No. 18-5209

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL BARRETT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

BRIAN A. BENCZKOWSKI
Assistant Attorney General

FRANCESCO VALENTINI
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the district court abused its discretion in denying petitioner's motion to appoint a new attorney to represent him on appeal.

2. Whether petitioner was denied the effective assistance of counsel on appeal because he was represented by the attorney that he had unsuccessfully moved to replace.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-2) is not published in the Federal Reporter but is reprinted at 718 Fed. Appx. 288. The orders of the district court are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 6, 2018. The petition for a writ of certiorari was filed on June 28, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Northern District of Texas, petitioner was convicted of conspiracy to possess with intent to distribute 50 grams or more of a mixture containing methamphetamine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(B). Judgment 1. The district court sentenced petitioner to 420 months of imprisonment, to be followed by four years of supervised release. Judgment 1-2. The court of appeals affirmed. Pet. App. 1-2.

1. Between at least January 2014 and April 2016, petitioner conspired with others to distribute methamphetamine in Fort Worth, Texas. Presentence Investigation Report (PSR) ¶ 9; Second Superseding Indictment (Indictment) 1. One of his suppliers was Tonya Blackwood, who gave petitioner three or more ounces of methamphetamine every other day for about eight months, for a total of at least 10,206 grams. PSR ¶¶ 11-12; C.A. ROA 760-761. Petitioner also obtained at least 9468 grams of methamphetamine from other sources. PSR ¶¶ 15-21; Addendum to PSR ¶ 26. Petitioner distributed those drugs to more than a dozen customers and allowed others to distribute methamphetamine at his home. PSR ¶¶ 10, 23. He also kept a .45-caliber firearm at his residence for protection. PSR ¶ 9.

A federal grand jury in Northern District of Texas charged petitioner with conspiracy to possess with intent to distribute 50 grams or more of a mixture containing methamphetamine, in violation

of 21 U.S.C. 841(a)(1) and (b)(1)(B). Indictment 1-2. Petitioner pleaded guilty without a plea agreement. Plea Tr. 1-24. At the plea hearing, petitioner stated that he was satisfied with his court-appointed attorney. Id. at 20.

2. a. The Probation Office conducted a presentence investigation and prepared a presentencing report for the district court. The Probation Office initially recommended holding petitioner accountable for 14.5 kilograms of methamphetamine and calculated an adjusted offense level of 40. PSR ¶¶ 26, 35-42. The Probation Office further recommended a three-level reduction for acceptance of responsibility, which would yield a total offense level of 37. PSR ¶¶ 44-46. Combined with a criminal history category of IV, the recommended advisory Guidelines range was initially 292 to 365 months of imprisonment. PSR ¶¶ 59, 104.

In response, petitioner filed, through his attorney, 19 objections to the presentence report, which disputed, among other things, the amount of methamphetamine he received from Blackwood, that he received drugs from other suppliers, and the occurrence of drug preparations and transactions at his residence. Objections to the PSR 1-5. Shortly thereafter, petitioner wrote a letter to the district court requesting a new attorney. C.A. ROA 248-249. Petitioner complained that his current attorney had told him that the only legal book at petitioner's disposal, "Busted by the Feds," was wrong and that his attorney was "not being very professional." Id. at 248. Petitioner also stated that his attorney had "not

kept attorney client privilege" and had prepared inadequate objections to the presentence report. Id. at 248-249.

The district court ordered petitioner's attorney to meet with petitioner in person "to the end of resolving any problems existing between them" and thereafter to "file a report with the court * * * concerning such meeting." D. Ct. Doc. 886, at 1 (Dec. 5, 2016). After holding the meeting, defense counsel reported that petitioner's concerns appeared to have been resolved. See C.A. ROA 275.

b. The Probation Office filed an addendum to the presentence report in response to petitioner's objections. Addendum to PSR 1-8. With minor exceptions, the Probation Office rejected petitioner's objections. Id. at 1-6. And the objections that the Office accepted -- e.g., correcting the location of petitioner's wedding -- had no effect on the report's Guidelines calculations. Id. at 6. The Probation Office noted, however, that it had inadvertently omitted 5173 grams of methamphetamine from its initial drug-quantity computation. Id. at 4. Correcting that omission increased petitioner's total drug quantity to 19,674 grams and his adjusted offense level to 42. Id. ¶¶ 26, 35-42. In addition, the Probation Office took the view that petitioner's objections falsely denied or frivolously contested relevant conduct, and it accordingly withdrew its recommendation of a three-level acceptance-of-responsibility adjustment. Id. at 6-7. The

revised advisory Guidelines range was 360 to 480 months of imprisonment. Id. ¶ 104.[1]

c. On the eve of sentencing, petitioner's attorney filed a motion for a continuance. Unopposed Mot. to Continue Sentencing 1-3 (Jan. 19, 2017). Counsel stated that, according to petitioner, information presented at petitioner's pre-trial detention hearing might support petitioner's objections to the drug quantity attributable to his dealings with Blackwood. Id. at 1. Counsel explained that he was waiting for the hearing transcript from the court reporter. Id. at 1-2.

At the sentencing hearing the following day, however, the government explained that the same evidence -- namely, statements made by Blackwood that the presentence report did not credit -- was reflected in Blackwood's interview report, which was already part of the sentencing record. Sent. Tr. 6-8. When petitioner's attorney insisted that he needed the transcript, the court criticized him for not conducting a preliminary review of the detention hearing's audio recording:

> COURT: Well, you don't know what's in the transcript. You don't know what would be in it. Mr. Davis, you just haven't done what you should do to cause me to grant a continuance based on the ground that you haven't found out what was said at the initial appearance.
>
> DAVIS: Well, your honor, with all due respect, I have never in 15 years of appearing in the Northern District heard of an

[1] The applicable 40-year statutory maximum sentence supplied the high end of petitioner's revised Guidelines range. Addendum to PSR ¶ 104; see Sentencing Guidelines § 5G1.1(a).

> attorney just listening to the court's audio recording there, and perhaps—
>
> COURT: You would have heard of it in this case if you would've done your job.

Id. at 9-10. The court denied petitioner's request for a continuance, finding that petitioner's attorney had "a full opportunity to present to the Court everything [he] need[ed] * * * to present [his] client's position." Id. at 38. The court adopted the revised presentence report's Guidelines computation and sentenced petitioner to 420 months of imprisonment, to be followed by four years of supervised release. Id. at 37-39.

3. Three days after sentencing, petitioner mailed a pro se notice of appeal to the district court. D. Ct. Doc. 1100, at 1 (Jan. 25, 2017). Along with the notice, petitioner included a letter asking for a different attorney, asserting that he was "afraid to trust his coun[s]el after [his] day in court with him" and was "not even sure if he [would] give a notice of appeal." Id. at 2. On the same day, petitioner's attorney mailed a notice of appeal on petitioner's behalf. D. Ct. Doc. 1111, at 1-3 (Jan 26, 2017); see id. at 2 (certifying service by mail on Jan. 23).

A few days later, petitioner's attorney moved to withdraw and requested that the court appoint new counsel to represent petitioner on appeal. See Mot. to Withdraw 1-2 (Jan. 31, 2017). Petitioner requested the same. D. Ct. Doc. 1140, at 1 (Feb. 1, 2017). The district court convened a hearing on the motions. See 1/31/17 Order 1.

At that hearing, the district court assured petitioner that his attorney was "doing everything he c[ould] to properly represent [petitioner]"; that the attorney had "done a good job"; and that the attorney would "represent [petitioner] well on [his] appeal." 2/2/17 Mot. Hr'g Tr. 6-7. The court acknowledged that it "probably shouldn't have said" at sentencing that petitioner's attorney was not "doing his job." Id. at 7-8. The court explained that "if [the court had] thought what [petitioner's attorney] was trying to get [i.e., the detention-hearing transcript] would have made any difference in [petitioner's] sentence, then [the court] would have given [the attorney] more time to do it, but [the court] was satisfied that it wouldn't have made any difference." Id. at 5-6; see id. at 8 (explaining that defense counsel "does a good job when he's up here" and that petitioner did not, in fact, need the detention-hearing transcript). The court thus denied petitioner's and his counsel's substitution motions. Id. at 9. And it later denied reconsideration. D. Ct. Doc. 1307 (Mar. 30, 2017).

4. On appeal, petitioner contended through counsel that the district court had abused its discretion in denying his request to substitute his appointed counsel. Pet. App. 1. After the close of briefing, petitioner also filed a pro se motion to have his appointed counsel relieved and new counsel appointed to re-brief the appeal. Pet. C.A. Mot. for Order 1-2 (Nov. 27, 2017). In that motion, petitioner expressed concern about his attorney's failure to raise challenges to three Guidelines enhancements and

claimed "extreme ineffectiveness and improper performance of counsel." Pet. C.A. Decl. 1-2 (Nov. 27, 2017). In a court-ordered response, petitioner's attorney explained that the sentencing claims identified by petitioner lacked merit. Resp. to Client's Mot. 2-3 (Dec. 14, 2017). Counsel did not discuss petitioner's asserted ineffective-assistance claim. He did state, however, that he would "happily step aside and assist in transitioning this case to new counsel should the court believe that new counsel is in [petitioner's] best interest." Id. at 3.

The court of appeals affirmed in an unpublished opinion. Pet. App. 1-2. As relevant here, the court of appeals affirmed the district court's denial of the motions to appoint substitute counsel, finding that petitioner had "failed to demonstrate a 'complete breakdown in communication' or 'irreconcilable conflict' with counsel." Pet. App. 2 (quoting United States v. Young, 482 F.2d 993, 995 (5th Cir. 1973)). The court of appeals also denied petitioner's motion to appoint new counsel and order re-briefing. Ibid.

ARGUMENT

Petitioner renews his contention (Pet. 11-14) that the district court abused its discretion in denying his motion for new appellate counsel, asserting that the court's statements at sentencing "undermine[d] the attorney-client relationship." Pet. 11 (emphasis omitted). The court of appeals correctly rejected that factbound contention, and its decision does not conflict with

any decision of this Court or of another court of appeals. Petitioner also contends (Pet. 7-10) that he received ineffective assistance of counsel on appeal because his appointed counsel, who represented him at sentencing, faced a conflict of interest in challenging the district court's denial of petitioner's request for new appellate counsel. Petitioner did not, however, press such an argument in the court of appeals -- either through counsel or on his own -- and this Court should not consider it in the first instance. Any claim of ineffective assistance of appellate counsel may be considered in post-conviction review proceedings. Further review in this Court is not warranted.

1. a. The Sixth Amendment guarantees a defendant the right to the assistance of counsel at all critical stages of the criminal proceedings. See Montejo v. Louisiana, 556 U.S. 778, 786 (2009). If the defendant cannot afford an attorney, he is entitled to appointed counsel. Gideon v. Wainwright, 372 U.S. 335, 342-345 (1963). An indigent defendant, however, has no right to counsel of his choosing. See Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 624 (1989) ("[A] defendant may not insist on representation by an attorney he cannot afford.") (brackets in original; citation omitted); see also United States v. Gonzalez-Lopez, 548 U.S. 140, 144 (2006). Nor does he have a right to a "meaningful relationship" with his counsel, as long as he receives sufficient representation. Morris v. Slappy, 461 U.S. 1, 14 (1983).

Section 3006A of Title 18 governs the appointment of counsel for indigent federal defendants. The statute provides that the "court may, in the interests of justice, substitute one appointed counsel for another at any stage of the proceedings." 18 U.S.C. 3006A(c). "Because a trial court's decision on substitution is so fact-specific, it deserves deference; a reviewing court may overturn it only for an abuse of discretion." Martel v. Clair, 565 U.S. 648, 663-664 (2012). Courts reviewing the denial of a defendant's request to substitute appointed counsel, or of appointed counsel's request to withdraw, consider "the timeliness of the motion; the adequacy of the district court's inquiry into the defendant's complaint; and the asserted cause for that complaint, including the extent of the conflict or breakdown in communication between lawyer and client (and the client's own responsibility, if any, for that conflict)." Id. at 663; see, e.g., United States v. Young, 482 F.2d 993, 995 (5th Cir. 1973) (considering whether "a conflict of interest, a complete breakdown in communication or an irreconcilable conflict" had occurred) (citation omitted).

b. The court of appeals correctly determined that the district court did not abuse its discretion when it declined to appoint new counsel for petitioner. Although petitioner's request appears to have been timely, the district court exhaustively inquired into petitioner's complaints and determined that replacement counsel was not warranted. First, when petitioner

expressed dissatisfaction with his appointed counsel before sentencing, the court directed counsel to meet with petitioner, attempt to resolve the difficulty, and report back. D. Ct. Doc. 886, at 1. Counsel reported back that the concerns had been resolved and petition did not renew any of his complaint at that time. See C.A. ROA 275. Later, when petitioner voiced concern with his attorney's performance at sentencing, the court took the unusual step of convening an ad hoc hearing. 1/31/17 Order 1. At the hearing, the court repeatedly inquired about petitioner's concerns. See 2/2/17 Mot. Hr'g Tr. 4-5, 7-9. In response to those concerns, it explained that it "probably shouldn't" have criticized defense counsel's performance and that it did so out of annoyance with the tardy request for a continuance. Id. at 8. The court assured petitioner that his counsel had performed effectively, that the additional evidence petitioner wanted to present would not have changed the outcome at sentencing, and that his attorney would continue to "do a good job" on appeal. Id. at 8-9. The court's extensive inquiry into petitioner's complaints was more than adequate.

The court of appeals did not err in finding that petitioner's distrust of his counsel fell short of a "complete breakdown in communication" or "irreconcilable conflict." Pet. App. 1 (quoting Young, 482 F.2d at 995). A "complete breakdown in communication" requires more than an evident distrust or dislike of counsel. See United States v. Romans, 823 F.3d 299, 312-313 (5th Cir.), cert.

denied, 137 S. Ct. 195 (2016). It requires "a total lack of communication preventing an adequate defense." United States v. Wild, 92 F.3d 304, 307 (5th Cir.) (quoting United States v. Cole, 988 F.2d 681, 683 (7th Cir. 1993)), cert. denied, 519 U.S. 1018 (1996). At no point has petitioner claimed that his appointed counsel totally failed to communicate with him. Although petitioner asserts that the court's criticism at sentencing created an "irreconcilable conflict" between him and his attorney, courts of appeals recognize that a defendant's unilateral lack of confidence in his attorney does not suffice to establish an "irreconcilable conflict." Romans, 823 F.3d at 312 (citation omitted); see Thomas v. Wainwright, 767 F.2d 738, 742 (11th Cir. 1985) (holding that a defendant's general loss of confidence in his counsel, standing alone, is insufficient to justify substitution), cert. denied, 475 U.S. 1031 (1986). Particularly after the district court's explanation and reassurances at the substitution-of-counsel hearing, any lingering conflict would necessarily be the result of petitioner's own unjustifiable refusal to accept the court's explanation. A defendant, however, "cannot force the appointment of new counsel by simply refusing to cooperate with his attorney, notwithstanding the attorney's competence and willingness to assist." Harding v. Davis, 878 F.2d 1341, 1344 n.2 (11th Cir. 1989); see also Romero v. Furlong, 215 F.3d 1107, 1114 (10th Cir.) ("A breakdown in communication warranting relief under the Sixth Amendment cannot be the result

of a defendant's unjustifiable reaction to the circumstances of his situation."), cert. denied, 531 U.S. 982 (2000). Further review of petitioner's substitution-of-counsel claim is therefore unwarranted.

2. Petitioner separately contends (Pet. 7-10) that he received ineffective assistance of counsel on appeal because his appointed attorney faced an "inherent conflict of interest" in challenging the district court's denial of petitioner's request for a new appointed counsel. Petitioner forfeited direct review of that contention, however, by not raising it in the court of appeals. Any ineffective assistance claim premised on that concern is therefore more appropriately considered in post-conviction review proceedings. In any event, even if petitioner had preserved the contention, it would not warrant relief because the underlying substitution-of-counsel claim as to which petitioner claims a conflict of interest itself lacks merit.

a. Criminal defendants convicted of felonies have a right to effective assistance of counsel on a direct appeal. See Evitts v. Lucey, 469 U.S. 387 (1985). This Court's decision in Strickland v. Washington, 466 U.S. 668 (1984), generally requires that to establish ineffective assistance of counsel, a defendant must prove both (1) deficient performance and (2) prejudice. Id. at 687. To demonstrate deficient performance, a defendant must show that defense counsel's conduct fell below an "objective standard of reasonableness," with the court applying a "strong

presumption" that counsel's strategy and tactics fell "within the wide range of reasonable professional assistance." Id. at 688-689. To demonstrate prejudice, a defendant must show that counsel's deficient performance "prejudiced the defense," through proof of a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 687, 694.

In Cuyler v. Sullivan, 446 U.S. 335, 349-350 (1980), this Court recognized a limited exception to the Strickland rule. It held that where a defendant can show that a conflict of interest arising from counsel's active representation of co-defendants adversely affected counsel's performance, reversal is required, even without a showing of a probable effect on the outcome of the proceeding. In the absence of an active, simultaneous representation of co-defendants, however, Culyer does not control, and Strickland requires a demonstration of deficient performance and prejudice. See Mickens v. Taylor, 535 U.S. 162, 174-175 (2002) (explaining that, although the court of appeals had extended Cuyler to "'all kinds of alleged attorney ethical conflicts,'" Cuyler "does not * * * support[] such [an] expansive application") (citation omitted).

b. Petitioner has forfeited direct review of his conflict-of-interest claim by failing to present it to the court of appeals. Petitioner's opening brief, which was submitted by appointed counsel, contended that the district court erred in failing to

recognize the interpersonal conflict between petitioner and counsel, but did not suggest that counsel faced a conflict of interest in advancing that claim on appeal. See Pet. C.A. Br. 9-17. And petitioner's own pro se motion to appoint new counsel and order re-briefing criticized several aspects of his counsel's representation, but did not allege any conflict of interest or even discuss his counsel's presentation of the substitution-of-counsel claim -- the only aspect of counsel's performance germane to the conflict of interest alleged here. See Pet. C.A. Mot. for Order 1-2; Pet. C.A. Decl. 1-2. As a result, the question that petitioner raises in this Court was never pressed in or passed on by the court below.[2] This Court should follow its "normal practice" of denying review of issues not raised below. EEOC v. Federal Labor Relations Auth., 476 U.S. 19, 24 (1986) (per curiam); see OBB Personenverkehr AG v. Sachs, 136 S. Ct. 390, 397 (2015) (a party's argument "was never presented to any lower court and is therefore forfeited").

That is particularly true given that petitioner seeks to raise an ineffective assistance of counsel claim. Reviewing courts frequently do not entertain claims of ineffective assistance of

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[2] Prior to his motion to appoint new counsel, petitioner also appears to have filed pro se a supplemental brief, raising various sentencing claims but not taking issue with his attorney's presentation of the substitution-of-counsel claim. See Resp. to Client's Mot. 1-2 (describing the arguments advanced in the supplemental brief). The court of appeals declined to accept that submission because petitioner was represented by counsel at the time. Id. at 2.

counsel on direct appeal, because the record will often be inadequate for the court to decide the issue. Instead, such claims are more typically raised by way of a motion pursuant to 28 U.S.C. 2255. See Massaro v. United States, 538 U.S. 500, 507 (2003) ("few [ineffectiveness] claims will be capable of resolution on direct appeal"). The concern with premature adjudication is particularly forceful where, as here, the defendant alleges that his attorney was ineffective on the appeal itself. To the extent petitioner can show that his attorney's alleged conflict of interest adversely affected his representation, he will be able to raise an ineffective assistance claim on collateral review. See id. at 509 ("We * * * hold that failure to raise an ineffective-assistance-of-counsel claim on direct appeal does not bar the claim from being brought in a later, appropriate proceeding under [Section] 2255.").

In any event, even if petitioner had not forfeited his ineffective assistance claim, the claim would lack merit. As the court of appeals correctly determined, the district court did not abuse its discretion in denying petitioner's and his counsel's motions to replace appointed counsel. Pet. App. 2; see also pp. 9-13, supra. Because petitioner could not have brought a meritorious substitution-of-counsel claim, he cannot satisfy the prejudice requirement of Strickland.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

BRIAN A. BENCZKOWSKI
Assistant Attorney General

FRANCESCO VALENTINI
Attorney

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