No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

Michael Barrett — PETITIONER
(Your Name)

vs.

United States of America — 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

Michael C. Barrett # 25677-177
(Your Name)

USMCFP Springfield PO Box 4000
(Address)

Springfield, MO 65801
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

1. Does it create a conflict of interest for a lawyer to have to argue on appeal that the trial court should have replaced him? Can this create an impermissible risk of constructive denial of counsel, as it puts the attorney and client's interests at odds?
2. If a judge undermines the attorney-client relationship, should new counsel be appointed to avoid the appearance of impropriety?

LIST OF PARTIES

[X] 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

[X] 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,
[X] is unpublished.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,
[X] is unpublished.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[ ] is unpublished.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[ ] is unpublished.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

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was April 6, 2018.

[X] 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

21 U.S.C. 841(a)(1). **Unlawful acts.** Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.

21 U.S.C. 841(b)(1)(B). **Penalties.** Except as otherwise provided in section 409, 418, 419, or 420, any person who violates subsection (a) of this section shall be sentenced as follows:(viii) 5 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers; such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years... a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or $5,000,000 if the defendant is an individual....Notwithstanding section 3583 of title 18, any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment....Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

21 U.S.C. 846. **Attempt and conspiracy.** Any person who attempts or conspires to commit any offense defined in this title shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

18 U.S.C. 3553(a)(1). **Imposition of a sentence. Factors to be considered in imposing a sentence.** The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider the nature and circumstances of the offense and the history and characteristics of the defendant;

18 U.S.C. 3553(a)(2)(C). the need for the sentence imposed--to protect the public from further crimes of the defendant;

STATEMENT OF THE CASE

Michael Barrett (aka Motorcycle Mike) was indicted in the Northern District of Texas for conspiracy to distribute methamphetamine in 2016, and detained pending trial. Because Barrett was found indigent, counsel was appointed, though the initial attorney had to be replaced due to conflict of interest, and attorney Leigh W. Davis replaced him.

Barrett and Davis had a contentious relationship. Even prior to sentencing, Barrett filed a pro se motion, asking for Davis to be replaced for demeaning and unprofessional conduct. The Court ordered the parties to attempt to reconcile, and, as a result, the motion was withdrawn. Barrett pled guilty, submitted an affadavit stipulating certain relevant conduct and was scheduled for sentencing on January 20, 2017.

The PSR calculated Barrett's offense level at a 37, attributing more than 15 kilograms of methamphetamine to him, well in excess of what he stipulated to. Counsel objected to this based on his understanding of Barrett's codefendant's hearings, though he later admitted to not researching the basis of his objection. Finding the objection frivolous, the amended PSR recommended removing Barrett's acceptance of responsibility.

Waiting until the day before sentencing to file for an extension, counsel told the Court that he had done no investigation into the facts underlying his objections, and stated he was unprepared for sentencing. Noting that he had been on the case over a year, and that these were old hearings, the Court lambasted counsel for not doing his job, and for unprofessional behavior. Somehow, the Court determined the transcripts sought would not aid Barrett, though no one knew what was in them, and denied the continuance. Unprepared for the hearing, counsel's unsupported objections raised Barrett's level by

three points, resulting in a sentence of 420 months. A timely notice of appeal was filed.

Barrett requested replacement of counsel for appeal based on the Court's comments, which was seconded by Davis. Acknowledging it had created the problem by criticising Davis, the Court nevertheless refused to replace him, suddenly finding he was doing a good job. Though Davis stated they couldn't work together, the Court stated that he'd do better than anyone else.

On appeal, Davis still had not viewed the transcripts, directly relevant to his request for an extension, and failed to dispute the Guideline calculations. Instead, his entire brief blamed both his client and the Court for his failings effectively denying his client a meaningful appeal, or any review of his sentence. Barrett filed a pro se addendum, which does not appear to have been considered, due to this representation by a professional attorney. On April 6, 2018, the Fifth Circuit Court of Appeals affirmed the sentence, and counsel withdrew, leaving Barrett to file for certiorari pro se, in large part trying to preserve issues for § 2255.

REASONS FOR GRANTING THE PETITION

I. Requiring an attorney to brief and litigate his own recusal creates an inherent conflict of interest, constructively denying a defendant effective assistance of counsel.

Defendants are entitled to single-minded representation from a conflict-free attorney, acting solely as their advocate, Strickland v Washington, 466 US 668, 685 (1984); United States v Cronic, 466 US 648, 656 (1984). Yet, in this case, this right was necessarily undermined by placing counsel in a position where he had to advocate for his own removal from the case on appeal. This creates an inherent conflict of interest for even the best, most zealous attorney, placing his and his client's desires and interests at cross purposes, the possibility of unfair result to the defendant is too great to ignore.

Here, Petitioner and his attorney had a breakdown in communications to the point where Petitioner completely lost trust in his representation, which is detailed more thoroughly in Ground II. He filed several motions complaining of counsel's performance and asking for him to be replaced. Though this initially appeared to be resolved, after sentencing, the problems were brought back to the Court's attention. Petitioner filed a pro se notice of appeal and several requests for information to the Court, not just argumenting his attorney, but asking for his attorney's removal for ineffectiveness. When this was denied, Petitioner filed his own pro se brief, which does not appear to have been considered by the Fifth Circuit, as it was not even mentioned in the opinion, supplementing his attorney's appeal.

Recognizing his client's dissatisfaction with him and the fact that, due to the district court record, this would almost certainly lead to a future ineffective assistance claim on § 2255. Counsel agreed that he should be

replaced on appeal. Reading sounsel's briefing of the matter, we can see the dangers of this practice are not hypothetical. Counsel recounts the breakdown of communications between the parties as being everyone's fault but his own. The appeal brief mentions that Petitioner simply refused to believe his lawyer's good faith promise that he would file a notice of appeal, and hints that Petitioner deliberately misled the Court by omitting details in his attorney's favor, (Appellant's Brief at 10). Of course, its not all the client's fault, counsel also blames the Judge for "unreasonably criticizing" him and stoking his client's resentment towards him, (Id at 11-15).

It is, of course, possible, as counsel suggests, that the Court's "severe criticism" of him suggesting he was "incompetent", not "do[ing his] job", and that he "failed his client," (Id at 16) is grossly unfair. It is also possible that his client should've talked to his counsel instead of the Court and not "put a happy face" on his problems in front of his attorney, (Id at 15). But it is just as possible that counsel's representation was deficient, and that everyone except him recognized this. The idea that the failures that led to Petitioner's sentence were potentially to be laid at counsel's feet, is nowhere to be found in the brief.

Regardless of the ultimate rights or wrongs of the matter, Petitioner was still entitled to the zealous advocacy of his attorney, atempting to get him reliéf by pointing out errors in the record. Since the very errors raised call into question the performance of counsel, Petitioner was entitled to have counsel point out that his client might not have received such a harsh sentence, but for his errors. At the very least, the evidence sought which could have mitigated the punishment, should have been examined, now that counsel had time, so as to show the panel the required prejudice; only one sentence out of the transcripts is cited.

Instead of zealously advancing his client's cause, then counsel is pushing his own. The brief reads more like an explanation for why counsel was not ineffective; the parties and circumstances conspired against him to prevent him from succeeding, than it does an argument for his client. Not only did counsel not present much of a reason to revisit his client's sentence, he actively and preemptively undermined his client's future § 2255 claims of ineffective assistance. This is hardly what the Constitution requires.

In Taylor v United States, 484 US 400, 436 (1988), the dissent noted that an attorney is placed in a conflict of interests when their failure to follow a discovery rule prevents them from fully putting forth a defense. It is unrealistic, they noted, to expect the attorney to leap up and say "don't punish my client, punish me instead!" Once the attorney and his client's interests become adverse, it is no longer possible to expect Constitutionally adequate representation, id at 437.

So, too, when an attorney is forced to argue that he should be, or should have been, removed from the case, the conflict of interests become immediate, inherent, and unavoidable. One need not cast aspersions on any specific attorney to recognisze this problem. It is simple human nature to defend ourselves against accusation, even if that accusation is fair, a fact this Court has previously recognized, see for example, North Carolina v Alford, 400 US 25, 37 (1970). Put another way, "[i]t is unlikely that [the lawyer on whom the conflict of interest charge focused] would concede that he had continued improperly to act as counsel", Mickens v Taylor, 535 US 162, 204 (2002) (citing Wood v Georgia, 450 US 261, 265 & n5 (1981).

There is too much risk to this practice. Whether the charge of ineffectiveness is fair or not, this puts the attorney and the defendant at odds. While there may be attorneys, even the vast majority of them, who could perform

such a tight rope walk, many could not. When the charge is unjust, there is a significant chance that it will sour relationships between the attorney and client, which can subtly influence, in a negative way, the quality of representation. When the charge is well founded, there is too much temptation to use the appellate process as a soap box to insulate his own errors, as was done here, effectively denying Petitioner representation at all, Cronic at 659-60.

The right to conflict free representation is far too important to all nice calculations into prejudice from its absence, fritter it away, Glasser v United States, 315 US 60, 76 (1942). Because the Fifth Circuit's review relied solely on briefs filed by a lawyer with conflicted loyalties; it is inherently unreliable. Petitioner deserves review by an attorney solely with his interests at heart. Anything else is unreliable, Penson v Ohio, 488 US 75, 87-87 (1988).

II. It does not further the "appearance of justice" to deny a defendant replacement counsel after the Court undermines the attorney-client relationship by demeaning the attorney's performance. This calls into question the integrity of the trial.

Many indigent defendants do not trust their lawyers; there is the general belief that, since the attorney is hired by the Court, and is an agent of the Court, that his first loyalty is to the Court, not his client, Jones v Barnes, 463 US 745, 761-62 (1983). Actions like these taken by the Judge in this case, further that unfortunate perception.

The appearance of justice is just as important as its reality, J.E.B. v Alabama ex Rel. T.B., 511 US 127, 161 & n3 (1994). It is important not just that proceedings actually be fair, they must **seem** fair to the parties involved and the general public, otherwise respect for the judiciary will falter and people will be less likely to follow its orders. Here, there is a significant question whether Petitioner received either.

At sentencing, the Judge denied a motion for a continuance because he felt that counsel had not exercised due diligence in attempting to determine whether the transcripts he was waiting on actually had anything useful in them. It also irked him that the motion was filed less than 24 hours before sentencing. He publicly chided him for not doing "what could have been done a long time ago." When counsel tried to defend himself, the Court stated unequivocably that his lack of knowledge was because he hadn't done his job, (ROA.470-71). Unprepared to proceed, by his own admission, counsel's performance at sentencing resulted in a 420-month sentence.

As counsel himself noted in the appellate brief:

> The district court's harsh and sharp criticism of counsel would have left Barrett with a very poor impression of his lawyer...[It] suggested counsel was incompetent...and flat out told everyone that counsel had failed his client...To expect Barrett to have any confidence in his

counsel after that lambasting is difficult.

(Appellant's brief at 16).

It's a rare defendant indeed that will hear a sitting judge criticize his attorney's performance and not believe there's something to it. Whether a lay person or someone with experience in the system, anyone listening to such an exchange will automatically assume that there **must** be something to it; judges do not belittle lawyers without reason. So, Petitioner did what any rational person would do, asked for a new attorney.

At the hearing for this request, the Court noted its role in creating this problem:

> I gather, Mr. Barrett that things that happened at your sentencing caused you some concern?...I think I did show a little bit of irritation that was being brought up at the last minute, but I can assure you, Mr. Barrett, that if I thought that what he was trying to get you would have any difference in your sentence, then I would have given him more time to do it, but I was satisfied it wouldn't have made any difference.

(ROA at 517-18).

This assurance is cold comfort to any defendant, let alone one who just received 35 years in prison. Having already hear the Court explicitly state that Counsel is not doing his job, an assertion to the contrary can only cause cognitive dissidence, assuming it is believed at all. Simply telling the defendant that it "shouldn't have said it" because he "does a good job when he's up here" does not cure the error. It merely sounds self serving.

No rational person upon hearing that their lawyer is doing a bad job could possibly have confidence in them. Again, lawyers do not get publicly reprimanded and belittled by sitting judges either on a regular basis or over seemingly trivial mistakes. To uninterested observers, this back and forth raises eyebrows, especially once it is learned that the attorney was not removed. So it can only serve to stoke the natural resentment that ever incarcerated inmate feels-to one extent or another-over his imprisonment to have such a long

sentence based on such a questionable proceeding.

Worse, even if the judge was overreacting, which itself is a problem, there is no question that counsel acted deficiently. Accepting that the Judge's admittedly inappropriate comments are not accurate, he then went on to claim that counsel was filing motions solely because his client mentioned them despite concluding that they had no merit or without investigating them (ROA at 521). Either is unreasonable. This led to the "significant objections" to the PSR that the Government relied upon to show counsel acted reasonably, (Appellant's Brief at 20-21).

Far from being effective advocacy, counsel's frivolous or unsupported objections were the reason that Petitioner lost his acceptance of responsibility. If the challenges were frivolous, counsel failed at his duty to inform his client of the law, preventing errors that would damage his client's cause. This also means he violated his duty to the Court in deliberately advancing meritless claims, Polk County v Dodson, 454 US 312, 324 (1981). If the claims had merit, and counsel didn't present them properly due to lack of investigation, which he himself claims, this, too was unreasonable, Strickland at 690-91. And, if counsel didn't know which it was, he failed in both duties.

With the criticism of counsel, the admitted detriment to the client, and counsel's admitted errors, the whole process in inherently suspect. While the Government brushed away the defendant's loss of faith in his lawyer as no big deal, nothing could be further from the truth. This Court has repeatedly recognized that an inmate's perception of his treatment, whether he feels he is treated fairly, is of great import to society, as it ultimately affects whether or not he rehabilitates, Morrissey v Brewer, 408 US 471, 484 (1972).

As noted in Ground I, and tacitly admitted to by the Government, this didn't just hurt Petitioner's confidence in his attorney, it turned the entire

appellate process into a game of finger pointing. it is correct to note, as the Government does, that counsel unilaterally put the blame on his client for the breakdown (Government's Reply Brief at 20). The end result of the process, a lawyer whitewashing himself of all responsibility and putting the blame solely on his client, **is the opposite of an adequate defense.** Not only did counsel's failures increase the sentence, they foreclosed effective review, essentially nullifying the appeal. Counsel's interest in excusing his actions "sealed his lips" on the crucial inquiries, Holloway v Arkansas, 435 US 475, 490 (1978).

This doesn't just lack the "look of justice," it seems to lack its substance as well. Being told that he "misunderstood" the Judge's unambiguous attack on his lawyer's abilities would not restore any person's confidence. Once that bell has been rung, and the Court caused the rift, it cannot be unrung.

Even had everything been run, perfectly, and it clearly was not, any defendant will be left with the firm conviction that his trial was fundamentally unfair. Nothing could be more destructive of the perception of the justice system, then the idea that a defendant's 35-year sentence is upheld because his lawyer was more interested in preserving his slandered reputation than defending his client.

If this Court can replace a lawyer, over a defendant's waiver, to remove an almost illusory potential of conflict of interest, Wheat v United States, 486 US 153 (1988), the Court can do so here to prevent enshrinement of much worse practices.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Michael C Boodoff

Date: 6-21-18