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

PETITIONER'S RESPONSE TO THE BRIEF IN OPPOSITION

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TABLE OF AUTHORITIES CITED

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Comes now pro se Petitioner, Michael Barrett, responding to the Solicitor General's brief in opposition of this Court granting certiorari. Instead of explaining why the actual questions presented should not be addressed, the brief in opposition substitutes similar issues and debates those instead. Accordingly, the brief provides no legitimate reason that certiorari should not be granted.

Cognizability of the Claims

The Solicitor General asserts that, regardless of the merits of the claims themselves, they should not be addressed here as they were not raised in the Fifth Circuit Court of Appeals (p 9, 13). In any event, these claims question Counsel's effectiveness, meaning they cannot be raised in a direct appeal. Petitioner should instead restart the process with a §2255-including its harder to satisfy burdens-requiring another round of proceedings (p 13, 15). Neither objection is valid or supported by precedent.

This Court has previously allowed litigants to raise serious errors or deviations from procedure that deprived the defendant of a fair hearing, or

of the hearing altogether. In Penson v Ohio, 488 US 75 (1988), both Counsel and the state courts refused to follow the Anders procedure. Though the lower courts found error and granted relief, Penson was allowed to appeal the matter to this Court, despite not having briefed it in the state court of appeals: See, also, McCoy v Court of Appeals, 486 US 429 (1988).

The fact that the errors leading to this denial of appeal also involve Counsel's performance does not magically make them uncognizable. After all, Penson, too, involved such claims. Indeed, the Solicitor General's own case, Massara v United States, 538 US 500 (2003) disclaims such categorical exclusions. While claims of ineffective assistance **generally** are inappropriate:

> There may be cases in which trial counsel's ineffectiveness is so apparent from the record that...it is advisable to raise the issue on direct appeal. There may be instances, too, when obvious deficiencies in representation will be addressed by an appellate court sua sponte.

at 508.

Clearly, Petitioner could not challenge Counsel's failures on appeal until they occured. Nor could Petitioner, a pro se inmate, know that he would receive no adjudication of other issues simply because they were not raised by Counsel. His desire to raise substantive issues that could potentially garner relief rather than pro forma procedural objections should not work to his detriment. Thus, even were there no guidance to show us the Solicitor General is wrong, his objections still would make little sense.

Beyond that, the suggestion to dismiss and have this refiled and relitigated as a §2255 does exactly what the law is supposed to abhor, creating an unneeded multiplicity of suits, Ashe v Swanson, 397 US 436, 457 (1970). The analysis of these issues on §2255 would essentially boil down to the same question- was Petitioner denied an effective appeal? Then the appeal would be vacated

and restarted as if he succeeded. This fails to conserve court resources and makes it harder on all parties as they must relitigate matters years after the fact as opposed to when they are fresh, supposedly what should be avoided whenever possible, see, for example, Parke v Riley, 506 US 20, 30 (1992).

This suggestion to find procedural bars when none exist is contrary to this Court's precedents and to basic principles of judicial economy. Accordingly, it must be rejected. We move to the questions themselves.

Merits of the Questions Raised

The Solicitor General subtly changes the nature of the question about Counsel's performance from his actual performance on appeal and whether his actions effectively denied his client appelate review to if the District Court erred in not removing him. Because the issues are so interrelated and cover much of the same ground, this bait and switch is easy to miss. Yet, in his reframing of the issues, the Solicitor General deftly sidesteps both questions and addresses his own strawman. Thus, in explaining why the opposition brief is wrong, we start with the reframing.

1. Should Counsel have been replaced on appeal?

As the Solicitor General correctly states, whether the District Court erred in refusing to replace Counsel is a fact intensive inquiry, and the District Court's findings should be given deference (p 8, 10). The opposition brief also notes that the District Court repeatedly chided Counsel for unprofessional conduct. The District Court's doublespeak defense of Counsel admitted that these outbursts were fueled by frustration that Counsel was making tardy and frivolous motions without doing proper investigation (p 11).

On its face, then, the District Court's ultimate determination is not just wrong, but is irrational. It simply cannot be that Counsel was missing deadlines or filing deficient motions, and that he performed effectively. The

findings expressly contradict the conclusion. They are, quite simply, mutually exclusive. And the District Court's promise that he would continue to do a good job-meaning he would provide the same level of "competence"-on appeal cannot seriously install confidence.

Like any rational individual, Petitioner wanted an attorney who would research his case, file relevant, arguable motions in a timely manner and not get reprimanded by the Judge for not doing his job. Regardless of the errors made on appeal, it was an abuse of discretion to catalogue Counsel's shortcomings and then refuse to remove him. Whether the parties had "irreconsileable differences", a "complete breakdown in communications" or "lack of trust" simply doesn't matter. The record shows that the Court refused to remove Counsel who was failing his client. This was error, and, since the Solicitor General does not-indeed, cannot content it was addressed in the Fifth Circuit, the lack of reversal is not dispositive. He is asking the Court to affirm a ruling that was never made.

2. Did Counsel's Actions Effectively Forfeit the Appeal

While it is ultimately irrelevant to whether Counsel performed ineffectively on appeal, the above discussion is instructive in coming to the question the Petition for Certiorari actually asked, whether it created an inherent conflict of interest to have an attorney argue for his own removal. Did Counsel's defense of himself come at the expense of his client, forfeiting the appeal?

The argument that Petitioner forfeited this claim by his lawyer's failure to raise it is nothing more than circular logic. It is Petitioner's fault that he didn't raise any issues in the Court below due to his attorney not acting as his agent because his lawyer didn't raise the issue. It merely restates the problem as the response.

The Solicitor General's tortured treatment of Strickland is doomed by

Christeson v Roper, 190 L.Ed.2d 763, 767 (2015) where this Court held that appointment for new counsel to argue equitable tolling was required since the original missed deadline was due to Counsel's negligence. The reasoning there echoes Petitioner's concerns in his opening brief:

> "A significant conflict of interest" arises when an attorney's "interest in avoiding damage to [his] own reputation" is at odds with his client's "strongest argument-i.e., that his attorneys had abandoned him."

Since advancing such a claim required denegrating his own performance, the attorney could not be expected to make such an argument which threatened their professional livelihood and reputation, id. Prejudice appears to have been presumed.

Just like Christeson, Counsel here failed to timely advance his client's interests. When called to task, he blamed everyone but himself. This continued well into appeal, with Counsel using the briefs to make excuses rather than advance substantive arguments on his client's behalf. One need go no further than the decision itself to see this. The denial of continuance was affirmed because Counsel did not even allege prejudice from the denial (not that he would've succeeded as the denial was due to his negligence). He was too busy defending his own reputation.

Even had Counsel performed adequately in the District Court, it would not change the analysis of his undermining the appeal. Petitioner has more than adequately documented prejudice from his attorney's deficient performance; he was in the same shoes as someone without any Counsel at all in a critical stage, Woods v Donald, 191 L.Ed.2d 464, 468 (2015).

The Solicitor General doe snot address this, as it cannot be defended on its merits, he isntead spouts platitudes about meaningful relationships that are relevant neither to the facts of this case nor the arguments raised.

3. The Breakdown in Relationship Caused by the District Court was Prejudicial

The Solicitor General tries unsuccessfully to brush aside the obviously valid complaints about the inadequacy of Counsel's handling of the appeal because the Appellate Court denied that a complete breakdown in communication occured. Of course, as already noted, the Appellate Court was only presented with Counsel's self serving account which blamed everything on his client. And the Solicitor General's highly imaginative retelling of the tale is based on that self serving brief.

Since it has already been shown, and the Solicitor General does not attempt to deny, that Counsel used the appeal as a forum to defend himself and his reputation, the breakdown in communications' impact on the actual defense is undeniable. It is far beyond an "evident dislike or distrust" or a "unilateral lack of confidence" as suggested (p 11-12). It is a demonstrated adversarial relationship that resulted in Counsel actively working against his client's ends.

Though Petitioner is chided for his "unjustifiable refusal to accept the Court's explanation" (p 12), it is not explained why Petitioner should have accepted this bizarre explanation. Unless it is now reasonable to miss filing deadlines and to fail to investigate, a concept at odds with Strickland, the Court's reassurances were nonsensical. "The Court is sorry it was frustrated with your lawyer for not doign his job. Be reassured that we were not implying he was doing a bad job by not doing what he was supposed to." This sounds ridiculous.

While the Solicitor General cites several cases, he fails to note that the defendants in those cases failed to allege **any** errors of Counsel. In Thomas v Wainwright, 767 F.3d 738, 742 (11th, 1985) for example, the defendant simply refused to answer questions posed by the Court. It was determined that

he was simply trying to thwart the proceedings by his silence. In United States v Romans, 823 F.3d 299, 312 (5th, 2016), the defendant was not as belligerant, but he, too, could not identify anything beyond "lack of communication."

Here, by contrast, not only has Petitioner pointed to specific errors, they were ones noted by the District Court. These cases are inappostate to the claims made here. This reduction of Petitioner's claims by the Solicitor General to the frivolous strawman is dishonest. And dishonesty forms no valid basis for a denial.

Ultimately, the Solicitor General decides to ignore the force of the argument. After all, one need not even address the actual fairness of the trial when it does not even **appear** fair. That Counsel defended himself and not his client on appeal is simply a matter of record; the briefs speak for themselves. Perhaps Petitioner will not prevail in his challenges, but he is entitled to have someone argue on his behalf, not Counsel's. If, for example, Petitioner should not have lost acceptance of responsibility simply because Counsel could not be bothered to research the objection before filing it, then that argument should be put forward.

Put bluntly, this does not **look** like effective advocacy or fairness. Considering that the Court continues to (kindly) criticize Counsel in "reassuring" Petitioner is like putting a bandaid on a severed limb. Reminding Petitioner of his attorney's chronic problems and then "reassuring" him he will continue to get the same quality of representation on appeal **is** the problem. This will not just increase any defendant's anxiety; it will raise the eyebrows of even the most pro-law and order observer.

This alone warrants a reversal.

Conclusion

As the actual claims made are not disputed, and the strawmen raised in

their stead are either incorrect on their own merits or irrelevant and dishonest, no proper reason has been given to deny certiorari.

Respectfully submitted this 4 day of December, 2018.

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CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served with copies of the **PETITIONER'S RESPONSE TO THE BRIEF IN OPPOSITION,** via first-class mail, postage prepaid by giving said document to prison officials for mailing, on this 4 day of December, 2018.

Michael C Barrett

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