on its predetermined conclusion that Reilly's Motion to Suppress would never have succeeded anyway.

V. Reasonable Jurists can Disagree as to Whether Reilly Has a Valid IAC Claim Based Upon Crawshaw's Failure to Properly Advise Him of His Right to Appeal.

The District Court's Order correctly notes that Attorney Crawshaw failed to properly inform Reilly about his appellate rights. (ROA.575-76.) However, it then goes on to state that his failure was irrelevant because "Reilly did not sufficiently demonstrate an interest in an appeal as to trigger counsel's duty to consult." (ROA.577.) The Order goes on to state that "Reilly has failed to demonstrate a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed." (ROA.578.) Defendant objects to these conclusion as incorrect for several reasons.

A. Attorney Crawshaw Had an Affirmative Duty to Explain Reilly's Appellate Rights to Him.

As the Court's Order correctly notes: "[C]ounsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either: (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." *Roe v. Flores-Ortega*, 528 U.S. 470,480 (2000)). Furthermore, "The existence of a duty to consult is assessed in light of 'all the information counsel knew or *should have known*.'" *United States v. Cong Van Pham*, 722 F.3d 320,323 (5th Cir. 2013) (citing *Flores-Ortega*, 528 U.S. at 480) (emphasis added).

In the meeting Crawshaw had with Reilly 2 days before his sentencing, Crawshaw mentioned that he would be coming back to discuss his appellate options with Reilly. (ROA.186.) Reilly asked him: "I thought we waived our right to appeal in the plea agreement?" (ROA.186.) Mr. Crawshaw responded, "We did, but you can still argue Ineffective Assistance of Counsel." (ROA.186.) The fact that Reilly was questioning if he still had the right to appeal is sufficient enough to put counsel on notice that he needs to follow up with him and get a definitive answer as to Reilly's desire for an appeal, <u>after</u> explaining the pros and cons of doing so. *See United States v. Pham*, 722 F3d. 320, 325 (5th Cir.2013) (holding that "this statement to counsel, when viewed in context, was enough to trigger counsel's constitutional duty to consult with Pham about an appeal.").

Considering all these factors, the record indicates that Reilly's interest in pursuing the follow-up meeting when he last met with Crawshaw, and his subsequent efforts to contact Crawshaw to set up this meeting "reasonably demonstrated" a desire on his part to pursue an appeal of his conviction. *See Pham*, 722 F3d. at 325 (noting that [j]ust as it is part of counsel's duty to recognize when a rational defendant would want to appeal, so too is it part of his duty to recognize when, however inartfully or inarticulately, his client demonstrates an interest in an appeal.").

B. Reilly's Repeated Attempts to Reach Out to Crawshaw "Reasonably Demonstrated to Counsel that He was Interested in Appealing" the Case.

Attorney Crawshaw conceded that at the time of the sentencing "there wasn't the opportunity" for Reilly to discuss his desire to appeal. (ROA.709.) That put Reilly in the position of being forced to wait for Crawshaw to return to meet with him to discuss the pros and cons of an appeal, and only then express any potential desire he had for an appeal. Once Crawshaw promised to have such a meeting with Reilly, he had a legal duty to follow up with him, especially since he had not communicated with Reilly at all after his sentencing to ask about his interest in filing an appeal. To his credit, Crawshaw admitted that "I messed up" in not having that meeting. (ROA.708.)

After he was sentenced, Reilly specifically testified that he reached out to Crawshaw on multiple occasions to discuss the possibility of filing an appeal, but

was never able to reach him. (ROA.667.) The fact that Reilly placed multiple phone calls to Mr. Crawshaw, but was unable to reach him is bolstered by Mr. Bo Carrington's testimony that (1) "he sent Mr. Crawshaw several text messages but received no response;" (2) "he called Mr. Crawshaw's office multiple times but only reached him one time;" and (3) "when Mr. Crawshaw realized who was calling, he told Mr. Carrington he would call him back later but never did." (ROA.536. ROA.689.) Reilly's assertions were also affirmed by Crawshaw's failure to contradict that he received phone calls from Reilly, and his admission that "he might have forgotten to call Mr. Carrington back." (ROA.537.)

The conclusions of the District Court's Order seem to misinterpret the standard for asserting a right to appeal. Specifically, the Court would have required that Reilly to affirmatively tell Crawshaw that he had decided to appeal before Crawshaw had ever fully explained his rights to appeal to him. The Court also expected Reilly to make this decision, despite the fact that Crawshaw had provided him conflicting information about his appellate rights before. Even at the evidentiary hearing, Attorney Crawshaw still seemed a bit confused about Reilly's right to appeal as he testified that "he believed Reilly had given up his appellate rights but acknowledged that Reilly might have still had some right to appeal based on a claim of ineffective assistance of counsel." (ROA.537.) Furthermore, the Court apparently expected Reilly to somehow express his desire to Crawshaw within the

14-day deadline, even though Crawshaw had never even told him there was a 14-day deadline for appeals in the first place.

The District Court's Order does not seem to give any weight to the fact that Reilly contacted Crawshaw's office on numerous occasions to discuss his appellate rights, and even enlisted the help of his friend, Bo Carrington to help him reach out to Crawshaw as well. Reilly testified that he reached out to Crawshaw by phone, email and regular mail, all to no avail. (ROA.666.) Only when he filed a grievance with the State Bar of Texas did Reilly get any response from Crawshaw. (ROA.666.)

Crawshaw's affirmative promise to visit Reilly to specifically discuss his appeal options cannot be discarded or removed from this equation. It must be considered when assessing any burden Reilly had to speak up to assert his appellate rights before the promised meeting took place. Once Crawshaw's promise to return and discuss his rights with him later was made, then Reilly had no duty to speak up until that meeting took place and his rights were adequately explained to him. The idea that Reilly had a duty to assert a right he didn't even know he had yet, or was in his best interest misconstrues the fundamental nature of a defendant's duty to indicate a desire for an appeal. Furthermore, it misunderstands the context of the communication of these two parties, vis-a-vis Reilly's appellate rights.

In summary, the District Court seems to be holding Reilly to a standard of proof that *conclusively* shows he asserted his right to appeal in a particular fashion.

However, the standard for purposes of obtaining relief in a 2255 case only requires that the Defendant "demonstrate that there is a *reasonable probability* that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed." *Flores-Ortega*, 528 U.S. at 480 (emphasis added). When Reilly's attempts to communicate with Crawshaw are put in their proper context, they establish a "reasonable probability" that if Crawshaw had met with him and fully explained his appellate rights to him, he would have wanted to file a direct appeal.

C. Reilly Has Also Established that There is a "Reasonable Probability" that a Rationale Defendant Would Have Wanted to Appeal.

The District Court Order also found that Reilly failed to prove that a rational defendant would have wanted to appeal. (ROA.586). The Court based this finding on another finding that Reilly failed to prove the existence of any non-frivolous basis for an appeal. (ROA.586.) Counsel believes that reasonable jurists could disagree on this point as well.

D. There is at Least Some Reason to Think that a Rational Defendant Would Have Wanted to Appeal.

Counsel argues that there is sufficient evidence that a "rational" defendant would have wanted to appeal this sentence. His sentence was 200 months in federal prison, a huge portion of his entire life. (ROA.157-58.) It is possible that a rational defendant in his shoes might be dissatisfied with a sentence this long, and seek legal ways to undo such a sentence, no matter how large the potential legal

obstacles to making such an appeal a success might be. In fact, over 10,425 defendants filed criminal appeals in 2020 alone, hoping for their chance at success as well. (App'x D). The District Court ruling does not in any way address this possibility, and instead devotes all attention to the "non-frivolous grounds for appeal" part of the analysis.

E. Reilly Had at Least Some Non-Frivolous Grounds for Appeal.

The Order concluded that "the ineffective assistance of counsel claim Reilly asserts he wanted to raise on appeal does not constitute a non-frivolous basis on which to appeal." (ROA.576.) In other words, it concludes that any such potential IAC claim would be automatically frivolous. The District Court correctly notes that IAC claims are not typically considered by the appellate court through a direct appeal process. (ROA.541.) While it is true that the appellate courts typically do not consider IAC claims on direct appeal, they do in some limited cases. *See, e.g., United States v. Phillips*, 664 F.2d 971, 1040 (5th Cir. 1981), *cert. denied*, *Meinster v. United States*, 457 U.S. 1136, (1982); and *United States v. Brown*, 591 F.2d 307, 310 (5th Cir. 1979), *cert. denied*, 442 U.S. 913 (1979). Nevertheless, the District Court concluded that Reilly's case does not meet any of the exceptions that have been established so far, because in those cases "the record was sufficiently developed." (ROA.541.)

In terms of sufficiency of the record, Counsel notes that the evidence is undisputed that Attorney Adam Crawshaw filed an untimely Motion to Suppress

Evidence. (ROA.113, ROA.110, ROA 121.) It is also undisputed that Crawshaw offered no evidence on the record that his failure to file said Motion on time was done on purpose, as part of some legitimate trial strategy. (ROA.700-704.) Since the evidence is undisputed on these points, there is a least *some* reasonable possibility that the appellate court might have considered this specific IAC claim on direct appeal. At best, the potential success of such a claim is a legitimately debatable point that reasonable jurists could disagree upon. *See Kimmelman v. U.S.*, 477 U.S. 365, 367 (1986), wherein the Court explained that:

> While the failure to file a suppression motion does not constitute per se ineffective assistance of counsel, the record clearly reveals that respondent's attorney failed to file a timely suppression motion, not due to trial strategy considerations, but because he was unaware of the search, and of the State's intention to introduce the bedsheet into evidence, due to his failure to conduct any pretrial discovery. Such failure here was not, as required under *Strickland*, reasonable and in accord with prevailing professional norms.

F. Reilly was Prejudiced by the Failure to Inform Him of His Appellate Rights.

The District Court also states that Reilly "has failed to demonstrate prejudice under *Strickland*." (ROA.576.) The Magistrate Report upon which the District Court relies on lists 3 other specific reasons for concluding that Reilly suffered no harm, because he would not have wanted to appeal anyway. (ROA.542.) However, all the of these reasons are faulty, as explained below.

1. Reilly Never Gave Up His Right to Appeal Any IAC Claims He May Have Had

The Report notes that one of the factors a Court should look at in determining prejudice is whether a Defendant has been admonished that he had given up most of his appellate rights. In support of its position, it cites *United States v. Kayode*, 777 F.3d 719, 728–29 (5th Cir. 2014). However, *Kayode* is distinguishable because it concerned a defendant trying to undo his judgment & conviction. On this IAC claim, Reilly is only attempting to regain his lost right to a direct appeal. As noted below, a Defendant is not required to prove prejudice when his IAC claim is based upon failure to advise him of the right to appeal.

2. Any Delay in Reilly Filing a 28 U.S.C. 2255 Motion Was the Fault of Attorney Crawshaw, Not Reilly

The second reason listed in the Report for a finding of no prejudice is the fact that "Reilly also waited almost a full year to file his Section 2255 petition, a fact that the Fifth Circuit has also found to indicate the unlikeliness of filing a timely appeal but for any deficient performance by counsel." (ROA.542.) In support of its conclusion, the Report relies upon *United States v. Bejarano*, 751 F.3d 280, 287 (5th Cir. 2014). However, the Report fails to note several critical facts which distinguish Reilly's case from *Bejarano's*.

In the *Bejarano* case, the attorney did discuss the possibility of an appeal with the Defendant at sentencing, but then told him that he had conclusively ruled it out. Therefore, the Defendant was put on notice that his attorney was definitely

not going to be filing an appeal for him, and would therefore not be expecting a possible appeal to come later. According to the attorneys in *Bejarano*:

> Ms. Atehortua-Castro and [Bejarano] did bring up the possibility of appealing the sentence. Both Mr. Gibson and I explained to them that they had waived their right to appeal except in limited circumstances and both Mr. Gibson and I told them that we did not believe those limited circumstances existed at this time. I told Ms. Atehortua-Castro that since the Court had sentenced her in accordance with the plea *there was nothing to appeal*.

Bejarano, at 282 (emphasis added).

In contrast, Crawshaw did not rule out the possibility of an appeal or make a definitive statement telling Reilly "there was nothing to appeal." Therefore, Reilly was on the hook waiting for more information and a definitive answer from Crawshaw during the critical 14-day filing period. If Crawshaw had definitively told him that he would not be filing any appeal for him, instead of misleading him into thinking the door for an appeal would still be open until he came back and visited him, then the result might have been very different.

There was also no testimony in the *Bejarano* case about the Defendant ever trying to contact his attorney again after the hearing to discuss the case. Nor is there any testimony about the Defendant reaching out to his friends or family to try and get in touch with his attorney about an appeal. Nor is there any evidence that said attorney failed to return phone calls, or follow up on any scheduled visits. Nor was any evidence that *Bejarano*'s attorney had a history of providing the client

misinformation, and filing critical pleadings late. All of these factors distinguish Reilly's case from the *Bejarano* one.

3. Reilly's Testimony that He Was Interested in Potential Appeal Was Supported by Witnesses

The Reports goes on to note that "the Fifth Circuit emphasized that a defendant's testimony that he would have appealed if consulted, standing alone, does not establish prejudice." *See United States v. Johnson,* 792 Fed. App'x 339 (5th Cir. 2020) (citing *Bejarano,* 751 F.3d at 286) (ROA. 542.) However, in this case, we have not just the testimony of the Defendant, but also the testimony of his friend, Bo Carrington, who also indicated that Reilly wanted to speak to Crawshaw about an appeal. The Court also has the testimony of Crawshaw admitting that Carrington reached out to him on Reilly's behalf. Although Crawshaw does not recall Carrington specifically asking him about an appeal for Reilly he does concede that "he might have forgotten to call Mr. Carrington back." (ROA.537.) If Crawshaw had done so, then Carrington would have had the time he needed to discuss everything Reilly wanted to tell Crawshaw, including his desire for an appeal.

G. Reilly is Not Required to Prove Any Prejudice Under the Flores-Ortega Standard.

As the Court in *Flores-Ortega* explained, if counsel is deficient in explaining a defendant's appellant rights to him, or fails to pursue an appeal on his behalf, then "counsel's deficient performance has deprived respondent of more than a fair

judicial proceeding; that deficiency deprived respondent of the appellate proceeding altogether." *Flores-Ortega*, 528 U.S. at 483. The United States Supreme Court recently affirmed this principle in *Garza v. Idaho*, ___ U.S. ___, 139, S. Ct. 738, 744 (2019), wherein the Court stated that:

> In certain Sixth Amendment contexts, however, "prejudice is presumed." For example, no showing of prejudice is necessary "if the accused is denied counsel at a critical stage of his trial," *United States v. Cronic*, 466 U.S. 648, 659 (1984), or left "entirely without the assistance of counsel on appeal," *Penson v. Ohio*, 488 U.S. 75, 88 (1988). . . . And, most relevant here, prejudice is presumed "when counsel's constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken." *Flores-Ortega*, 528 U.S. at 484. We hold today that this final presumption applies even when the defendant has signed an appeal waiver.

The Court goes on to emphasize that "when deficient counsel causes the loss of an entire proceeding, it will not bend the presumption-of-prejudice rule simply because a particular defendant seems to have had poor prospects." *Garza* at 747 (citing*, Jae Lee v. United States*, 582 U.S. ____, 137 S. Ct. 1958, 1966–67, 198 L.Ed.2d 476 (2017)).

H. It is Not Incumbent on Reilly to Prove the Meritorious Nature of Any Appeal that He Might Have Wanted to Pursue in the Case.

The *Garza* Court then went on to caution about focusing on whether the defendant's potential appeal was likely to be considered meritorious or successful upon filing. As they explained:

> This Court has already rejected attempts to condition the restoration of a defendant's appellate rights forfeited by ineffective counsel on proof

> that the defendant's appeal had merit. In *Flores-Ortega*, the Court explained that prejudice should be presumed "with no further showing from the defendant of the merits of his underlying claims." In *Rodriguez v. United States*, 395 U.S. 327, (1969), similarly, the Court rejected a rule that required a defendant whose appeal had been forfeited by counsel "to specify the points he would raise were his right to appeal reinstated.'". So too here.
>
> Moreover, while it is the defendant's prerogative whether to appeal, it is not the defendant's role to decide what arguments to press. *See Barnes*, 463 U.S. at 751, 754, 103 S. Ct. 3308. That makes it especially improper to impose that role upon the defendant simply because his opportunity to appeal was relinquished by deficient counsel. "Those whose right to appeal has been frustrated should be treated exactly like any other appellants; they should not be given an additional hurdle to clear just because their rights were violated at some earlier stage in the proceedings." *Rodriguez*, 395 U.S. at 330, 89 S. Ct. 1715.
>
> We accordingly decline to place a pleading barrier between a defendant and an opportunity to appeal that he never should have lost.

Id .

In the alternative, Counsel argues that whether or not Reilly suffered prejudice is a legitimately debatable among jurists of reason.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

/s/ Stephen H. Gordon
Stephen H. Gordon
Court Appointed Counsel
THE GORDON LAW FIRM, P.C.
5820 IH-10 West, Suite 400
San Antonio, Texas 78201
Tel.: (210) 531-9700
Fax: (210) 732-0158
stephen@thegordonlawfirm.com
Attorney for Defendant-Appellant

CERTIFICATE OF SERVICE

I hereby certify that on June 22, 2022, I electronically filed this "Petition for Writ of Certiorari" with the Clerk of Court using the CM/ROA system which will send notification of such filing to Ashley C. Hoff, U.S. Attorney for the Western District of Texas (Attn: Assistant U.S. Attorney Tracy Thompson), via electronic mail.

/s/ Stephen H. Gordon
STEPHEN H. GORDON
Attorney for Defendant-Appellant

CERTIFICATE OF COMPLIANCE WITH WORD COUNT LIMIT

This document complies with the word limit of Sup. Ct. R. 33(1)(g) because, excluding the parts of the document exempted by Sup. Ct. R. 33(1)(d), this document contains 8988 words.

/s/ Stephen H. Gordon
STEPHEN H. GORDON
Attorney for Defendant-Appellant
Dated: June 22, 2022