21-6520

ORIGINAL

Supreme Court, U.S.
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No. 21-

IN THE

SUPREME COURT OF THE UNITED STATES

MARK J. ZIMNY, *Petitioner,*

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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November 30th, 2021

QUESTION PRESENTED

Did an appellate court contravene Supreme Court precedent by granting the government's motion for summary disposition when prior decisions of this Court, as well as lower Court decisions on nearly identical questions of law, establish that a defendant's request is (at least) debatable among reasonable jurists and in fact presented a 'substantial question' on instant appeal? See: Garcia v. Davis, 2018 U.S. Dist. LEXIS 192801, *35 (S.D. Texas, Nov. 13, 2018), *Weaver v. Massachusetts*, 582 U.S. ___ (2017), and *Jordan v. Fisher,* 135 S. Ct. 2647, (2015).

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is Mark J. Zimny, defendant-appellant below. Respondent is the United States of America, plaintiff-appellee below. Petitioner is not a corporation.

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APPENDICES

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Mark J. Zimny respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The judgment of the United States Court of Appeals for the First Circuit is reprinted in the appendix at Petition Appendix 1-2 ("Pet. App.").

The district court order at issue is reprinted in the appendix at Pet. App. 3 to 5.

JURISDICTION

The United States Court of Appeals for the First Circuit entered its judgment on August 3rd, 2021. It denied Mr. Zimny's motions for reconsideration and reconsideration en banc on September 3rd, 2021. Pet. App. 1a–2a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The question presented involves the Sixth Amendment to the Constitution, which provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence." U.S. Const. amend. VI.

STATEMENT OF THE CASE

Did an appellate court's limited analysis and granting of the government's motion for summary disposition conflict with precedent from this Court and other Circuits establishing that a summary judgment "shall" be granted "if the movant shows that there is no genuine dispute as to any material fact and the movement is entitled to judgment as a matter of law."

Rule 56(a), Fed. R. Civ. P. On a motion for summary disposition, the court must "construe the facts in the light most favorable to the non-moving party" and "resolve all ambiguities and draw all reasonable inferences against the movant." *Delaney v. Bank of Am. Corp.*, 766 F.3d 163, 167 (2nd Cir. 2014). The government's motion (and the Panel's limited judgment granting it) offered no sustainable argument for summary disposition other than what are unfounded and debatable conclusions[1] by the district court based on errors of law. The judgment (paralleling the government's motion) further completely bypassed issues presented in opposition that unequivocally demonstrated "genuine dispute as to material fact" in the case, including: (a) missing evidentiary testimony from lead counsel at Appellant's trial attesting to the prejudice incurred by counsel's errors; (b) an issue of disputed material fact related to conflicted counsel's failure to question an important witness regarding a critical exhibit in the trial (Exhibit 1615) (Doc. 1851, p. 5-7); and (c) the district court's failure to expressly address claims made in the originally filed §2255 petition.[2] (Doc. 1851)

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[1] Indeed, the very conclusions that the district court recognized were debatable at that time and subject to further interpretation via certification for appeal.

[2] Additional record support of their being "genuine dispute as to material

The Panel's decision to grant summary disposition based on this flawed calculus, in the last instance, conflicts with the following decisions of this Court: *Weaver v. Massachusetts*, 582 U.S. ___ (2017), *Miller-El v. Cockrell*, 537 U.S. 322 (2003) (Miller-El 1), *Neder v. United States*, 527 U.S. 1 (1999) and *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006) and other Federal Circuits, See: *Spitzas v. Boone*, 464 F.3d 1213, 1225 (10th Cir. 2006); *Freeman v. Chandler*, 645 F.3d 863, 867 (7th Cir. 2011); *Santa v. United States*, 492 Fed. Appx. 949, 950-51 (11th Cir. 2012) and *Peach v. United States* 468 F.3d 1269 (10th Cir 2006) ("One of the issues petitioner raised in his Rule 60(b) motion in *Spitznas* was whether the district court failed to consider one of the claims he had raised in his habeas petition. 464 F.3d at 1224. We held that this issue "represents a `true' Rule 60(b) claim. It asserts a defect in the integrity of the federal habeas proceedings.)

The Panel's decision also conflicts with the following federal habeas decision of the First Circuit:

Bui v. DiPaolo, United States Court of Appeals, First Circuit, 170 F.3d 232, 1999. (J. Selya) recognizing that: "We believe that the necessity for a substantial showing extends independently to each and every issue raised by a habeas petitioner", (settling that "*each and every issue raised by a habeas petitioner*" is presumed to be addressed on the merits by the district court in the first instance). The First Circuit further codified that: "In the interests of fairness and judicial economy, we also rule that, when the district court grants a limited COA and the

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fact" that the Panel ignored in granting the government's motion for summary disposition can be found in the record of the underlying case in the District Court, (Cr:10024-RWZ) where Appellant's June 22nd, 2020 filed Rule 60(b)(4) Motion to Vacate or Set Aside that Court's Judgment, (Doc. 511), has to date not yet been decided.

petitioner reasonably seeks to expand it, his appeal on the certified issue(s) should be held in abeyance, and full briefing deferred, until this court determines the appealability of the issues that the district court deemed unworthy of appellate scrutiny (and, thus, whether we will issue a complementary COA)", establishing that the district court is required to deem such issues unworthy, not fail to address them altogether.

Consideration by this Court is necessary to resolve these exceptionally important questions, and to secure and maintain the conformity of First Circuit decisions and compliance with controlling Supreme Court law and to prevent manifest injustice in Petitioner's appeal.

Procedural History-

I. Appellant filed a Pro Se petition to Vacate His Sentence Pursuant to 28 U.S.C. §2255 and for the appointment of counsel on April 26, 2019 (Dkt. 458). On May 2nd, 2019 the district court issued an order granting appellant's motion for the appointment of counsel without any findings (Dkt. 460). An initial opposition to the petition was filed by the government on May 20, 2019 along with an accompanying motion for an order to waive the appellant's attorney-client privilege arguing that: "The United States...cannot fully respond to the ineffective assistance of counsel claims contained in Zimny's Section 2255 motion, without being afforded an opportunity to obtain information (including documents, information and affidavits from former counsel regarding the events in question." (Dkts. 466 and 467 at 4). The government's opposition further argued that it "will necessarily need sufficient time to prepare its further opposition to the factual and legal assertions raised by Zimny's Section 2255 motion." (Dkt. 466 at 5). The government never

alleged that Zimny's claims were inadequate on their face or presented conclusions or mere speculation. In fact they claimed just the opposite—that they needed additional time and documentation, an early call for an evidentiary hearing and expansion of the record, in order to fully respond to Zimny's properly presented claims in the petition. [3]

On June 13, 2019 the district court issued an order requesting that the parties submit briefs responsive to the "sole question whether the petition sufficiently alleges ineffective assistance of counsel such that further inquiry is warranted." (Dkt. 471). The government filed its responsive brief on the "sole question" issue on July 11, 2019 (Dkt. 474) and Appellant filed his reply brief on August 17th, 2019 (Dkt. 481). In its responsive brief the government characterizes Zimny's § 2255 petition as boiling down to the following four claims for habeas relief:

- Attorney Watkins was constitutionally ineffective in preparing a motion for continuance which was denied, depriving petitioner of representation of his counsel of choice. Motion at 5-6. (Dkt. 474 at 1).
- Prejudice is to be presumed in this case. Motion at 3. (Id.)
- Prejudice is shown because Attorney Watkins was unprepared at trial, resulting in disarray and a failure to investigate or use exculpatory evidence, and supported by a juror's statement that the jury was "50/50". Motion at 6-7. (Dkt. 474 at 2).

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[3] An argument that Zimny echoed in his original petition (Dkt. 458 at 5, 9) wherein he proposed that "the facts memorialized by the record and subsequent rulings from the First Circuit clearly establish sufficient signs of ineffectiveness as a whole in addition to meeting the lesser burden of setting forth clear markers of deficient performance and potential markers of prejudice necessary to secure remand for an evidentiary hearing" while citing United States v. Marquez-Perez, 835 F. 3d 153, (1st. Cir. 2016) as supportive.

- Attorneys Annen, Watkins and Bretz were conflicted, resulting in a failure to inquire into evidence petitioner asserts was exculpatory. Motion at 7. (*Id*).

On December 10th, 2019 the district court issued an order and opinion denying Zimny's Motion to Vacate under §2255 with the following rationale: "because Zimny cannot articulate the prejudice caused by any of his allegations of counsels' deficient performance, his motion fails on its face." (Dkt. 483).[4] In its opinion the district court, echoing this Court's findings from 2017 in *United States v. Zimny* 857 F.3d 97 (1st Cir. 2017), does not dispute that Petitioner has made a colorable showing that his counsel was deficient under the first Strickland prong: "yet even if counsel's conduct was deficient under the first Strickland prong" (Dkt. 483 at 3). However, the district court goes on to add that: "he [Zimny] cannot show any resulting prejudice". (Dkt. 483 at 3). The district court characterized Zimny's §2255 petition as "boiling down to two claims of prejudice: (1) First, Zimny contends that his lead counsel at the trial, Albert Watkins, was unprepared to cross-examine an important witness, Gerald Chow; and (2) Zimny faults his

[4] Such an articulation was provided via affidavit by trial counsel Kevin Reddington on 09/06/2019 well in advance of the district court's December 10, 2019 ruling but due to ineffectiveness and neglect of court-appointed counsel, Mark Shea, never presented to the district court as material evidence, despite Petitioner's repeated requests to do so. See: Exhibit A Zimny affidavit, June 16, 2020, Email and Message history between Zimny, Shea, LaRocque and Reddington regarding lost affidavit, June 16, 2020. **Apparently in response to Zimny's recently filed Rule 60(b) motion (Dkt. 511), Attorney Mark Shea tardily filed the lost affidavit of Attorney Reddington in the district court, thereby presenting new evidence to that court, and thereby this Court, of a clear articulation of the prejudice caused by counsels' deficient performance at Zimny's trial. (See: Exhibit B, Dkt. #512, Affidavit of Kevin Reddington, June 29, 2020).

counsel for failing to make a 'reasonable investigation' into a purportedly exculpatory document." (Dkt. 483 at 4, 5). It should be noted here that this summary by the district court addresses two fewer claims than the government itself acknowledged Zimny as having properly presented in his initial habeas petition (Dkt. 474, at 1, 2). These unaddressed claims, as the government summarized capably, are perhaps the most important of the petition: (1) that Attorney Watkins was constitutionally ineffective in preparing a motion for continuance which was denied, depriving petitioner of representation of his counsel of choice (thereby triggering a structural error) and (2) that given the structural error caused by counsel's ineffectiveness prejudice should be presumed, even in a habeas context. (Dkt. 474 at 1).

Appellant filed his opening brief in this proceeding on October 26th, 2020 (Doc. 6901) and the government filed a Motion for Summary Disposition on November 17th, 2020 (Doc. 9999), to which the Appellant responded in opposition on November 22nd, 2020 (Doc.5054). This Court issued its judgment on August 3rd, 2021.

STATEMENT OF FACTS

The Unaddressed Claims-

II. The district court made passing note of Zimny's primary ineffectiveness claims, but misapprehended them as one's that "raised identical points on direct appeal, arguing that the denial of his continuance motion deprived him of his Sixth Amendment right to counsel of choice" and that he now "recasts the issue as one of ineffective assistance of counsel." (Dkt. 483, 3). (See: *Banister v. Davis*, Supreme Court of the United States. June 1, 2020 S. Ct. 2020 WL 2814300: "Indeed, the availability of Rule 59(e)

may make habeas proceedings more efficient. Most obviously, the Rule enables a district court to reverse a mistaken judgment, and so make an appeal altogether unnecessary. See United States v. Ibarra, 502 U. S. 1, 5 (1991) (per curiam) (noting that giving district courts a short time to correct their own errors "prevents unnecessary burdens being placed on the courts of appeals"). Of course, Rule 59(e) motions seldom change judicial outcomes. But even when they do not, they give habeas courts the chance to clarify their reasoning or address arguments (often made in less-than-limpid pro se petitions) *passed over or misunderstood before.*"). The district court did not dispute the findings of the First Circuit in United States v. Zimny 857 F.3d 97 (1st Cir. 2017) that counsel's performance was ineffective across multiple levels, but misses the mark when it concludes that "even if counsel's conduct was deficient under the first Strickland prong, Zimny cannot show any resulting prejudice". [5] This finding fails to address entirely Zimny's clearly presented habeas claim that counsel's deficient performance resulted in structural error that pervaded the entirety of Zimny's trial, thus eliminating the need to show prejudice in this context. [6] This argument as presented in Zimny's originally filed §2255 petition is of such import that the government devoted considerable effort to disputing it in its July 11th, 2019 response to this Court's "sole-question" order, citing among other authorities Weaver v. Massachusetts, 137 S. Ct. 1899, 1909-10 (2017).[7] See: *Freeman v. Chandler*,

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[5] Dkt. 483 at 3.

[6] Dkt. 458 at 3, 4, 6,7: "the Circuit's findings firmly establish that a reasonable probability and potential markers of prejudice existed in Zimny's case, where requiring a defendant to show that he or she was prejudiced by the denial of a continuance motion is incompatible with Gonzalez-Lopez where the Court highlighted the difficulties of showing prejudice in such contexts" p.4.

[7] The government's response states: "The fact that claimed ineffective assistance has resulted in a so-called "structural error" does not

645 F.3d 863, 867 (7th Cir. 2011): ("Did Freeman successfully raise the issue of conflict-free counsel in his habeas petition? *868. As noted, Freeman most prominently highlighted the question of counsel of choice, and not conflict-free counsel, in his petition. But conflict-free counsel was also referenced in the petition, if inconspicuously. The state discussed conflict-free counsel throughout eleven pages of its answer, so there can be no argument that it was lulled into believing that Freeman was not arguing conflict-free counsel and was thereby prejudiced. And the district court discussed the merits of Freeman's conflict-free counsel theory in its memorandum. In short, the question of conflict-free counsel received attention from everyone involved in Freeman's habeas case, which suggests it was not waived. And, if not waived, the district court should have addressed this argument fully on the merits. Therefore, the district court should not have denied Freeman's Rule 60(b) motion. The motion correctly observed that the district court had overlooked one of his arguments for habeas relief. Hence, the motion was not a successive habeas petition. *See Gonzalez,* 545 U.S. at 538, 125 S. Ct. 2641.")

Zimny's Clearly Presented Claim of Structural Error Resultant From Counsel's Established Ineffectiveness Was Never Addressed by The District Court on the Merits-

III. The doctrine of "structural error", a claim of constitutional error stemming from counsel's established ineffectiveness that is clearly articulated in Zimny's §2255 petition multiple times and responded to in detail by the

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automatically relieve the defendant of the obligation to show prejudice under Strickland." (Dkt. 474 at 3). This is the exact question that Zimny's petition sought addressed by the district court on the merits, in at least as exacting a manner with citation to relevant authorities, as the government has attempted to do in opposition, and the primary grounds for his petition to this Court for an expansion of issues certified for appeal

government in opposition [8], is never addressed in the district court's ruling denying the habeas petition.

Zimny's Section 2255 petition presents two substantial questions (among other unaddressed claims) of constitutional error that remain unaddressed by the district court, namely that: (a) counsel was ineffective in filing timely and compliant motions necessary to preserve Zimny's Sixth Amendment right to counsel of choice at his trial; and (b) these errors resulted in structural error at Zimny's trial, such that prejudice must be presumed. As other circuits have held, "It is not settled law whether a habeas petition may be granted for structural error raised in an ineffective assistance of counsel claim on collateral review." Garcia v. Davis, 2018 U.S. Dist. LEXIS 192801, *35 (S.D. Texas, Nov. 13, 2018). It is further not disputed that Zimny's case for habeas relief presents not only a clear case on the law, as noted above, but also one on the facts. The Appellate Court's opinion in this case clearly establishes factual findings that, "Reddington failed to request assistance from the court in a timely and effective manner," United States v. Zimny, 873 F.3d 38, 57 (2017); that Rule 40.2 of the Local Rules of the United States District Court for the District of Massachusetts placed the obligation on counsel to alert the district court judge and the Massachusetts Superior Court judge of a conflict, Id. at 53-54; and that counsel had "never even informed the district court of the continuances in the Baptiste trial until March 4 — nine days after he first

[8] See: Dkt. 458, 2-7 and at 4: "Gonzalez-Lopez teaches that requiring a defendant to demonstrate prejudice from the continuance denial in order to establish a deprivation of his right to counsel of choice imposes an obligation to prove what cannot be proven" and government opposition (Dkt. 474 at 2-4): "The fact that claimed ineffective assistance has resulted in a so-called "structural error" does not automatically relieve the defendan of the obligation to show prejudice under Strickland."

learned of the delay-causing witness- attendance issue." Id. at 54. As the district court held in Garcia, "it is uncertain under current Supreme Court precedent whether a claim of ineffective assistance of counsel can raise an issue of structural error such that prejudice need not be demonstrated." 2018 U.S. Dist. LEXIS 192801, *34. Zimny's petition has done just that, and similar to the Garcia case, thus "raises difficult constitutional questions regarding whether Petitioner must demonstrate prejudice in order to succeed. Id. at *35. These questions should be addressed by the appellate Court via remanding the proceeding back to the district court for a ruling on the merits of Zimny's concurrently filed Rule 60(b) petition, and why this petition for certiorari should be granted.[9]

[9] Petitioner filed a Rule 60(b) Motion to Vacate or Set-Aside the District Court's 12/10/19 judgment and order on June 15th, 2020, Dkt. 511, and its disposition is still pending in that court at the time of this filing.

REASONS FOR GRANTING THE PETITION

I. IT IS UNCERTAIN UNDER CURRENT SUPREME COURT PRECEDENT WHETHER A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL CAN RAISE AN ISSUE OF STRUCTURAL ERROR SUCH THAT PREJUDICE NEED NOT BE DEMONSTRATED

In the context of this case the importance of Local Rule 40.2(d), and counsel's failure to invoke it, cannot be understated because on it turns the erroneous deprivation of Zimny's constitutional right to his counsel of choice, and therefore his entire conviction.[10] Zimny notes that, had the proper procedure for conflict of cases been followed, an accommodation short of a continuance that would have allowed for Attorney's Reddington's critical participation in Zimny's trial may have been reached between the district court and the Massachusetts Superior Court. This is the reasonable probability of a

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[10] Rule 40.2 of the Local Rules of the United States District Court for the District of Massachusetts, which places the obligation on counsel to alert the district court judge and the Massachusetts Superior Court judge of the conflict and the scheduling policy set forth in the rule: Counsel shall notify the presiding Superior Court Justice and the judicial officer [of the district court] of the scheduling conflict, in writing, no later than 7 days after the receipt of the scheduling order giving rise to the conflict. Counsel's notification shall include (1) the names and docke numbers of each case, (2) the date and time of the scheduled proceedings i each case, and (3) a brief statement as to which case has precedence under this policy. LR, D. Mass. 40.2(d). Once counsel provides this required written notice, the rule directs that "[t]he case or cases not having precedence shall be rescheduled, *unless the presiding Superior Court justice and judicial officer [of the district court] agree otherwise.*" *Id.* (emphasis added). Thus, Zimny has sufficiently alleged that, but for counsel not following the proper procedures for when a conflict in court appearances arises, he would not have been deprived of his counsel of choice for the trial.

different outcome, but for counsel's ineffectiveness, that meets the Strickland standard. We will never know the answer to what the District Court might have done if confronted with a properly presented Motion for Accommodation pursuant to L.R. 40.2(d), because counsel never presented it with one in an egregious example of ineffectiveness. While not seeking to indulge in the 'distorting effects of hindsight', Zimny argues that it is impossible (even for the district court) to speculate that the district court would have ignored what a local rule of the Circuit "clearly" directed and offer no attempt to accommodate Reddington's conflict if it was presented with a mechanism and authority for doing so. This is the structural error claim raised and unaddressed in Zimny's § 2255 petition, writ large.

As this Court held in *United States v. Gonzalez-Lopez*, 548 U.S. 140, 146 (2006): "Where the right to be assisted by counsel of one's choice is wrongly denied, therefore, it is unnecessary to conduct an ineffectiveness or prejudice inquiry to establish a Sixth Amendment violation." *Id.* at 148. Instead, "[d]eprivation of the right is 'complete' when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the representation he received." In particular the unaddressed questions in Zimny's habeas petition presented here need to be addressed by this Court because "the right at stake here is the right to counsel of choice, not the right to a fair trial; and that right [is] violated [when] the deprivation of counsel [is] erroneous. No additional showing of prejudice is required to make the violation 'complete.'" *Id.* at 146.

Even the government recognized the significance of these properly presented claims in Zimny's habeas petition when it offered vigorous argument in opposition. The Supreme Court

recently addressed structural error in the context of a public-trial violation raised as an ineffective-assistance-of-counsel claim. *Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017). The Court held that "not every public-trial violation will in fact lead to a fundamentally unfair trial....

Nor can it be said that the failure to object to a public-trial violation always deprives the defendant of a reasonable probability of a different outcome. Thus, when a defendant raises a public-trial violation via an ineffective assistance-of-counsel claim, *Strickland* prejudice is not shown automatically." *Id.* at 1911. Thus, the Government's claim (Gov. Memo at 3) that "a defendant claiming ineffective assistance is only relieved of the obligation to prove prejudice where the error in question is of a kind that always results in a fundamentally unfair proceeding or a reasonable probability of a different outcome," is wide of the mark, and invites the district court to address the legal dispute accordingly, something it has not done. See: "It is not settled law whether a habeas petition may be granted for structural error raised in an ineffective assistance of counsel claim on collateral review." *Garcia v. Davis*, 2018 U.S. Dist. LEXIS 192801, *35 (S.D. Texas, Nov. 13, 2018).

II. THE UNADDRESSED CLAIMS PRESENT ISSUES THAT ARE BOTH DIFFICULT AND CLOSE AND ARE CRITICAL TO THE RESOLUTION OF PETITIONER'S HABEAS PROCEEDING-

At the very least, Zimny's petition for habeas relief on this issue alone has demonstrated that reasonable jurists could determine that the constitutional errors he presents are among the limited class of cases that constitute structural error. Accordingly, Zimny has successfully established that the questions raised are not only

of a constitutional stature, but also "both difficult and close." Id. at *45. The district court acknowledged as much when it issued a Certificate of Appealability in its December 10, 2019 order and opinion on the petition respective to the ancillary issues that flow from this primary claim. "However, a certificate of appealability shall issue as to Zimny's claims regarding the cross-examination of Gerald Chow and exculpatory evidence regarding Exhibit 1615, but not as to any other claims" (Dkt. 483, 7). It is well-settled within this Circuit and by the Supreme Court that "at the COA stage, the only question is whether the applicant has shown that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." Citing Miller-El v. Cockrell, 537 U. S. 322, 336, Buck v. Davis, 137 S. Ct. 759, 776 (2017).

However, while the district court issued a limited COA to two issues Zimny presented that were resultant from the underlying structural error caused by the denial of the continuance, it never addressed, or even acknowledged, this important constitutional defect in Zimny's trial itself as rendering the entire proceeding fundamentally unfair (or not), and therefore obviating the need to demonstrate prejudice from counsel's deficiencies in the traditional Strickland framework. This failure of the district court to address Zimny's properly presented habeas claims was the initial basis presented via petition to this Court for expansion of the issues certified for appeal on January 24, 2020 (Doc. ID 2264).

The First Circuit's Take-

The First Circuit's preliminary take on the issue

of Zimny's having to show prejudice resulting from a denial of counsel of choice was that it was "vexing" because "a court, in deciding whether to grant a continuance, should consider whether and how a lack of continuance may or may not impair defense efforts." Zimny, 873 F.3d at 52. The First Circuit, in its findings that both excoriate Reddington's performance as being "ineffective" and deny that this Court abused its discretion in not granting the continuance as a function of this subpar performance held that, "one struggles to see how a defendant could be required to show that the result of the trial likely would have differed had a court not abused its discretion by denying a continuance needed to allow participation by counsel of choice." Id. at 53 (citing Gonzalez-Lopez, 548 U.S. at 150 151).

However, what contributes to that panel's analysis is that it found defects in counsel's performance, that it enumerated painstakingly, as being the root cause of the denial of Zimny's Sixth Amendment continuance motion, not an abuse of the district court's discretion in denying that motion as was argued on appeal.[11] These very same arguments, that it

[11] Likewise, the prior Panel of this Court did not place much stock in the 'immutable procedural history of the case' argument that the district cour references as guiding its decision in denying the continuance. (See: *Unite States v. Zimny,* 873 F.3d 38, 57 (2017): "Even if the prior continuances did not militate strongly in favor of denying the continuance motion, ther were several other factors—including the court's supportable assessment that Reddington failed to request assistance from the court in a timely an effective manner as provided in Local Rule 40.2(d)—that supported the denial of the motion." The district court attempts to reshape the narrative of its decision to deny the continuance well after the fact in 2019 by stating that it "had everything to do with the immutable procedura history of the case" (Dkt. 483, at 3) but this is a proposition that is reliant on the distorting effects of hindsight in a universe where the court was not presented with a Rule 40.2(b) complaint motion by counsel, and as such, has little merit. The inverse being, but for counsel's ineffectiveness, if the district court was presented with a fully complain Rule 40.2(b) continuance motion in 2015, there is a reasonable probably it

was counsel's ineffectiveness and errors that resulted in this Court's denial of a continuance necessary to preserve Zimny's Sixth Amendment right to counsel of choice, form the gravamen of Zimny's habeas petition and constitute "not merely a clear case on the law...but a clear, and readily evident, case on the facts." On the very topic of the significance of Local Rule 40.2(d) the First Circuit held: "Reddington did not seek to invoke Local Rule 40.2(d), which *clearly* (emphasis added) has been adopted to reasonably resolve scheduling conflicts." *United States v. Zimny*, 873 F.3d 38, 57 (2017). Based on these criteria alone, and that the district court has issued a Certificate of Appealability which implies that Zimny has raised issues of constitutional significance that deserve encouragement to proceed further, Zimny respectfully moves this Court En Banc for expansion of the claims certified for appeal pursuant to Fed. R. App. 22 and Rule 11 of the Rules Governing Proceedings under 28 U.S.C. § 2255 to include the unaddressed claims identified above or in the alternative for an order of remand to the district court to make appropriate findings of fact on the unaddressed claims in the first instance.

VI. The Panel's Judgment Does Not Acknowledge Genuine Issues of Disputed Material Fact that Render Summary Disposition Inappropriate-

The government's Motion for Summary Disposition (Dkt. 9999), and an accompanying Motion for an Order Staying the Briefing Schedule (Dkt. 0005) pending this Court's resolution of that motion on the grounds that "the district court properly rejected the two ineffective

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would have granted it given that the rule "directs" the court to do so in the case without priority, which was Zimny's.

assistance claims that were certified for appeal" and that the Appellant "raises myriad other issues" that are "beyond the scope of the appeal" (Mot. At 1) fail and should be granted certiorari because the government misstates and ignores disputed issues of material fact presented in the Appellant's brief and initial §2255 petition while recycling argument from preliminary conclusions reached by the district court in its initial order certifying numerous issues for appeal, wherein that court recognized even then that the issues the Appellant presented were of a constitutional magnitude, debatable by jurists of reason and deserved encouragement to proceed further (See Doc. 9999, A:1). The government's motion (and the Panel's subsequent one-page judgment) offers little more in the way of argument for summary disposition than what are now well-outdated and debatable conclusions[12] by the district court based on errors of law, missing evidentiary testimony from lead counsel at Appellant's trial attesting to the prejudice incurred by counsel's errors and its failure to expressly address claims made in the originally filed §2255 petition.

The standard of review for a motion for disposition under Rule 56(a) of the Federal Rules of Civil Procedure state that summary judgment "shall" be granted "if the movant shows that there is no genuine dispute as to any material fact and the movement is entitled to judgment as a matter of law." Rule 56(a), Fed. R. Civ. P. On a motion for summary disposition, the court must "construe the facts in the light most favorable to the non-moving party" and "resolve all ambiguities and draw all reasonable inferences against the movant." *Delaney v. Bank of Am. Corp.*, 766 F.3d 163, 167 (2nd Cir. 2014). The movant in this case, the government, has not met

[12] Indeed, the very conclusions that the district court recognized were debatable at that time and subject to further interpretation via certification for appeal.

this burden and therefore accordingly its motions for relief should be denied upon rehearing.

If the plainly exceptional facts and circumstances of Mr. Zimny's case are not even debatably extraordinary within the meaning of a petition for certiorari, then this option for collective reconsideration has limited meaning. Pending before the district court presently is a Rule 60(b) motion to vacate its judgment and issue a ruling addressing all of Zimny's properly presented habeas claims on the merits (Dkt. 511). If that motion is granted and the district court issues new findings, this petition would be moot. Zimny's initial petition to the appellate Court for an expansion of the district court's issued certificate of appealability framed the unaddressed claims as such, and requested that they be included in the issues certified for appeal or subject to remand to the district court such that it could properly address them in the first instance.[13] The initial Panel denied Zimny an expanded COA on the issue, reasoning that "the district court's resolution of the aspects of the petition with respect to which Zimny seeks an expanded certificate of appealability was neither debatable nor wrong" and that "Zimny has failed to make a substantial showing of the denial of a constitutional right in relation to the claims". Panel Op. at 1 (Doc. 9074, 04/01/2020). The Panel's decision in that instance is in error, in both regards, and was reached through a wholesale failure to engage with the facts of Mr. Zimny's case. Indeed, the relevant portion of the Panel's one page decision never mentions the word structural error or the reality of the unaddressed claims. The Panel's decision equally fails to address the question of why the district court's resolution of the properly

[13] See: Exhibit C

presented constitutional claims regarding structural error in Zimny's initial habeas petition are "neither debatable nor wrong", a finding belied by Zimny's citation to a contrary resolution by a jurist of reason in Texas (See: Doc. 2264, at 3, 9: (citing Garcia v. Davis, 2018 U.S. Dist. LEXIS 192801, *35 (S.D. Texas, Nov. 13, 2018) ("Petitioner's claim for ineffective assistance of counsel warrants particular consideration, because it is uncertain under current Supreme Court precedent whether a claim of ineffective assistance of counsel can raise an issue of structural error such that prejudice need not be demonstrated.") As other circuits have held, "It is not settled law whether a habeas petition may be granted for structural error raised in an ineffective assistance of counsel claim on collateral review." Garcia v. Davis, 2018 U.S. Dist. LEXIS 192801, *35 (S.D. Texas, Nov. 13, 2018). This is as "genuine a dispute of material fact" as they come, and should accordingly not be scuttled via the judicial side door of summary disposition because it would be more convenient for all.

This Court should grant certiorari because Mr. Zimny's case involves a question of exceptional importance –the question of whether a habeas petition may be granted for structural error raised in an ineffective assistance of counsel claim on collateral review (and that those claims ought to be addressed on the merits by the district court in the first instance)–and its decision to grant the government's application for summary disposition herein conflicts with prior decisions of other Circuits and this Court. Specifically, the Panel's opinion reflects its own evaluation of the merits of Mr. Zimny's appeal[14], rather than an

[14] The district court concluded much of the same when it held that: "The arguments in this habeas appeal are not such evident winners, as demonstrated by the fact that the court has already denied them." U.S. Dist. Court, J. Zobel opinion, 5/13/2020. (Dkt. 507, at 3). This is an

assessment of the debatability of the District Court's failure to address Zimny's properly presented habeas claims and its denial of certification of those unaddressed issues for appeal. Although the Panel in denying appellant's motion for an expanded COA "pa[id] lip service to the principles guiding issuance of a COA," Tennard v. Dretke, 542 U.S. 274, 283 (2004), by properly identifying the governing law, see Panel Op. at 1, it failed to conduct the narrow analysis required by this law. This sort of brevity in this context has been described as continuing a "troubling" pattern, Jordan v. Fisher, 135 S. Ct. 2647, 2652 n. 2 (2015) (Sotomayor, dissenting), in that the Panel improperly, according to the district court, "decid[ed] the merits of [Mr. Zimny's] appeal, and then justified] its denial of a COA based on its adjudication of the actual merits." Miller-El, 537 U.S. at 336-337. Moreover, in reaching the obviously incorrect conclusion that this case involves an ordinary ineffectiveness claim, the Panel failed to "give full consideration to the substantial evidence [that Mr. Zimny] put forth," id. at 341, and failed to acknowledge or address the fact that Zimny put forth clear and convincing evidence supporting the debatability of the District Court's decision. See: Doc. 2264, at 3, 9: (citing Garcia v. Davis, 2018 U.S. Dist. LEXIS 192801, *35 (S.D. Texas, Nov. 13, 2018). In light of these flaws in the Panel's analysis, and the highlighted genuine disputes that exist as to material fact generated by new evidence presented on the record since the district court's initial ruling, the granting of certiorari is appropriate.

III. THIS CASE IS A GOOD PROCEDURAL VEHICLE.

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interesting finding, especially since the appellate Court has not yet rule on those arguments at the time.

Mr. Zimny's case presents a single dispositive legal issue. Because Mr. Zimny properly preserved his objections, the First Circuit passed on the question presented at length, and Mr. Zimny's case presents an important and recurring problem for trial courts—clarification that is uncertain under current Supreme Court precedent whether a claim of ineffective assistance of counsel can raise an issue of structural error such that prejudice need not be demonstrated. ("Petitioner's claim for ineffective assistance of counsel warrants particular consideration, because it is uncertain under current Supreme Court precedent whether a claim of ineffective assistance of counsel can raise an issue of structural error such that prejudice need not be demonstrated.") As other circuits have held, "It is not settled law whether a habeas petition may be granted for structural error raised in an ineffective assistance of counsel claim on collateral review." Garcia v. Davis, 2018 U.S. Dist. LEXIS 192801, *35 (S.D. Texas, Nov. 13, 2018).

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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