ORIGINAL

No. 22-7349 23 -

IN THE

SUPREME COURT OF THE UNITED STATES

THOMAS J. M. GOODIN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Thomas J.M. Goodin
R 20647-035
USP Pollock
P.O. Box 2099
Pollock, LA 71467

April 10, 2023

QUESTIONS PRESENTED

1. Whether the Fifth Circuit clearly erred for failing to consider Mr. Goodin's new arguments in support of his claim that trial counsel was ineffective.

2. Whether the Fifth Circuit clearly erred by exceeding the limited scope of the COA analysis.

3. Whether Mr. Goodin has demonstrated ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 668 (1984).

4. Whether the District Court's denial of Mr. Goodin's motions to appoint counsel and for an evidentiary hearing was an abuse of diseretion.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Thomas J. M. Goodin respectfully petitions this Court for a writ of certiorari to review the order of the United States Court of Appeals for the Fifth Circuit denying a Certificate of Appealability ("COA") to review the denial of his motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255; and affirming the district court's order denying his motions to appoint counsel, and for an evidentiary hearing.

OPINIONS BELOW

The District Court's decision denying Mr. Goodin's motion under § 2255; motion to appoint counsel; and motion for an evidentiary hearing is available at United States v. Goodin, No. 3:18-CR-154, 2022 U.S. Dist. LEXIS 144670 (W.D. La. Aug. 11, 2022) (Appendix A). The District Court issued a short order declining the issuance of a Certificate of Appealability. United States v. Goodin, No. 3:18-CR-154 (W.D. La. Aug. 11, 2022) (Appendix B). The Fifth Circuit denied a COA and a petition for rehearing en banc. United States v. Goodin, No. 22-30507, 2022 U.S. App. LEXIS ______ (5th Cir. Nov. 14, 2022)

(Appendix C); United States v. Goodin, No. 22-30507, 2023 U.S. App. LEXIS ____ (5th Cir. Jan. 11, 2023). (Appendix E).

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). This petition is timely filed. [The judgment of the Fifth Circuit was entered on November 14, 2022. A petition for rehearing en banc was denied on January 11, 2023.

RELEVANT PROVISIONS

This case involves a federal prisoner's constitutional rights under the Fifth and Sixth Amendments, and is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), codified in relevant part at 28 U.S.C. § 2255; and the Criminal Justice Act ("CJA") codified in relevant part at 18 U.S.C. § 3006A.

The Fifth Amendment to the United States Constitution provides:

> No person shall be * * * deprived of life, liberty, or property, without due process of law.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to *** have the Assistance of Counsel for his defense.

Title 18 U.S.C. § 3006A provides:

> An attorney shall be appointed for a financially eligible person in certain criminal proceedings, "from his initial appearance *** through appeal, including ancillary matters appropriate to the proceedings," or who "is entitled to the appointment of counsel under the Sixth Amendment to the Constitution.

This case also involves the application of 28 U.S.C. § 2253(c), which states:

> (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from-
> (B) the final order in a proceeding under Section 2255.

Further, a COA should not issue absent "a substantial showing of the denial of a constitutional right." Id. § 2253(c)(2); Fed. R. App. P. 22(b).

STATEMENT OF THE CASE

Following a four-day-jury-trial, in the United States District Court for the Western District of Louisiana, Thomas J. M. Goodin ("Goodin"), was convicted on one count of conspiracy to distribute and to possess with intent to distribute fifty (50) grams or more of methamphetamine in violation of 21 U.S.C. §§ 846 and 841(a)(1); one count of possession with intent to distribute fifty (50) grams or more of methamphetamine in violation of 21 U.S.C. §§ 841(a)(1) and 2; and one count of possession with intent to distribute ten (10) grams or more of phencyclidine ("PCP") in violation of §§ 841(a)(1) and 2. Doc. 178, 187.[1] Mr. Goodin was sentenced to 504 months as to the three counts followed by 10 years of supervised release. Doc. 218. The United States Court of Appeals for the Fifth Circuit affirmed his conviction and

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[1] Doc. "_." refers to the docket entries in United States v. Goodin, No. 3:18-CR-154 (W.D. La).

sentence on February 10, 2021. The judgment was entered into the Court record on March 15, 2021. Doc. 261.

On July 13, 2022 Mr. Goodin timely filed a motion to vacate, set aside, or correct sentence under 28 U.S.C. § 2255. He also moved for the appointment of counsel and an evidentiary hearing. Doc(s). 278, 278-1. In his motion under §2255, Mr. Goodin raised two (2) grounds for relief: 1) that his trial counsel was ineffective for failing to move to suppress a warrantless search of a FedEx package; and 2) that his appellate counsel was ineffective for failing to challenge the district court's enhancement of his sentence based on a prior conviction in which he was constructively denied counsel.

On August 11, 2022 the district court denied the §2255 motion, the motion to appoint counsel, and motion for an evidentiary hearing. Doc. 289 (Appendix A). The district court also denied a COA. Doc. 288 (Appendix B).

On September 20, 2022 Mr. Goodin raised new arguments in support of his claim that trial counsel was ineffective for failing to move to suppress evidence from a warrantless search: while an actual search warrant had been attached to the

Application for Search Warrant, Affidavit, and Return Receipt, it only covered a residence and not the FedEx package; that an additional search of the FedEx package occurred two and a half hours before the search at issue; that the k-9 officer involved in the search was off-duty; and that there was no probable cause to search the package. The Fifth Circuit found that it did not have jurisdiction to consider these "new arguments", citing Black v. Davis, 902 F.3d 541, 545 (5th Cir. 2018) (Appendix C).

On Novemer 14, 2022 the Fifth Circuit denied Mr. Goodin's application for a COA, and affirmed the district court's denial of all other outstanding motions. (Appendix C).

In this case, everyone agrees that the actual search warrant for the FedEx package was not attached to the Application for Search Warrant, the Affidavit, and Return Receipt. See Doc. 286 at 9. "The actual search warrant was not attached." Id. at 9. And, it is uncontroverted that Mr. Goodin's retained counsel (Mr. Hansen) enrolled as co-counsel in the prior state proceeding (because he did not know the facts of Mr. Goodin's case or how the law applied to those facts). See Doc. 219, Def. Ex. 1, at 2; see also Doc. 251, at 6.

In denying Mr. Goodin's application for a COA, the Fifth Circuit stated, "[f]irst, the package search was not warrantless; the record is clear that a warrant was issued. Trial counsel was not ineffective for failing to move to suppress evidence on this ground. Second, Goodin had counsel on his prior conviction and was not constructively denied counsel's assistance. Appellate counsel was not ineffective for failing to challenge the prior conviction enhancement." (Appendix C).

As Goodin set out fully and in great detail in his motion for rehearing en banc from the denial of a COA at the Fifth Circuit (Appendix D) Black, 902 F.3d at 545 did not apply to him, because he properly raised the issue that trial counsel was constitutionally ineffective for failing to move to suppress a warrantless search. Any "new arguments" before the court in support of that issue should have been considered; and that by deciding that "the package search was not warrantless" and that "Goodin had counsel on his prior conviction and was not constructively denied counsel's assistance" instead of asking "only if the District Court's decision was debatable," the Fifth Circuit sidestepped the threshold COA process and first decided the merits of Goodin's appeal (without considering all his arguments), and then justified its denial of the COA based on its adjudication of the actual (truncated) merits, thereby in essence deciding the appeal without jurisdiction and on an incomplete record, contravening this court's precedents in Yee v. City of Escondido, 530 U.S. 519, 534 (1992); Martinez v. Ryan, 566 U.S. 1, 17 (2012); Trevino v. Thaler, 133 S.Ct. 1911, 1915 (2013); and Buck v. Davis, 137 S.Ct. 759, 774 (2017) (quoting Miller-El v. Cockrell, 537 U.S. 322, 327 (2003). There is little doubt that Mr. Goodin suffers an injustice and that the Fifth Circuit's order runs the risk of undermining the public's confidence in the judicial process.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

On October 5, 2017, at approximately 7:30 a.m., agents with Metro Narcotics[2] and MPD were

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[2] Metro Narcotics is a unit comprised of officers from Monroe Police Department ("MPD"), West Monroe Police Department, Drug Enforcement Agency ("DEA"), sheriff's office, and state police. This unit is involved in high profile drug investigations.

inspecting packages at the FedEx located at 1111 Oliver Rd, Monroe Louisiana. *See* Doc. 92, at 65 (Hearing Transcript). As Agent Nicolas Oglesby watched packages being offloaded from a truck onto a conveyor belt, he observed one package (the "GIX" package) that he found suspicious. He pulled the package off the conveyor belt for additional inspection. *Id.* at 79-82. Allegedly, Agent Oglesby handed the package off to Officer Jason Hendrix and his narcotics certified K-9, Buck, to conduct an outer air sniff of the package. Doc. 230, at ¶ 8. However, Officer Oglesby did not recall who he handed the package to: [Oglesby: A. I handed that package across the conveyor belt to another agent.

Mr. Caldwell: Q. Do you recall what agent?

Oglesby: A. I do not.

Doc. 92, at 82.] Furthermore, Agent Oglesby did not personally see the dog sniff.

Mr. Caldwell: Q. On this particular date, did you see

Officer Hendrix run the dog over this package?

Oglesby: A, No, I did not.

Id. at 83. Nor did Oglesby recall who [told] him the dog alerted on the package.

Mr. Caldwell: Q. Is that correct? Do you know if it was Officer Hendrix that told you [that this package had a positive alert] or was it another [Metro Narcotics Unit] MNU officer?

Oglesby: A. I don't recall.

Id., at 98. Neither did the K-9 handler, Officer Hendrix, testify to [witnessing] [the] K-9 alert to the presence of narcotics.

Mr. Caldwell: Q. Okay. Do you recall on October 5th any of that?

Hendrix A. I don't recall...

Mr. Caldwell: Q. You don't recall any specific packages that day?

Hendrix: A. No...

Mr Caldwell: Q. You don't recall the results?

Hendrix: A. No.

Id., at 128. Notwithstanding, law enforcement seized and searched the package prior to 9:00 a.m. and discovered methamphetamine. See Doc. 88-2 at 5, 88-3 (Def Exs. 2 at 5, 3). Notably, this search took place 2 and a half hours before Agent Oglesby's search of the FedEx package that commenced at 11:00 a.m. and concluded at 11:30 a.m. See Doc. 87-2, 87-4 (Gov. Exs. 2,4); cf. Docs. 88-2, at 5; 88-3 (Def. Ex. 2,3). Allegedly, Agent Oglesby applied for and received an electronic search warrant from state judge Stephen H. Winters. See Doc. 92 at 69-89.

Mr. Caldwell: Q. How do you typically submit your search warrants?

Oglesby: A. Through search Warrant Now.

Id. at 69.

Mr. Caldwell: Explain that to me.

Oglesby: A. It is ... a system that you log into... it's got some prefilled forms [...] you type ... all your information in there. You type your narrative for your affidavit, and submit it to the judge on call.

Id. at 70.

REQUEST TO TAKE JUDICIAL NOTICE

Mr. Goodin request this Court [p]ursuant to the provisions of Federal Rule of Evidence 201 to take notice of [D]ocument [N]umber 56, filed in United States v. Lyons, No. 19-CR-00283-001 (W.D. La.) (Appendix F). "A court may take judicial notice of a document filed in another court... to establish the fact of such litigation and related filings [.]" Ferguson v. Extraco Mortg. Co., 264 F. App'x 351, 352 (5th Cir. 2007).

1. Gov't Ex. 1 (Declaration of Brian Johnson

Director of Operations for Warrant Now).

2. Gov't Ex. 2 (Electronic Warrant - by Warrant Now).

3. Gov't Ex. 3 (Audit Trail - by Warrant Now)

As relevant here, "Once approved the warrant is date and time stamped with the date and time the Judicial Officer approved the warrant." (Appendix F, at 43a, ¶ 9). When the defense asked Agent Oglesby what time he submitted the request Agent Oglesby could not answer. When the defense asked Oglesby what time he received approval for the search request, Oglesby could not answer.

Mr. Caldwell: Q. What time did you submit your request for a warrant?

Oglesby: A. There's a record of that. Obviously it was done electronically, but I'm not -- I'm not sure. I don't know.

Mr. Caldwell: Q. What about do you recall after you made the application how long it was before you received a response?

Oglesby: A. I don't *** I am not sure what time I got a response to the warrant request or from the judge.

Doc. 92 at 88-89.

Based on the statement of Oglesby that "[t]here is a record of that [the audit trail]." Doc. 92 at 88. And the Declaration of Brian Johnson stating, "WarrantNow's application keeps a warrant audit trail on its servers independently and in perpetuity." (Appendix E, 43a, ¶ 10). Mr. Goodin filed a Freedom of Information Act Request with Ouachita Parish Sheriff's Office and WarrantNow. In it's response, it did not have a record of the date and time stamp of any communications between Agent Oglesby and Judge Steven H. Winters. See (Appendix G, at 51a-67a); Cf. (Appendix F at 50a).

On June 16, 2019, a federal grand jury returned a superseding indictment which added a sentencing enhancement based on a prior conviction. Doc. 135. After a four-day-trial, Goodin was found guilty as charged Doc. Nos. 178-187. The sentence enhancement phase of the trial was held on July 19, 2019, and the jury returned a verdict of guilty. Doc. Nos. 186, 196.

Goodin was sentenced on November 6, 2019. At the sentencing hearing, Goodin presented evidence concerning the prior conviction. He called the attorney who he retained to represent him in the proceeding, Steve A. Hansen. Doc. 251 at 4-19. During this hearing Mr. Goodin established that:

1. He retained Steve A. Hansen to represent him in the state proceeding on May 16, 2005;
2. That Mr. Hansen failed to move the court for a continuance in order to review or look at the case file and/or discovery;
3. That Mr. Hansen advised him to plead guilty without knowing the facts of the case or how the law applied to those facts;
4. That Mr. Goodin filed a disciplinary complaint with the Louisiana Bar Association;
5. That Mr. Hansen refunded his fee; and
6. That such a refund would be based on an Ethics violation rather than an Ineffective Assistance of Counsel Claim.

In objecting to the PSR (Doc. 215) objection 5, and (Doc. 230) objection 6, Goodin argued that his conviction was uncounseled and in violation of this Sixth Amendment right to counsel. The court denied his objections and sentenced him to

504 months in prison. Doc. 218.

On November 8, 2019 Goodin filed a timely Notice of Appeal. Doc. 226. On February 10, 2021, the United States Court of Appeals affirmed Goodin's conviction and sentence. See United States v. Goodin, 835 Fed. Appx. 771 (5th Cir. 2021). The judgment was entered into the Court record on March 15, 2021, and Mr. Goodin's 28 U.S.C. § 2255 motion was timely filed thereafter. Doc. Nos. 261, 278.

On August 11, 2022 the district court denied Goodin's § 2255 motion. United States v. Goodin, No. 3:18-CR-154-1, 2022 U.S. Dist. LEXIS 144670 (W.D. La. Aug. 11, 2022), (Appendix A). The district court issued a short order declining the issuance of a COA. United States v. Goodin, No. 3:18-CR-154-1 (W.D. La. Aug. 11, 2022) (Appendix B).

Mr. Goodin sought a certificate of appealability (COA) to appeal the District Court's dismissal and denial of his 28 U.S.C. § 2255 motion to vacate, set aside, or correct sentence; and appealed the denial of his motion to appoint counsel, and motion for an evidentiary hearing. The Fifth Circuit denied a COA and a petition for rehearing en banc. United States v. Goodin, No. 22-30507 (5th Cir. Nov. 14, 2022) (Appendix C); United States v. Goodin, No. 22-30507 (5th Cir. Jan. 11, 2023) (Appendix E).

REASONS FOR GRANTING THE WRIT

I. Certiorari Should Be Granted Because the United States Court of Appeals for the Fifth Circuit Imposed an Improper and Unduly Burdensome COA Standard that Contravenes This Court's Precedents, Reflects Deep Arbitrariness, and Risks Undermining the Public's Confidence in the Judicial Process.

In this case, it was error for the Fifth Circuit to hold it lacked jurisdiction to consider Mr. Goodin's "new arguments" in support of his claim that trial counsel was ineffective: First, there is a difference between raising new issues and raising new arguments in support of an issue properly raised. Yee, 503 U.S at 534. In addition, this Court has found an exception to the procedural bar, when in the initial-review collateral proceedings, there was no counsel or counsel in that proceeding was ineffective. Trevino, 133 S.Ct. at 1915.

The Fifth Circuit determined that it is clear that a warrant issued without considering whether the electronic means were reasonable.

The actual warrant in this case was not attached and the affidavit in support and return receipt do not comport with either Rule 41 of the Federal Rules of Criminal Procedure nor Louisiana Revised Statute 9:2603.1. Unlike the cases relied on below, no majistrate judge or district court judge has testified to the authenticity of the evidence in support of the warrant and in this case, evidence of a warrant is inherently unreliable or alternatively fake evidence.

In this case, reasonable jurist could debate whether there was sufficient safeguards in the electronic warrant process to comply with the Fourth Amendment. Reasonable jurist could also debate whether trial counsel was ineffective for failing to challenge the electronic warrant on this ground.

The Fifth Circuit also found that Goodin had counsel on his prior conviction and was not constructively denied counsel. This finding fails to establish whether the court identified any unethical conduct or whether counsel failed to put the prosecutions case to any meaningful testing.

Reasonable jurists could debate whether Mr. Goodin was constructively denied counsel on his prior conviction. Reasonable jurist could also debate whether appellate counsel was ineffective for failing to raise this preserved claim on appeal.

The Fifth Circuit dismissed both of Mr. Goodin's claims after it refused to hear "new arguments," and inverted the statutory order of operations by deciding the merits of the appeal before determining whether the legal questions were debatable, contravening this Court's clear precedent.

The public legitimacy of our criminal justice system relies on procedures that are neutral, accurate, consistent, trustworthy, and fair, and a sentence that lacks reliability because of unjust procedures may well undermine public reputation of the proceedings.

A. The Fifth Circuit's Order Holding That It Did Not Have Jurisdiction to Consider New Arguments Raised for the First Time on Appeal, Contravenes This Court's Holdings in Yee v. City of Escondido, 503 U.S. 519, 534 (1992); and Trevino v. Thaler, 133 S.Ct. 1911, 1915 (2003).

"[T]here is a difference between raising new issues and making new arguments on appeal. If an issue is 'properly presented, a party can make any argument in support of that [issue]; parties are not limited to the precise arguments they made below." Yee, 503 U.S. at 534. Moreover, this Court has recognized procedural default not to bar federal habeas corpus court from hearing substantial claim of ineffective assistance of counsel at trial, where state procedural framework typically made meaningful opportunity to raise ineffective assistance claim on appeal highly unlikely, where in the initial-review collateral proceedings, there was no counsel or counsel in that proceeding was ineffective." Trevino, 133 S.Ct. at 1915.

The procedural framework in the Fifth Circuit makes it highly unlikely a prisoner will have a meaningful opportunity to raise an ineffective assistance of trial counsel on appeal. See United States v. Cantwell, 470 F.3d 1087, 1091 (5th Cir. 2006) (the general rule of this circuit is that a claim of ineffective-assistance-of-trial-counsel will not be resolved on direct appeal); see also United States v. Isgar, 739 F.3d 829, 841 (5th Cir. 2014). Mr. Goodin did not have counsel during the §2255 proceeding.

B. Evidence Demonstrates that the Fifth Circuit's Interpretation of the COA Standard Continues to Contravene this Court's Guidance Regarding the Application of the COA Standard.

The Fifth Circuit erred by inverting the statutory order of operations by deciding that a search warrant had issued; and that Mr Goodin had counsel on his prior conviction. See Buck v. Davis, 137 S.Ct. 759, 774 (2017); Miller-El v. Cockrell, 537 U.S. 322, 327 (2003). By exceeding the limited scope of the COA analysis, and deciding this appeal on the merits, the Fifth Circuit decided this appeal, in essence without jurisdiction. This is a disturbing departure from the basic rule of law as construed and interpreted in Buck, 137 S.Ct. at 774; and Miller-El, 537 U.S. at 327.

C. Reasonable Jurist Could Unquestionably Debate Whether Law Enforcement Conducted a Warrantless Search and Whether Trial Counsel Was Ineffective for Failing to Move to Suppress Evidence on This Ground.

In this case, everyone agrees that the actual search warrant was not attached. Doc. 286 at 9. Allegedly, Agent Oglesby applied for and received an electronic search warrant from state judge Stephen H. Winters, through a system called WarrantNow. "[I]t is [a] system that you log [into], it's got some prefilled forms, you type your narrative for affidavit and submit to the judge." See Doc. 92 at 69-70. (cleaned up).

As relevant here, "[O]nce approved the warrant is date and time stamped with the date and time the Judicial Officer approved the warrant." (Appendix E, at 43a, ¶ 9); see also (Appendix F, at [45a-49a]); But [cf.] (Appendix G, at 63a-[67a]). In order for an electronic warrant to comply with the Fourth Amendment it must [meet] minimum safeguards. [See Rule 41(d)(3) of the Federal Rules of Criminal Procedure (requiring electronic warrants be "based on information communicated by ... reliable means;" see also Louisiana Revised Statute 9:2603.1 (D) ("Any application used to attach a digital signature to any warrant or affidavit must have security procedures in place that insure the authenticity of the digital signature. The application must also be able to keep an electronic record of the warrant or affidavit, including the time and date of when the [signature was attached. The application must also include encryption measures to ensure secure access of the application.") See also La. R.S. 9:2603.1 (F) ("In any instance where an affidavit is submitted to a judge or magistrate electronically, the electronic signature of the affiant shall satisfy the constitutional requirement ... and [be] in compliance with Subsection D of this Section. ..."). Id. at F.

The actual warrant in this case was not attached and the affidavit in support and application for search were used as proof of the warrant. See (Appendix A, at 7) ("The existence of a search warrant can be proved by the presentation of other evidence," citing United States v. Pratt, 438 F.3d 1263, 1271 (11th Cir. 2006)). Notwithstanding, the other evidence must be reliable.

Unlike the cases below, no judge or magistrate judge testified to the authenticity of the warrant in this case. Unlike the warrants in State of Louisiana v. Jadarius M. Ignont, No. 17-F-002755, (Doc. 56-1); and United States v. Morgan Lyons, No. 19-CR-00293-001 (Appendix F, at 45a), the evidence in this case is missing its date and time stamp, where the judicial officer approved the warrant. Nor is there an electronic record of the warrant, application for search, or affidavit, including the time and date when the signature was attached. See (Appendix G). In this case, the evidence of a warrant is at best inherently unreliable and at worst fake evidence.

In this case, Mr. Goodin's Fourth Amendment claim is meritorious and there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstate prejudice. Kimmelman v. Morris, 477 U.S. 365, 375 (1986).

D. Reasonable Jurist Could Debate Whether Mr. Goodin Had Counsel on His Prior Conviction and Whether Appellate Counsel Was Ineffective for Failing to Challenge the Prior Conviction Enhancement on this Ground.

On November 6, 2019, the sentencing court held a hearing with respect to Defense Objection 5, and PSR Objection 6 Doc 251. It is uncontroverted that the attorney was accused of unethical conduct and that Mr. Goodin's attorney fee was refunded. Doc. 218. Mr. Goodin posits that Attorney Hansen's conduct meets Cronic's presumption of prejudice standard. See United States v. Cronic, 466 U.S. 648, 659 n.25 (1984). And this Court has forbidded the use of uncounseled convictions for sentence enhancement in subsequent criminal cases. See Burgett v. Texas, 389 U.S. 109 (1967); United States v. Tucker, 404 U.S. 443 (1972).

The right to counsel extends to all critical stages of prosecution. Mempa v. Rhay, 389 U.S. 128, 134 (1967). This includes the proceedings in which a plea is entered. Hamilton v. Alabama, 368 U.S. 52, 54 (1961); White v. Maryland, 373 U.S. 59, 60 (1963) (same).

Even when the accused intends to plead guilty, "counsel still must render competent service." Herring v. Estelle, 491 F.2d 125, 128 (5th Cir. 1974). "And a lawyer who is not familiar with the facts and law relevant to his clients case cannot meet that required minimal level." Id. at 128.

In this case, both appointed counsel and retained counsel enrolled as co-counsel to one another outside the presence of Mr. Goodin. Doc. 219, Def. Ex. 1, at 2-3. Mr Goodin retained Mr. Hansen because there was a conflict with Mr. Courteau in not wanting to investigate the facts of his case. Doc. 251, at 20-43. Mr. Goodin did not knowingly waive or forfiet his right to conflict free representation.

Notwithstanding, although Mr. Hansen was available to assist Mr. Goodin, "the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." Cronic, 466 U.S. at 659-60. A constructive denial exists in this case, because Mr Hansen "'entirely fail[ed] to subject the prosecution's case to a meaningful adversarial test[ ]', thus making 'the advesary process itself presumptively unreliable.'" Id. at 659.

E. Denying a Motion to Appoint Counsel and a Motion for an Evidentiary Hearing is Clearly Erroneous Were Mr. Goodin Has Shown Some Indicia of Viable Issues In His Motion.

The right for an indigent party to have a court-appointed attorney emanates from three different sources. First, the Fifth Amendment's Due Process Clause may provide the right when "fundamental fairness" requires it. Gagnon v. Scarpelli, 441 U.S. 778, 790 (1973). Second, the Sixth Amendment provides the right at "critical stages of a criminal prosecution," including during a first appeal. Id. Third, a defendant has a statutory right to counsel under 18 U.S.C. § 3006A when: (1) the defendant is entitled to appointment of counsel under the Sixth Amendment to the Constitution; (2) the defendant "is under arrest, such representation is required by law"; the district court determines that "the interests of justice so require" when a defendant seeks relief under 28 U.S.C. §§ 2241, 2254, or 2255; and (4) "ancillary matters" through appeal.

Specifically, the Criminal Justice Act ("CJA") provides the following about the duration of appointments:

> (c) Duration and substitution of appointments- A person for whom counsel is appointed shall be represented at every stage of the proceedings from his initial appearance before the United States magistrate judge or the court through appeal, including ancillary matters appropriate to the proceedings. 18 U.S.C. § 3006A(c).

An examination of the legislative history shows that Congress intended for "ancillary matters" to include efforts out of the original proceeding that protect the constitutional rights of the accused. See H.R. Rep. No. 1546, 91st Cong., 2d Sess., reprinted in 1970 U.S.C.C.A.N. 3982, 3989. According to legislative history:

> The act would not only provide for appointed counsel at every stage of the trial from initial appearance through appeal, but also for 'ancillary matters appropriate to the proceedings.' This provision is necessary to ensure that the rights

of the persons are fully protected. Many times remedies technically outside the scope of the trial proper may be necessary to insure that the rights of the persons are fully protected.... Although there is no apparent ruling to the contrary, the express inclusion of 'ancillary matters appropriate to the proceedings' will insure that the attorney who spends time and effort to protect a right considered valuable in defending the principal crime charged can be compensated under the act.

Id. Based on the legislative history, Mr. Goodin posits that the purpose of the CJA is to insure effective representation for those charged with a crime and confronted with the risk of being deprived of constitutional rights in ancillary post-conviction proceedings through appeal that are sufficiently related to the principal criminal case. H.R. Rep. No. 91-1546, 91st Cong. 2d Sess., reprinted in (1970) U.S. Code Cong. & Ad. News, at 3983; CONG. REC 13728 (1970); see also United States v. Smith, 633 F.2d 739, 741 (7th Cir. 1980).

Additionally, the Guide to Judiciary Policy instructs that when "determining whether a matter is ancillary to the proceedings, the Court should consider whether the matter, or issues of law or fact in the matter, arose from, or are the same as or closely related to, the facts and circumstances surrounding the principal criminal charge." Guide to Judiciary Policy, § 210.20.30 (b) (emphasis added); see also In re Burger, 498 U.S. 233, 234-35 (1991) (per curiam) (citing Guide to Judiciary Policy in interpreting CJA).

In this case, the initial - § 2255 proceeding is the first designated proceeding for Mr. Goodin to raise the ineffective-assistance-of-trial-counsel claim, the collateral proceeding is the equivalent of Mr. Goodin's direct appeal as to that claim and defendant's "are generally ill equipped to represent themselves" where they have no brief from counsel and no court opinion addressing their claim. Halbert v. Michigan, 545 U.S. 605, 617 (2005).

Finally, under Rule 41(e) of the Federal Rules of Criminal Procedure an evidentiary hearing is required on a motion to suppress only when necessary to receive evidence on an issue of fact, Id. A claim of ineffective assistance based on a failure to file a motion to suppress cannot be reviewed without testimony as to the reason behind failing to file the motion. See Machibroda v. United States, 368 U.S. 487, 493-95 (1962). If an evidentiary hearing is required, the judge shall appoint Counsel. United States v. Vasquez, 7 F.3d 81, 84 (5th Cir. 1993).

CONCLUSION

For the foregoing reasons, Mr. Thomas J.M. Goodin prays that this Court grant a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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