

In the Supreme Court of the United States

MILTON DWAYNE GOBERT,

Petitioner,

v.

BOBBY LUMPKIN, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,

Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals for the Fifth Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

I. This Court should decide the important question whether a per se rule that counsel is not ineffective whenever she acts in accordance with her client's wishes violates *Strickland*.

The State does not dispute that the lower courts' analyses of Gobert's ineffective assistance of counsel (IAC) claim began and ended with the premise that "a defendant cannot direct their legal counsel to pursue a specific strategy and subsequently accuse them of providing inadequate representation for adhering to those instructions." BIO at 14 (citing Pet. App. A at 3a-4a); *see also* BIO at 17. Nor could it. When Gobert raised his claim in state post-conviction proceedings, the trial court unequivocally declared, "When a defendant preempts his attorney's strategy by insisting that...certain evidence be put on or kept out, no claim of ineffectiveness can be sustained." Pet. App. C 84a (quoting *McFarland v. State* 845 S.W.2d 824, 848 (Tex. Crim. App. 1992)). The Texas Court of Criminal Appeals adopted the trial court's conclusions of law without modification. Pet. App. D at 89a. And, when Gobert sought relief in federal court, the Fifth Circuit repeated the state courts' error by holding that counsel's performance could not be unreasonable because "[i]t was Gobert *himself* who... insisted on calling [Lass] as a witness." Pet. App. A at 3a. (emphasis in original).

Although the State does not contest that the courts applied a per se approach, it avoids adopting the "rule" label, opting instead for the term "principle." *See, e.g.*, BIO at 1, 14, 17. Perhaps this attempt to rebrand the lower courts' analysis stems from a recognition that this Court has consistently rejected the idea—both in *Strickland* itself and in cases interpreting *Strickland*—that "mechanical rules" can dictate whether counsel's

performance was reasonable. *Strickland*, 466 U.S. at 696; *see e.g., Rompilla v. Beard*, 545 U.S. 374, 393-94 (2005) (describing the majority’s refusal to adopt a per se rule that counsel must review the complete case file of any prior convictions as “a decision [that] simply applies our longstanding case-by-case approach to determining whether an attorney’s performance was unconstitutionally deficient under *Strickland*”) (O’Connor, J., concurring); *id.* at 399 (“We have warned in the past against the creation of ‘specific guidelines’ or ‘checklist[s] for judicial evaluation of attorney performance.’”) (Kennedy, J., dissenting) (quoting *Strickland*, 466 U.S., at 688); *id.* (“A *per se* rule...is a radical departure from *Strickland* and its progeny.”) (Kennedy, J., dissenting); *Roe v. Flores-Ortega*, 528 U.S. 470, 480-81 (2000) (refusing to adopt a per se rule requiring counsel to consult with defendants about whether to appeal because “bright-line rule[s]... have no place in a *Strickland* inquiry”); *Dunn v. Reeves*, 141 S. Ct. 2405, 2412 (2021) (“[A]s the majority implicitly acknowledges, a *per se* rule that a habeas petitioner’s claim fails if his attorney did not testify at an evidentiary hearing is flatly incompatible with *Strickland*” because “[n]o single type of evidence is a prerequisite to *Strickland* relief.”) (Sotomayor, J., dissenting).

Regardless of the label, the Fifth Circuit’s approach to resolving IAC claims where counsel acted in accordance with her client’s instructions—as in Gobert’s case—violates this precedent. Under the Fifth Circuit’s approach, the client’s instructions operate as “an absolute bar [to relief] in *every* case,” regardless of the circumstances. *Cf. Reeves*, 141 S. Ct. at 2413 (emphasis in original). The State implicitly acknowledged as much by asserting generally that granting IAC relief “when [a] lawyer did what he was asked” would be “absurd.” BIO at 18.

By rejecting Gobert’s IAC claim based only on the fact that “his lawyer did what he asked,” *id.*, the reviewing courts failed to “engage in the circumstance-specific reasonableness inquiry required by *Strickland*.” *Flores-Ortega*, 528 U.S. at 478; *see Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986) (“The reasonableness of counsel’s performance is to be evaluated from counsel’s perspective at the time of the alleged error *and in light of all the circumstances.*”) (citing *Strickland*, 466 U.S. at 689) (emphasis added); *see also Strickland*, 466 U.S. at 688 (“In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel’s assistance was reasonable *considering all the circumstances.*”) (emphasis added). The State does not suggest otherwise. Indeed, it does not even engage with the specific facts of Gobert’s case when discussing the performance prong of the Fifth Circuit’s analysis. *See* BIO at 16-18. Instead, the State relies on the mistaken assertion that the dispositive per se “principle” applied to evaluate the reasonableness of Gobert’s counsel is “aligned with” *Strickland*. BIO at 1.

According to the State, “the reasonableness of Gobert’s trial counsel’s actions *can be* determined by Gobert’s own statements and actions” because *Strickland* explicitly stated as much. BIO at 17 (emphasis in original). However, this overstates and misreads *Strickland*’s holding. In *Strickland*, the Court stated that “the reasonableness of counsel’s actions *may* be determined...by the defendant’s own statements and actions” and that “[c]ounsel’s actions are *usually* based...on informed strategic choices made by the defendant[.]” *Strickland*, 466 U.S. at 691 (emphasis added). This equivocal language suggests that whether the client’s wishes can justify counsel’s actions will depend on the facts. It

will not be reasonable for counsel to follow the client’s instructions on all matters in all cases. *Cf. Reeves*, 141 S. Ct. at 2413.

This reading is reinforced by other language in *Strickland* itself: “Most important, in adjudging a claim of actual ineffectiveness of counsel, a court should keep in mind that the principles we have stated do not establish mechanical rules.” *Strickland*, 466 U.S. at 696. Therefore, the per se rule applied in Gobert’s case—and routinely applied by at least the Second, Fifth, Sixth, and Eighth Circuits—is inherently incompatible with *Strickland*’s requirement that courts assess “the performance inquiry” in light of “all the circumstances.” *Id.* at 688.

The State attempts to turn this case on its head by accusing Gobert of applying a per se rule. It asserts: “Gobert argues that, essentially, courts must assess *Strickland* deficiency with little or no regard for the defendant’s own actions.” BIO at 17. Gobert does not—and never has—argued that a client’s actions are irrelevant to *Strickland*’s performance inquiry. Consistent with this Court’s precedent, Gobert argues merely that courts must consider the client’s actions “in light of all the circumstances” of the case and “keep in mind that counsel’s function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case.” *Strickland*, 466 U.S. at 690.

Of course, it is the State that advocates a per se rule. That rule—or dispositive “principle”—accounts for only one factor: whether counsel was following her client’s instructions. It does not inquire whether this Court’s caselaw or prevailing professional norms have allocated the decision-making authority on the issue at hand to counsel or to the client. Nor does it consider whether counsel acted in line with or against her own professional

judgment, or whether counsel relied on her client’s direction without conducting any investigation whatsoever. Under the totality-of-the-circumstances approach required by *Strickland*, however, these factors must be considered in the IAC analysis. *See Strickland* 466 U.S. at 688.

In Gobert’s case, counsel acted against his own professional judgment by blindly following his client’s instructions—without any investigation—on a decision this Court has allocated to counsel rather than the client. *See* Pet. 24-25. Notably, the State’s Opposition does not address any of Gobert’s arguments about the allocation of decision-making authority or the fact that counsel admitted to acting against his own professional judgment. *See* Pet. 8-16.

Finally, the State asserts that the lower courts’ decision “must be reviewed under the doubly deferential standards of *Strickland* and 28 U.S.C § 2254(d).” BIO at 20. As an initial matter, the trial counsels’ decision to abdicate his decision-making authority to Gobert is not entitled to any deference. But, even under *Richter*’s double-deference standard, the lower courts erred. While *Strickland* established a “presumption” of reasonable performance, it also made clear that the presumption may be “overcome.” *Strickland*, 466 U.S. at 689; *see also Morrison*, 477 U.S. at 384. *Strickland* “requires deference to counsel’s informed decisions, [and] strategic choices...based on professional judgment.” *Strickland*, 466 U.S. at 681. Because Gobert’s counsel admitted that the decision to call Lass was not informed or strategic, and because counsel acted against their own professional judgment in putting Ms. Lass on the stand, App G. at 95a – 96a, their decision merits no deference. *Strickland*, 466 U.S. at 681. Nor is the state court’s decision entitled to deference. It was

based on a per se rule that conflicts with *Strickland* and was, therefore “contrary to, or involved an unreasonable application of, clearly established Federal law[.]” 28 U.S.C. § 2254(d)(1).

Finally, the State argues that, because of the “overwhelming” evidence that Gobert presents a future danger, it would be impossible to establish prejudice from counsel’s deficient performance. BIO at 22. The State cites evidence in support of a future-dangerousness finding, but it ignores Gobert’s arguments, set forth in his Petition, why he has demonstrated prejudice. *See* Pet. at 29-30. Those arguments include the unreliability of Dr. Richard Coons, whose future-dangerous testimony was found inadmissible by the state court; the fact that Lass’s harmful testimony came from the defense’s own witnesses; and the State’s reliance on the Lass testimony, through Coons’s speculative testimony, to bolster its case. *Id.* Given these facts and circumstances, counsel’s uninformed acquiescence to Gobert’s instructions to put Lass on the stand was prejudicial.

II. Certiorari is warranted to resolve division in the courts regarding whether a client must satisfy a substantive threshold to trigger the trial court’s duty to inquire about his request for new counsel.

While his federal habeas proceedings were pending in district court, Gobert filed motions and letters complaining about his attorneys and asking for substitute counsel. Among other things, he complained that his attorneys had misstated facts in their pleadings and did not communicate with him—that they had, in fact, not written him for a year and had obtained a new address without telling him. *See* Pet. at 6. Despite these complaints, and the fact that Gobert had filed a “Motion for Opportunity to Be Heard,” ROA.807-14, the trial court did not question him about his request for new counsel. The court of appeals

found no abuse of discretion in this failure, holding that Gobert’s complaints to the court were insufficient to trigger the duty to inquire of Gobert. Pet. App. A at 8a. Gobert argues that the trial court’s failure is contrary to this Court’s precedent and that the Fifth Circuit’s decision is inconsistent with approaches taken by other circuits.

The State disagrees. It argues that Gobert has asked the wrong question and that, so long as the district court’s inquiry was not “so inadequate” as to amount to an abuse of discretion, there can be no error in failing to conduct a “hearing.”

The State misses the mark, in two ways. First, it misreads Gobert’s argument by focusing on a formal-hearing strawman. Second, it ignores the effect of a rule that allows courts to forgo inquiring of the defendant unless he satisfies some substantive burden. That rule risks unreliable and incorrect results and deprives the defendant—who is generally not versed in the law—an opportunity to explain himself. It also skews the inquiry in favor of the actor who is most likely to be available to speak to the issue—the conflicted trial attorney.

A. The State’s reframed issue ignores the risk of unreliable and incorrect results created by imposing a substantive burden on defendants requesting new counsel.

In *Martel v. Clair*, this Court imposed a duty on trial courts to probe “why a defendant wants a new lawyer” in resolving motions for substitute counsel. 565 U.S. 648, 654 (2012). In this case, the Fifth Circuit suggested that, based on this record, that inquiry need not involve questioning Gobert, because he they did not satisfy a substantive burden—they were too “general” and did not rise above mere unhappiness “with the work of his current federal habeas counsel.” Pet. App. A at 8a. The State does not refute that the Fifth Circuit,

and other courts, impose such a burden. Rather, it appears to embrace such an approach, arguing that the only proper question is “whether a district court’s inquiry was so inadequate, in light of the facts of the case, that it constituted an abuse of discretion.” BIO at 28. However, as Gobert has demonstrated, the question of whether a substantive-burden is appropriate is critical to the adequacy of the court’s inquiry, because the failure to inquire produces an inadequate and skewed record and leads to unreliable, and likely incorrect, outcomes.

The State’s re-framed discussion of the cases cited by Gobert in his petition does nothing to demonstrate otherwise. *See* BIO at 29-34. In sum, the State argues no more than that the extent of the inquiry into a request for new counsel must be governed by the facts—an assertion Gobert has not challenged. Further, none of the cases cited by the State in support of its argument permit a court to sidestep its duty to inquire by requiring the defendant to satisfy some initial threshold burden; thus, they support Gobert’s argument that the circuits are divided on this important question. Nor do, contrary to the State’s arguments, the cases, assessed on their facts, support the court of appeals’ decision here.

The Third Circuit. As Gobert has demonstrated, the United States Court of Appeals for the Third Circuit does not impose a threshold burden on a defendant’s initial request for substitute counsel. *See* Pet. at 35 (citing *United States v. Senke*, 986 F.3d 300 (3d Cir. 2021)). Consistent with its reframing of the issue, the State attempts to contrast *Senke* with another Third Circuit case—*United States v. Diaz*, 951 F.3d 148, 155 (3d Cir. 2020). BIO at 30. But that case does not shed any light on the question of when a court’s duty to inquire is triggered because, there, the trial court made a proper inquiry. The

defendant twice asked for new counsel. *Diaz*, 951 F.3d at 152. Upon the first request, the trial court “promptly” held a hearing to inquire, in accordance with Third Circuit law, and the court appointed a new attorney. *Id.* The defendant then continued to write to the court expressing concerns about his new attorney’s communications. The court continued to monitor the issue, forwarding the complaints to new counsel. *Id.* After several more letters, counsel requested a continuance, representing to the court that “all issues had been resolved.” *Id.* at 152-53. The defendant then appeared in court with counsel for a pretrial hearing and raised no concerns. Further, although the defendant continued to write the court about problems, he did not again ask for a new attorney.

Diaz supports Gobert’s arguments. The trial court immediately held a hearing when Diaz first requested new counsel. At that hearing, the court had the opportunity to talk to Diaz and assess his credibility. When new complaints arose, the court employed a wait-and-see approach but did not deny the request for new counsel outright, and the problems were eventually resolved, as was evidenced by an in-court appearance by Diaz.

The State appears to believe that *Diaz* favors its position because the court resolved the question without holding a second hearing. But Gobert has not argued that a hearing is required—rather, he framed the issue as “what triggers the trial court’s duty to conduct a hearing, or at least inquire further.” Pet. at 33. Further inquiry should, when the defendant has made facially plausible assertions supporting substitution, include an inquiry of the defendant. *See Clair*, 565 U.S. at 664 (noting importance of “making further inquiry of [the defendant] and his counsel.”); *see also Diaz*, 951 F.3d at 154 (affirming the importance of “allowing the defendant, as well as counsel, the opportunity to be heard on the matter.”).

The State attempts to avoid this conclusion by comparing the inquiry in this case to that in *Clair*, which, according to the State, involved only “review of a letter Clair’s counsel sent to the Court addressing his motion.”) BIO at 27. But the State ignores that “[t]he District Court responded [to the defendant’s request for new counsel] by asking *both parties* to address Clair’s motion to substitute counsel.” *Clair*, 565 U.S. at 654.

The Sixth Circuit. The State is also incorrect that the Sixth Circuit case cited by Gobert, *United States v. Collado-Rivera*, 759 F. App’x 455 (6th Cir. 2019), does not support Gobert’s arguments. See BIO at 32; see also Pet. at 35. The State argues that *Collado-Rivera* stands merely for the conclusion that, when the defendant offers no reason whatsoever for his request for new counsel, the court must conduct an inquiry. BIO at 31-32. But this does not advance the State’s position. Had *Collado-Rivera* been decided in the Fifth or Eleventh circuits, he would have been entitled to no further inquiry because he did not satisfy the threshold burden those courts place on defendants.

The Ninth Circuit. Similarly, the State misreads the Ninth Circuit’s discussion, in *United States v. Velazquez*, 855 F.3d 1021 (9th Cir. 2017), of the duty to inquire. See BIO at 32-33 & n.10; Pet. at 35. As the State observes, the *Velazquez* court did state that a “failure to conduct an inquiry” may not be error when the trial court “has sufficient information to resolve the motion.” BIO at 32 (citing *Velazquez*, 855 F.3d at 1034). However, the court did not suggest that “sufficient information” excluded contributions by the defendant. To the contrary, it held that, when a trial court learns of a conflict, it ““should question the attorney or defendant privately and in depth and examine available witnesses.”” *Id.* (citations omitted).

The Fourth Circuit. As Gobert noted in his Petition, the Fourth Circuit takes a different approach from the other circuits, holding that the failure to conduct an inquiry can eliminate deference to the trial court’s findings. *See* Pet. at 35 n.13 (citing *United States v. Blackledge*, 751 F.3d 188, 194 (4th Cir. 2014)). In addition, the Fourth Circuit requires only that the defendant have raised a “seemingly substantial” claim to trigger the duty to inquire. *Blackledge*, 751 F.3d at 194. The Fourth Circuit cases cited by the State do not say otherwise. *See* BIO at 33 (citing *United States v. Hill*, 492 F. App’x 365, 371 (4th Cir. 2012) (citing *United States v. Perez*, 661 F.3d 189, 192 (4th Cir. 2011))). Indeed, the *Perez* court reaffirmed that “[a]n inquiry into the reasons for a defendant’s dissatisfaction with his or her lawyer is necessary for the trial court to determine whether good cause for substitution exists.” *Perez*, 661 F.3d at 192 (citing *United States v. Mullen*, 32 F.3d 891, 896 (4th Cir.1994)).

The State again attempts to argue that the Fourth Circuit’s approach is in line with that of the Fifth, because it “acknowledged that a failure to inquire into reasons for requesting new counsel at a hearing ‘does not rise to an abuse of discretion.’” BIO at 33 (citing *Hill*, 492 F. App’x at 371). But an inquiry does not require a hearing.

B. Requiring a defendant to survive a substantive threshold produces unreliable results and adequate review of requests for new counsel.

As this case demonstrates, requiring a defendant to state more than a facially valid reason to provide substitute counsel before making an inquiry into his claims can result in unreliable, incorrect, and irreversible decisions. This case demonstrates that danger. The State has argued, throughout these proceedings, that Gobert’s complaints about his

attorneys were vague and superficial. As Gobert demonstrated in his Petition, his complaints were also the source of confusion to the district court and, apparently, to the State. *See* Pet. at 36 (describing confusion and misconceptions about Gobert’s requests). The court of appeals relied on the Gobert’s requests, as interpreted by the State, to conclude that Gobert had not made sufficiently substantial claims to trigger an inquiry of him.¹ *See* Pet. App. A at 8a; *see also* BIO at 35-36 (continuing to argue Gobert’s requests were substantively insufficient). In fact, the failure to inquire further of Gobert assisted in creating an incomplete and baffling record. *See Clair*, 565 U.S. at 665 (a record inquiry into the defendant’s allegations “permits meaningful appellate review of a trial court’s exercise of discretion”) (quotations omitted). Gobert made assertions suggesting a significant breakdown in the relationship between himself and counsel—including that counsel had not communicated with him in a year and had changed their address without telling him. *See* Pet. at 37 (citing cases demonstrating that breakdown in relationship is proper ground for substituting counsel). Inquiry would have fleshed out Gobert’s complaints and confirmed or dispelled evidence of such a breakdown.² This is especially significant because Gobert

¹ Among the materials the State argues created sufficient support for the district court’s denial was an *ex parte* letter from trial counsel. ROA.873; *see* BIO at 27 (referring to letter). That letter did not refute Gobert’s assertions. Indeed, it acknowledged that Gobert was continuing to ask for new attorneys. *See* Pet. at 6. The district court still did not inquire of Gobert.

² The State argues that the district court did not abuse its discretion in denying Gobert’s motions for new counsel—a question not presented in Gobert’s petition. BIO at 34. However, given the nature of the breakdown in communications—a breakdown counsel did not refute—and the district court’s ultimate conclusion that the attorney-client relationship was irreparably damaged—a proper inquiry likely would have resulted in Gobert receiving new counsel.

told the court that he had an IQ of 73. *See* ROA.873. It is likely that any lack of specificity or clarity arose from that unexplored fact. *See Clair*, 565 U.S. at 665 (inquiry must be context-specific). Indeed, the underlying basis for Gobert’s complaints against counsel—that his attorneys did not raise claims he asked to be raised—did not become part of the record until after the district court had denied his motion, and then only because an outside attorney filed a motion on his behalf. Gobert did not understand what level of detail was required to get an “opportunity to be heard” and was never given the chance to explain himself.

Because inquiry was warranted, and because no inquiry was made, the district court did not have an adequate basis for denying Gobert’s request for new counsel.³

³ Although the State contends that district court “could have” denied the request for new counsel based on timeliness, it did not do so. BIO at 34-35. When Gobert made his request for new counsel, time remained for him to request to file an amended petition. Had the district court inquired of Gobert, it could have assessed the nature of the missing claims and considered that alongside the possibility of an amended complaint.

CONCLUSION

This Court should grant certiorari to resolve these important questions.

Respectfully submitted,

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