

JUL 10 2013

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13-6646

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

IN THE  
SUPREME COURT OF THE UNITED STATES

RODOLFO CIPRIANO GOMEZ — PETITIONER  
(Your Name)

vs.

RICK THALER — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

~~UNITED STATES COURT OF APPEALS for the FIFTH CIRCUIT~~  
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

RODOLFO CIPRIANO GOMEZ, TDCJ No. 1343576  
(Your Name)

6999 RETRIEVE RD., WAYNE SCOTT UNIT  
(Address)

ANGLETON, TEXAS 77515-6618  
(City, State, Zip Code)

(none)  
(Phone Number)



## QUESTION(S) PRESENTED

1. Whether, under the Antiterrorism & Death Penalty Act of 1996 (AEDPA), a FRANKS V. DELAWARE, 438 U.S. 154 (1978) hearing, under facts and circumstances as those presented here, is a "critical stage of the criminal proceedings" as envisioned by this Court in UNITED STATES V. CRONIC, 466 U.S. 648 (1984), where Petitioner's attorney's presence is required under the Sixth Amendment?
2. Whether the Fifth Circuit Court of Appeals erred when it held that Petitioner's right to his attorney's presence at a FRANKS V. DELAWARE hearing was not violated when the state trial court held such hearing and was thus not "contrary to, or involved an unreasonable application of clearly established Federal law, as determined by [this] Court"?
3. Whether Petitioner's Sixth Amendment right to confront and cross-examine his accusers was violated by the absence of his attorney from the continued FRANKS V. DELAWARE hearing?
4. Whether Petitioner's attorney's absence from the FRANKS V. DELAWARE hearing was, by Petitioner, a knowing, intelligent and voluntary waiver as required by JOHNSON V. ZERBST, 304 U.S. 458, 462-463 (1938)?
5. Whether, under the facts and circumstances presented herein, a conflict of interest arose and existed due to Petitioner's attorney's absence and therefore lack of representation at the FRANKS V. DELAWARE hearing?

## LIST OF PARTIES

- All parties appear in the caption of the case on the cover page.
- All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE  
SUPREME COURT OF THE UNITED STATES  
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

**OPINIONS BELOW**

For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

- reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

- reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix \_\_\_\_\_ to the petition and is

- reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

The opinion of the \_\_\_\_\_ court appears at Appendix \_\_\_\_\_ to the petition and is

- reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

## JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was April 25, 2013.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. A\_\_\_\_\_.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

For cases from **state courts**:

The date on which the highest state court decided my case was \_\_\_\_\_.  
A copy of that decision appears at Appendix \_\_\_\_\_.

A timely petition for rehearing was thereafter denied on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. A\_\_\_\_\_.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall ..... have Assistance of Counsel for his defence."

The threshold question under the AEDPA is whether Petitioner sought to apply a rule of law that was clearly established at the time his state court conviction became final. In UNITED STATES V. CRONIC, this Court held that an appeals court must reverse a criminal defendant's conviction "without any specific showing of prejudice to defendant when counsel was either totally absent or prevented from assisting the accused during a critical stage of the proceeding." *Id.* 466 U.S. at 659 n. 25. At the time Petitioner's state conviction became final, CRONIC was clearly established Federal law.



## STATEMENT OF THE CASE

The court of appeals in this case held that "the state court did not unreasonably apply clearly established federal law" because it "conclude[d] no Supreme Court precedent has directly addressed the issue of whether the denial of counsel at a hearing on a motion to suppress is a "complete denial of counsel" at a "critical stage" of the criminal proceeding for the purposes of the Sixth Amendment."

Petitioner's right to the effective assistance of counsel was violated when his attorney was absent during the continuation of the FRANKS V. DELAWARE hearing held on February 10, 2003 and February 13, 2003.

Additionally, Petitioner did not waive his constitutional right to: (1) counsel, and/or (2) to conflict-free representation.

The facts underlying the Sixth Amendment claim are set forth in the opinion below. Petitioner was indicted and convicted for engaging in organized criminal activity. Prior to trial, counsel for Petitioner filed a motion to suppress evidence based on the affiant's including untruthful statements in the probable cause warrant. The state trial court held a hearing wherein Petitioner established the affiant, Detective Juan Guerrero (Guerrero) made deliberately untruthful statements to establish probable cause. After closing arguments, the trial court advised the parties that they should return to court on Monday, February 10, 2003, with written briefs addressing certain concerns raised during the hearing. At this point, defense counsel, Mr. Glen Peterson, informed

the trial court he would be on a ship that weekend and would not be able to attend the February 10th hearing, but that he would provide written briefs to other counsel. The trial court informed Peterson that his presence would not be required as it would not be Peterson's case they would be trying, and that other counsel could "adequately carry the ball on argument."

At this point in the proceedings, Petitioner had established that Det. Guerrero's affidavit in support of the probable cause warrant contains deliberate falsehoods. At this particular hearing (on February 6th), Det. Guerrero states the confidential informant (CI) told him that he bought drugs from Petitioner on December 12, 2001, an alleged fourth buy which was not a subject of the warrant or the affidavit in support thereof. This information was obtained, not from the undercover officer (Pastrano), but from the CI himself, without an corroboration.

On February 10th, Detective Adam Pastrano is called by the State and in his testimony, he unequivocally maintains that the fourth sale was made by Arnaldo; he saw it go down. This testimony was crucial because it clearly contradicted what Det. Guerrero claimed the CI told him, and Peterson could have exploited this contradiction and used it to push for a FRANKS ruling which is the whole purpose of this hearing because Petitioner was seeking an excisement of the deliberate falsehoods and reckless disregard for the truth statements from the affidavit to have the illegally obtained evidence suppressed.

The State posited that Peterson's presence was not required

and that Peterson was "merely absent from a small portion of the proceedings" which proceedings were ultimately, according to the State, "meritless."

At the beginning of the February 10th hearing, the state trial court takes judicial notice that Mr. Peterson is not present but determines to address the issue of absence whenever the issue might come up. Having noted that Mr. Peterson is absent, the trial court does absolutely nothing to determine whether Petitioner agrees or waives his attorney's presence; the record is silent on whether Petitioner knowingly, intelligently and voluntarily waived his Sixth Amendment right to counsel at this critical stage of the proceedings.

The State has been insistent throughout these current proceedings that his co-defendants' attorneys adequately protected the Petitioner's interests at the hearing in which Peterson was absent however, here, too, the record is silent---there is nothing in the record that even remotely passes for an agreement by codefendants' attorneys to represent Petitioner or conversely, any agreement by Petitioner accepting such representation.

Because of Peterson's absence, Petitioner's Sixth Amendment right to effective assistance of counsel and to confront his accusers were violated. Ultimately, that Sixth Amendment violation spilled over to the trial itself causing egregious harm.

Finally, the State claims the motion to suppress hearing is not a "critical stage" of the criminal proceedings. The State supplied no case law, state or federal, in support of this conclusory statement.

## REASONS FOR GRANTING THE PETITION

On February 6, 2003, Detective Juan Guerrero, under cross-examination by defense counsel, Mr. Glen R. Peterson, admitted he included false information in the affidavit for probable cause he presented to the magistrate who issued the search and arrest warrant for three (3) controlled buys of heroin. Petitioner was seeking to suppress the evidence obtained through the arrest warrant due to lack of probable cause and lack of a reliable informant. Once Petitioner established that Guerrero made deliberate falsehoods in the affidavit, with a reckless disregard for the truth, Petitioner was in the process of seeking excisement of the false statements from the affidavit under FRANKS V. DELAWARE, 438 U.S. 154, 98 S.Ct. 2674 (1978), when the trial court expressed its concerns regarding (1) the allegation of gang affiliation, (2) the credibility and reliability of the confidential informant (CI) and whether he was searched prior to each alleged controlled buy. The trial court goes on to state he does not know what to do when such serious issues have come out that he now knows are not true. The trial court states it does not believe the Affiant intentionally lied but avers the statement "The Affiant did all this (personally searched the CI) before each corroborated buy," could have been worded differently, e.g., "Someone working under my authority." The trial court, however, goes on to state that "If I take out this paragraph the whole case fails." Therefore, the trial judge, unsure of specifically what the law states in this regard, requests a copy of the FRANKS case to read during a break,

at this point in the proceedings, Peterson reurges the motion to disclose the CI. The trial judge says he's not going to make a ruling yet---first of all because he has not yet heard all the testimony of whether any of this has been corroborated or not; he is thinking the State is going to bring in someone to testify that the buys were corroborated and the CI searched, thus giving the State the benefit of doubt.

After closing argument and after the court has made it clear that it wants all counsel present on February 10, 2003, talking to the court through briefs, Peterson informs the court that he will be on vacation and will not be able to attend the Monday, February 10th hearing. The court acquiesced, stating "It wont be your case we'll be trying" and that "other cocounsel can carry the ball on argument."

FEBRUARY 10, 2003:

At the commencement of the continuation of the FRANKS V. DELAWARE hearing, the trial court takes judicial notice that Peterson is not present, stating it will deal with that issue whenever it arises. By this time, the judge has read FRANKS and knows the Petitioner has made his preliminary showing, and also is aware he made a mistake by allowing Peterson to absent himself. According to the trial court, they have just picked a jury in Arnaldo Gomez's case and that this was a pre-trial matter. It is still a probable cause hearing for Arnaldo because he still has not shown falsehood. On the other hand, Petitioner has made his showing and, per FRANKS, is now entitled to go behind the four corners of

of the affidavit.

This "continuation of a FRANKS hearing" was for the purpose expressed by the trial court on February 6th, however, the prosecutor, Ed Springer, called Detective Adam Pastrano, in an attempt to corroborate the December 12, 2001 buy and that the CI was search prior thereto. Det. Pastrano was the on-the-scene undercover officer witnessing the alleged drug transactions. Under examination, Det. Pastrano testifies that he did not search the CI and did not identify Petitioner was a seller of drugs to the CI. Questioned that Det. Guerrero, in his written report, stated Guerrero was told by the CI that Petitioner sold him drugs, Det. Pastrano unequivocally stated that Pastrano was on-the-scene and, therefore, Pastrano should be believed.

Petitioner contends that under UNITED STATES V. CRONIC, 466 U.S. 648 (1984), the absence of Peterson at this "critical stage of the proceedings" deprived him of his Sixth Amendment rights to the effective assistance of counsel, and the right to confront his accusers and this deprivation further violated his rights to due process of law and to a fair and impartial trial under the Fifth and Fourteenth Amendments to the United States Constitution.

The Fifth Circuit Court of Appeals has "decided an important federal question in a way that conflicts with relevant decisions of this Court, or, in the alternative, has decided an important question of federal law that has not been, but should be, settled by this Court." Supreme Court Rule 10(c)

The Fifth Circuit granted a certificate of appealability (COA)

on the question of "whether the state court's denial of Gomez's claim that he was denied counsel during a critical stage of his criminal proceeding was an unreasonable application of [CRONIC]."

In affirming the denial of habeas relief by United States District Court (USDC) for the Western District of Texas, San Antonio, the court of appeals concluded "that no supreme Court precedent has directly addressed the issue of whether the denial of counsel at a hearing on a motion to suppress is a "complete denial of counsel" at a "critical stage" of a criminal proceeding for the purposes of the Sixth Amendment." APPENDIX A at 8.

In Texas, "a suppression hearing is a critical phase of a criminal proceeding." CURRY V. STATE, 228 S.W.3d 292 (Tex.App. -Waco 2007. It therefore necessarily follows that a criminal defendant has a right to counsel at such a hearing. see IOWA V. TOVAR, 541 U.S. 77, 87, 124 S.Ct. 1379 (2004)("The Sixth Amendment secures to defendant who faces incarceration the right to counsel at all 'critical stages' of the criminal process"). In CRONIC, this Court set out criteria to assist lower courts in determining when a proceeding becomes sufficiently "critical" to come within the rule. First, the Court said, "there must be the denial of such significance that it makes the adversary process itself unreliable." And, second, that "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., 466 U.S. at 662. "In deciding what qualifies as a 'critical stage,' courts have "recognized that the period from arraignment to trial [i]s the most crucial period of

the proceedings." UNITED STATES V. WADE, 388 U.S. 218, 225, 87 S. Ct. 1926 (1967)(quoting POWELL V. ALABAMA, 287 U.S. 45, 57, 53 S. Ct. 55 (1932)). In "WADE, this Court offered a further half -step in cementing a definition of 'critical stage,' writing that the "determination whether the hearing is a 'critical stage' requiring the provision of counsel depends ... upon an analysis 'whether potential substantial prejudice to defendant's rights inheres in the ... confrontation and ability of counsel to help avoid that prejudice.'" VAN V. JONES, 475 F.3d 292, 300-301 (6th Cir.2007).

Petitioner contends the court of appeals' determination that the state court's application of CRONIC to the facts and circumstances herein was not an "unreasonable application of clearly established Federal law," (APPENDIX A at 8), "conflicts with relevant decisions of this Court."

The right to counsel attaches at arraignment, extends through the first appeal and guarantees an accused the assistance of counsel at all critical stages of a proceeding. MICHIGAN V. HARVEY, 494 U.S. 344, 357, 110 S.Ct.-1176, 108 L.Ed.2d 293 (1990). A pretrial hearing considering the suppression of the defendant's confession is such a critical stage because its "results might well settle the accused's fate and reduce the trial itself to a mere formality." see id., at 358 n. 5, 110 S.Ct. 1176 (quoting UNITED STATES V. WADE, [supra]).

HENDERSON V. FRANK, 155 F.3d 159, 166 (3rd Cir.1998).

Once a defendant in a motion to suppress hearing establishes that the affiant made deliberate falsehoods, with a reckless disregard for the truth, in an affidavit to establish probable cause for a search and arrest warrant, and those falsehoods are excised, whatever evidence was the subject of the suppression hear-



ing is subject to the exclusionary rule's "fruits of the poisonous tree" doctrine. UNITED STATES V. LEON, 468 U.S. 897, 906-910, 104 S.Ct. 3405, 3411-3413 (1984)("Standing to invoke the rule has thus been limited to cases in which the prosecution seeks to use the fruits of an illegal search or seizure against the victim of police misconduct."); see also WONG SUN V. UNITED STATES, 371 U.S. 471, 491-492, 83 S.Ct. 407, 419-420 (1963). The FRANKS Court also recognized this fact: "...the Court has not questioned, [], the continued application of the rule to suppress evidence from the State's case where a Fourth Amendment violation has been substantial and deliberate." *Id.*, at 171, 98 S.Ct., at 2684. Had Peterson been present, he would have argued not only the contents of his brief, but also establish the CI was not searched by anyone prior to the alleged controlled buy on December 12, 2001, thus being in a position to push for a FRANKS ruling because not only was the affiant not credible, but Det. Pastrano could not vouch for Det. Guerrero's claims in the affidavit. If the CI is not believable and Det. Guerrero's untruths are exposed, then there's no probable cause to arrest Petitioner, consequently, Petitioner would have been entitled to a favorable FRANKS ruling and the exclusionary rule would have prohibited the illegal evidence from being used against him, mandating his immediate release.

In this context and under the facts and circumstances presented hereinabove, there can be no doubt but that the suppression hearing was, under CRONIC, a 'critical stage' which required the presence and assistance of Peterson. Petitioner has stead-

fastly maintained throughout these various proceedings that Peterson's absence, whether voluntary or not, deprived Petitioner of the benefit of his Sixth Amendment rights to the effective assistance of counsel, confrontation of his accusers, due process of law and of a fair and impartial jury---all accomplished without Petitioner's knowing, intelligent and voluntary waiver of that Sixth Amendment right.

CRONIC was "clearly established Federal law" in 2001 and this Court therein set out the criteria necessary to reach a determination in this case and within the AEDPA criteria, yet the Fifth Circuit Court of Appeals chose instead to not give effect to the same Supreme Court citations utilized in reaching decisions which held that suppression hearings are 'critical stages' under GIDEON V. WAINWRIGHT, 372 U.S. 335 (1963), HAMILTON V. ALABAMA, 368 U.S. 52 (1961), POWELL V. ALABAMA, 287 U.S. 45 (1932), and UNITED STATES V. WADE, supra, KIRBY V. ILLINOIS, 406 U.S. 682 (1972), and UNITED STATES V. RUSSELL, 205 F.3d 768 (5th Cir.2000) and other cases cited throughout Petitioner's pleadings. The right to counsel is such a basic and cherished right that this Court has described it as a structural defect. "The existence of [structural] defects--deprivation of counsel, for example--requires automatic reversal of the conviction because they infect the entire trial process." BRECHT V. ABRAHAMSON, 507 U.S. 619 (1993).

The Fifth Circuit erred in ruling that the state trial court did not "unreasonably appl[y]" CRONIC in light of the facts pre-

sented in this particular case. The AEDPA required a ruling that CRONIC applied because Peterson was absent at a 'critical stage' and that absence, whether voluntary or not, prejudiced Petitioner in this particular hearing.

Based on the foregoing, it is respectfully requested that this Court find that the Fifth Circuit erred in its decision that the state trial court did not "unreasonably appl[y]" CRONIC to the facts presented in this case and remand with instructions that it review Petitioner's habeas claims under CRONIC's criteria.

#### QUESTION NO. 2

In the alternative, Petitioner contends that the Fifth Circuit "has decided an important question of federal law that has not been, but should be, settled by this Court." Rule 10(c), supra.

Specifically, the Fifth Circuit concluded "that no Supreme Court precedent has directly addressed ... whether the denial of counsel at a hearing on a motion to suppress is a "complete denial of counsel" at a "critical stage" of the criminal proceeding for the purposes of the Sixth Amendment." APPENDIX A at 8. In a footnote (3), the court of appeals goes on to state that Petitioner "would have a compelling argument" in a direct appeal context as opposed to an argument in "a habeas context" because the AEDPA limits their standard of review because there exists no Supreme Court precedent holding that a "suppression hearing is a "critical stage" under CRONIC. However, the focus should be on whether or not a defendant is entitled to the assistance of counsel, under

the facts and circumstances presented here, in a FRANKS V. DELAWARE hearing which has the real potential to end the prosecution of Petitioner at its conclusion? In light of Det. Pastrano's testimony where he could neither vouch for Det. Guerrero's affidavit claims of Guerrero having searched the CI prior to the controlled buys, or his (Pastrano's) certainty that it was Arnaldo who sold the CI drugs on December 12, 2001, the State used that December 12th sale in its closing argument before the jury---Peterson's presence at the continuation of the FRANKS hearing was crucial. It is evident that the evidence adduced from the February 10th and 13th, 2003 FRANKS hearing was used to later convict Petitioner.

In the cases cited by the Fifth Circuit in its footnote 3 (APPENDIX A at 8), suppression hearings are critical stages---however, that case law is of no benefit to Petitioner because those are either pre-AEDPA or direct appeal cases; Petitioner's issue was raised thru or in the habeas context, therefore the need for a post-AEDPA Supreme Court decision that, under facts similar as those presented herein, a defendant is entitled to the assistance of counsel at a FRANKS V. DELAWARE suppression hearing because of the critical nature of the proceeding. This situation is ripe for this Court consideration. Petitioner's situation was at a "critical stage" because under FRANKS Peitioner was attacking the veracity of the Affiant who drafted the affidavit to show probable cause. Under these circumstances, Petitioner was entitled to the presence of his attorney to confront and cross-examine

the witnesses against.

The State argued that even if the AEDPA did not apply herein, Petitioner's "denial of counsel was not 'of such significance that it makes the adversary process itself unreliable.'" Letter-Brief (Let.Br.) at 15. Calling attention to the circumstances of the hearing, the State set out five (5) instances in support of its request for denial of habeas relief: "(1) the voluntary nature of Peterson's absence; (2) the presence of other attorneys representing Gomez's interests; (3) the cumulative nature of the additional testimony; (4) the measures taken to cure any prejudice that might have occurred; and (5) the meritless nature of the hearing." Id. at 13. Petitioner has already addressed Nos. 1, 3, 4, & 5 (at 8 thru 13); therefore, as CRONIC counsels: the reasons for counsel's absence does not matter, what matters is whether the defendant's right to a fair trial was violated by that absence; the testimony of Det. Pastrano was not cumulative because he, as the on-the-scene undercover officer, had to corroborate the CI's drug transactions and, therefore had to corroborate what the CI allegedly "told" Det. Guerrero, that it was Petitioner who sold drugs to the CI on December 12th. However, on this very point, Det. Pastrano unequivocally stated that it was Arnaldo, not Petitioner who sold drugs to the CI on the 12th---this was not "cumulative" testimony but different testimony from different witnesses verifying facts that had not been previously verified and could not be verified by anyone else; the "measures taken to cure any prejudice" to Petitioner could not be taken by trial attorney Huff

because Det. Pastrano's previous identification of Arnaldo as the person who sold drugs to the CI on December 12th was an opportunity that was lost at the suppression hearing and could not be cured by the "prophylactic measures" taken by Huff at trial when Det. Pastrano changed his position and identified Petitioner as the seller of drugs to the CI on December 12th---nothing could "cure" that prejudice in light of the fact that that same evidence was used to convict Petitioner of the charged offense; and as for the "meritless nature of the hearing", Det. Pastrano's additional testimony expressly identifying Arnaldo as the one who sold drugs to the CI on December 12th and not Petitioner as claimed by Det. Guerrero (certainly Petitioner was not identified as a seller in any of the previous drugs sales) lends support to the fact that this hearing was any but.

For the reasons above stated, Petitioner requests this Court grant certiorari on this issue because it is ripe for this Court's determination as there will be instances when this issue will again arise that will require this Court's attention and resolution. Petitioner also requests this Court not allow Petitioner's lack of sophistication in presenting his claims before this Court to stand in the way of vindication of his Federal Constitutional rights.

#### QUESTION NO. 3

"Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it

affects his ability to assert any other rights he may have." CRONIC, 466 U.S. at 654. One of those right affected was the right to confront and cross-examine one's accusers. U.S.Const. Amend. 6.

As indicated above, Det. Pastrano's testimony exculpated Petitioner from any of the sales of drugs to the CI, yet Petitioner was not able to take advantage of the opportunity presented by that testimony because Peterson was absent and Petitioner had no one to champion his cause. Peterson could have taken this point to a successful conclusion, gotten the evidence suppressed as to Petitioner, and the indictment/charges dismissed against him. This lost opportunity had a detrimental effect on the outcome of Petitioner's trial---again, uncurable prejudice. "The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment..."). STRICKLAND V. WASHINGTON, 466 U.S.668, 687. Significantly here, the right to counsel is denied when counsel's acts or omissions cause a "breakdown of the adversarial process.." CRONIC, 466 U.S. at 657-58.

Likewise, for the reasons stated hereinabove, Petitioner requests this Court grant ceriorari on this issue because it was a manifestation of Peterson's absence and the vital, crucial testimony of Det. Pastrano---testimony which had the potential to have the charges dropped against Petitioner and end his legal problems.

#### QUESTION NO. 4

On February 6, 2003, after argument in the motion to suppress

hearing, the trial court, after informing all counsel that it required their presence in court on Monday, February 10th, Peterson informed the court he would be on vacation and would not be able to attend the Monday morning hearing. The court allowed as it would not be his case they would be trying then and allowed Peterson to absent himself. On the following Monday morning, February 10 (and for the subsequent hearing on February 13th), the trial court (no doubt after reading FRANKS V. DELAWARE over the weekend) noted for the record that Peterson was absent and stated that the court would deal with that issue when it came up. 3 REPORTER'S RECORD (RR) at 103-19; Let. Br. at 6-7.

If not on February 6, 2003, for certain on February 10th, and 13th, 2003, the trial court should have inquired of Petitioner if Petitioner was in accord with Peterson's absence (according to the State, it was allegedly a "joint motion to suppress" hearing) at that time. The State seems to equate Peterson's filing of a brief with "physical appearance"---as if the brief could confront and cross-examine each witness presented as s/he testified on the moment, or argue to the court on whatever issues had arisen during these particular hearings.

In Texas, the filing of a complaint commences criminal proceedings, thus, at this point, "the explicit guarantees of the Sixth Amendment are applicable." MOORE V. ILLINOIS, 98 S.Ct. 458, 464 (1977). Once the right attaches, the right to counsel under the Sixth Amendment applies to all "critical stages of the prosecution." KIRBY V. ILLINOIS, 406 U.S. 682, 690 (1972).



That Peterson was absent is beyond dispute. Once the trial court established that Peterson was absent, at that point it the trial court should have determined whether Petitioner was consented to Peterson's absence or if he would like to waive his right to Peterson's physical presence---yet the trial court did nothing. Instead, the judge clearly did not contemplate the requisite waiver of counsel issue when he suggested that "other counsel can adequately carry the ball on argument." 3 RR 108-109. Let.Br. at 7. This statement, the State contends, means co-counsel would protect Petitioner's interests---presumably, to the detriment of their individual clients. Id. at 17. It must be noted that neither of the two attorneys mentioned as "co-counsel" consented to any type of "representation" of Petitioner, and Petitioner at no time (a) agreed to their "representation", and (b) waive his right to counsel, and (c), the trial court never inquired of Petitioner what his thoughts were on this matter.

"The judge seemed to believe that he and the attorney could decide, without consulting Petitioner when [the attorney] could absent himself from the proceeding." *SIVERSON V. O'LEARY*, 764 F.2d 1208 (7th Cir.). It is the "responsibility, obligation and duty of the trial judge to make this "serious determination of waiver" and such determination should appear plainly on the record." *FORD*, 526 F.2d at 922 (5th Cir.1976). Moreover, the trial court's actions contributed to the situation adversely affecting Petitioner. After noting Peterson's absence, and the examination of Det. Pastrano began, instead of consulting with Petitioner

about Peterson's absence and what Petitioner wanted to do about it, the trial court, the prosecution, and the other attorneys decided they could proceed. In such a situation, where the impairment of Petitioner's Sixth Amendment right was easy to identify and prevent, the state acted to further the deprivation.

"The assistance of counsel is a requisite to the very existence of a fair trial and the Sixth Amendment assures that a defendant cannot be deprived of personal liberty, whether the crime charged are classified as petty, misdemeanor or felony, unless he has legal counsel ... or has understandingly intelligently and voluntarily waived assistance of legal counsel." FORD V. WAINWRIGHT, 526 F.2d 919, 921 (5th Cir.1976). The content of the discussion between Peterson and the trial court regarding Peterson's absence, however, is not dispositive of the waiver. Peterson cannot waive for Petitioner "an inherently personal right of fundamental importance, such as the right to representation by counsel." UNITED STATES V. JOSHI, 896 F.2d 1303, 1307 (11th Cir).

Once the Sixth Amendment right to counsel has attached, it can only be waived by "an intentional relinquishment or abandonment of a known right or privilege." JOHNSON V. ZERBST, 304 U.S. 458, 464 (1932). The Supreme Court has repeatedly recognized that counsel is crucial at pretrial proceedings. "To deprive a person of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself. Recognizing that the right to the assistance of counsel is shaped by the need for the assistance of counsel, we have found that the

right attaches earlier, 'critical' stages in the criminal process 'where the results might well settle the accused's fate and reduce the trial itself to a mere formality.'" MAINE V. MOULTON, 474 U.S. 159, 170 (1985) (citations omitted). Beyond doubt, the suppression hearing was a critical stage in this criminal prosecution. COLEMAN V. ALABAMA 399 U.S. 1 (1970).

There is nothing in the record herein that indicates that Petitioner waived his right to Peterson's presence at this crucial hearing. Petitioner was "deprived of the guiding hand of counsel" without his having any input on the matter. Surely, the trial court did not make any effort to protect Petitioner's federal constitutional rights.

The Court should remand this issue to the Fifth Circuit for consideration and determination.

#### QUESTION NO. 5

The trial court, in allowing Peterson to absent himself from from the continuation of the FRANKS hearing on February 10th, stated that "other counsel could carry the ball on argument." This statement was obviously made without consideration that the cases had been severed and that the individual objectives of the parties were distinct in spite of the fact that it was considered a "joint motion to suppress" hearing. On Petitioner's part, he was seeking a FRANKS ruling---the excisement of the deliberate and reckless disregard for the truth falsehoods from the affidavit; with that excisement, there would be no probable cause as to

Petitioner---codefendants still had to establish the preliminary falsehoods and deliberate disregard for the truth. However, when Det. Pastrano took the stand and testified that it was not Petitioner who made the drug sales to the CI on December 12th, but Arnaldo, Joseph Garcia (Arnaldo's attorney) quickly tried to imply that it was Petitioner who was identified as the seller by the CI. It is evident that there was a conflict-of-interest in allegedly "ordering" cocounsel to "represent the interests of Petitioner in this crucial and pivotal hearing because Garcia and Friesenhahn (Sandra Gomez's attorney) could not "protect" Petitioner's interests to the detriment of their individual clients. "Defense counsel has an ethical obligation to avoid conflicting representations and to advise the court promptly when a conflict arises during the course of trial." CUYLER V. SULLIVAN, 446 U.S., at 346. Texas Disciplinary Rules of Professional Conduct 1.06(b)-(2), provides in part that a lawyer will not represent a person if that person's interests "reasonably appears to be or become adversely limited by the lawyer's or law firm's responsibilities to another client." See GONZALES V. STATE, 605 S.W.2d 278, 282 (Tex.Crim.App.1980). In order for there to be any type of "representation.. by cocounsel" and thereby, conflict-free, Petitioner first had to waive his right to Peterson's absence and then consent to cocounsel's "representation"---neither of scenarios occurred and the record is silent on the issue of waiver or consent to representation by cocounsel. JOHNSON V. ZERBST, 304 U.S. at 464.

**CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted,

  
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Date: July 19, 2013