No. 18-5121

IN THE SUPREME COURT OF THE UNITED STATES

LESLIE DOMINIC MUSGROVE, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court violated petitioner's Sixth Amendment rights by considering acquitted conduct in determining his sentence.

2. Whether the district court violated petitioner's Sixth Amendment rights by not appointing him an additional, independent attorney at a post-trial hearing in which petitioner sought new counsel for sentencing based on the assertion that his trial attorney had been ineffective.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A2) is reported at 710 Fed. Appx. 155. The magistrate judge's report and recommendation (Pet. App. C1-C15) and the district court's order (Pet. App. D1-D6) are not published in the Federal Supplement but are available at 2017 WL 9517118 and 2017 WL 3085054.

JURISDICTION

The judgment of the court of appeals was entered on February 1, 2018. A petition for rehearing was denied on April 3, 2018 (Pet. App. B1). The petition for a writ of certiorari was filed

on June 26, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of West Virginia, petitioner was convicted of conspiracy to possess with intent to distribute and to distribute cocaine and methamphetamine, in violation of 21 U.S.C. 841(a)(1), (b)(1)(A), and (b)(1)(B) and 846; and aiding and abetting the possession with intent to distribute more than 500 grams of cocaine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(B). Judgment 1. The court sentenced petitioner to 360 months of imprisonment, to be followed by four years of supervised release. Judgment 2-3. The court of appeals affirmed, 545 Fed. Appx. 199, and this Court denied certiorari, 134 S. Ct. 2739. Petitioner subsequently filed a motion to vacate his conviction under 28 U.S.C. 2255. D. Ct. Doc. 456 (May 26, 2015). The district court denied the motion, Pet. App. D1-D6, and the district court and the court of appeals both denied petitioner a certificate of appealability, id. at D6, A1-A2.

1. From at least October 2010 until April 2011, petitioner trafficked in large quantities of methamphetamine, marijuana, and cocaine throughout West Virginia, Maryland, and Pennsylvania. Presentence Investigation Report (PSR) ¶¶ 38, 42; Sent. Tr. 38. Petitioner first came to the attention of law enforcement in November 2010, when officers in Hardy County, West Virginia,

arrested Danielle Corbin for possession of approximately one kilogram of cocaine. PSR ¶ 40. Corbin told law enforcement that petitioner had paid her to transport the cocaine and that petitioner had, on multiple occasions, paid her and her sister to make similar trips. PSR ¶¶ 41-42. In February 2011, law enforcement learned from an informant, Shawn Rohrbaugh, that he was also transporting narcotics for petitioner. PSR ¶ 48. Law enforcement facilitated a controlled buy in which Rohrbaugh followed petitioner's instructions to purchase 14 grams of methamphetamine. PSR ¶¶ 53-56, 70.

A federal grand jury returned a superseding indictment charging petitioner with conspiracy to possess with intent to distribute and to distribute cocaine and methamphetamine, in violation of 21 U.S.C. 841(a)(1), (b)(1)(A), and (b)(1)(B) and 846 (Count 1); aiding and abetting the possession with intent to distribute more than 500 grams of cocaine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(B) (Count 3); and aiding and abetting the distribution of more than five grams of methamphetamine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(B) (Count 14). PSR ¶¶ 1-4.

2. a. At trial, Corbin testified that petitioner had paid her $500 per to trip to transport narcotics, that she had made roughly 15-20 such trips, and that she was caught transporting cocaine in November 2010. PSR ¶ 71. Rohrbaugh also testified at trial. Contrary to what he told law enforcement, however,

Rohrbaugh testified that he had obtained his drugs from Daryl Smith, not petitioner, and that it was Smith who, in February 2011, instructed him to purchase methamphetamine. PSR ¶ 76.

The jury found petitioner guilty of conspiracy (Count 1) and aiding and abetting the possession of cocaine (Count 3). Judgment 1. In response to a special interrogatory, the jury found that the conspiracy involved "Five hundred (500) grams or more of cocaine" and "Five (5) grams or more of methamphetamine." D. Ct. Doc. 278, at 2-3 (Feb. 22, 2012). The jury acquitted petitioner of aiding and abetting the distribution of methamphetamine (Count 14). Judgment 1.

b. After the trial but before sentencing, petitioner filed a pro se motion to dismiss his counsel "and have new counsel appointed to [his] pending court proceedings." D. Ct. Doc. 297, at 1 (Mar. 22, 2012). Petitioner asserted that his counsel had rendered ineffective assistance at trial because he failed to file for a bond hearing and did not subpoena certain phone records. Id. at 1-3.

The district court held a hearing to address petitioner's motion. Petitioner's counsel acknowledged that he had not filed for bond but explained that he did not do so because petitioner had already been denied bond and his circumstances had not changed. 6/7/12 Tr. 3. Petitioner's counsel also informed the court that he had declined to subpoena the phone records "as a matter of strategy," because in his view "the fact that the government hadn't

produced any records showing that those phones belonged to [petitioner] * * * might create reasonable doubt." Id. at 4. At the conclusion of the hearing, the court dismissed petitioner's counsel on the ground that his relationship with petitioner had deteriorated, and the court appointed petitioner new counsel for his sentencing. Id. at 7; see D. Ct. Doc. 330, at 1-2 (June 7, 2012).

On October 3, 2012, petitioner filed another pro se motion in which he argued, inter alia, that his original counsel had rendered ineffective assistance during trial. D. Ct. Doc. 351 (Oct. 15, 2012). The district court denied petitioner's motion, finding that "the strategic decisions expressed by [counsel] to [petitioner] * * * were reasonable." D. Ct. Doc. 354, at 4 (Oct. 22, 2012). The court also observed that petitioner failed to establish that the alleged errors had prejudiced him at trial. Ibid.

c. The Probation Office prepared a presentence report that assigned petitioner a base offense level of 36 under the advisory Sentencing Guidelines, finding him accountable for 10,178.65 kilograms of marijuana equivalent. PSR ¶ 103. The report included in that amount the 14 grams of methamphetamine involved in the February 2011 controlled purchase by Rohrbaugh. PSR ¶¶ 64, 70. After adding two offense levels for petitioner's role as an organizer or leader of the conspiracy, PSR ¶ 106, and two levels for obstruction of justice, PSR ¶ 107, the report calculated petitioner's total offense level as 40, PSR ¶ 112. The Probation Office determined that, with a criminal history category of III,

petitioner's advisory Guidelines range was 360 to 480 months of imprisonment. PSR ¶ 154.

At the sentencing hearing, petitioner acknowledged that the district court could permissibly consider conduct associated with a charge on which he was not found guilty by the jury in calculating his sentence. Sent. Tr. 9. He nevertheless argued that, "in this particular case," the court should limit the drug quantities attributable to petitioner to the minimum amounts reflected in the jury's special interrogatory findings. Ibid. Petitioner also argued that, based on Rohrbaugh's testimony, the 14 grams of methamphetamine from the February 2011 controlled purchase should not be included as relevant conduct. Id. at 12-14. The court rejected petitioner's arguments. The court found it "clear" that "Mr. Rohrbaugh was lying" during his testimony when he denied petitioner's involvement in the controlled purchase. Id. at 20. The court thus found, by a preponderance of the evidence, that petitioner was responsible for the 14 grams of methamphetamine involved in that purchase. Ibid. The court sentenced petitioner to 360 months of imprisonment, the lower bound of the advisory guidelines range. Id. at 42.

d. Petitioner filed a notice of appeal. D. Ct. Doc. 374 (Nov. 28, 2012). In his appeal notice, petitioner included a "P.S." stating that he was "also requesting for a new attorney to be appointed for [his] appeal." Ibid. The court of appeals granted petitioner's request and appointed new counsel. 12-4967 C.A. Doc.

3, at 1 (Dec. 3, 2012). In his appeal, petitioner contended that the district court had erred in several ways, including by: (1) denying petitioner's motions for a continuance; (2) failing to compel the attendance of three defense trial witnesses; (3) declining to instruct the jury regarding the mechanics of a substantial-assistance motion; (4) refusing his pro se request to call Rohrbaugh at sentencing; and (5) applying a two-point enhancement for obstruction of justice. 545 Fed. Appx. 199, 200-202. The court of appeals affirmed in a per curiam opinion, id. at 203, and this Court denied certiorari, 134 S. Ct. 2739.

3. In 2015, petitioner filed a motion to vacate his sentence under 28 U.S.C. 2255. D. Ct. Doc. 456, at 1-19. As relevant here, petitioner renewed his argument that his trial counsel had been ineffective for failing to subpoena phone records and failing to discover exculpatory evidence. Id. at 10. Petitioner also argued that the separate attorney who represented him at sentencing and the attorney who had represented him on appeal were both ineffective because each failed to argue that petitioner's Sixth Amendment rights had been violated when the district court did not appoint him substitute counsel for the post-trial hearing in which petitioner sought a new attorney. Id. at 13; see D. Ct. Doc. 515, at 2, 6 (Apr. 29, 2016).

The magistrate judge recommended that petitioner's motion be denied, determining that petitioner failed to meet his burden under Strickland v. Washington, 466 U.S. 668 (1984), to prove that

sentencing counsel or appellate counsel had performed deficiently and that counsel's alleged errors had caused him prejudice. Pet. App. C9-C10. The district court agreed with the magistrate judge and denied petitioner's Section 2255 motion. Id. at D6. It also denied a certificate of appealability. Ibid.

In an unpublished opinion, the court of appeals denied petitioner's request for a certificate of appealability, concluding that petitioner had failed to make "a substantial showing of the denial of a constitutional right." Pet. App. A2 (quoting 28 U.S.C. 2253(c)(2)).

ARGUMENT

Petitioner contends (Pet. 2-5) that the district court erred in considering acquitted conduct in calculating his advisory Sentencing Guidelines range. He also contends (Pet. 6-8) that the court violated his Sixth Amendment rights by failing to appoint independent counsel to represent him at the hearing in which he sought to discharge Beck for rendering ineffective assistance. Petitioner's arguments do not implicate any division among the courts of appeals, have not been properly preserved, and fail on the merits. Further review is unwarranted.

1. Petitioner argues (Pet. 2-5) that the district court violated his Sixth Amendment rights by taking acquitted conduct into account at sentencing. Petitioner has procedurally defaulted that claim, which in any event is foreclosed by longstanding

precedent of this Court and implicates no division among the courts of appeals.

a. Petitioner did not argue at sentencing that the district court's consideration of acquitted conduct violated the Sixth Amendment. To the contrary, he affirmatively acknowledged that such conduct could properly be considered by the court. Sent. Tr. 9; see id. at 9-14. Petitioner also failed to raise an acquitted-conduct claim on direct appeal. See 545 Fed. Appx. 199. The first time that petitioner raised such a claim was in his Section 2255 motion. See D. Ct. Doc. 456-1, at 54-59 (May 26, 2015).

Courts generally may not consider on collateral review a claim that the prisoner failed to present on direct review, unless the prisoner can establish both "cause" for the default and "prejudice" from the asserted error. Bousley v. United States, 523 U.S. 614, 622 (1998) (citation omitted). Even assuming that petitioner could show prejudice, he has advanced no argument that his failure to raise that claim at sentencing or on direct review should be excused.

Moreover, neither the district court nor the court of appeals on collateral review addressed petitioner's contention that reliance on acquitted conduct at sentencing violated his Sixth Amendment rights. This Court's standard practice, as "a court of review, not of first view," is not to consider issues that were not pressed or passed upon below. Cutter v. Wilkinson, 544 U.S. 709, 718 n.7 (2005); see, e.g., Zobrest v. Catalina Foothills Sch.

Dist., 509 U.S. 1, 8 (1993); Adickes v. S. H. Kress & Co., 398 U.S. 144, 147 n.2 (1970). Petitioner has identified no sound reason for this Court to deviate from its usual practice here.

b. Even if petitioner had properly preserved his acquitted-conduct claim, or had advanced compelling grounds to set aside his procedural default, the claim would fail on the merits. In United States v. Watts, 519 U.S. 148 (1997) (per curiam), this Court held that "a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence." Id. at 157. The Court noted that under the pre-Guidelines sentencing regime, it was "well established that a sentencing judge may take into account facts introduced at trial relating to other charges, even ones of which the defendant has been acquitted," and that "[t]he Guidelines did not alter this aspect of the sentencing court's discretion." Id. at 152 (internal quotation marks omitted). And the Court explained that a jury's determination that a litigant failed to prove a fact beyond a reasonable doubt does not have preclusive effect in contexts in which a lower standard of proof applies. Id. at 156 ("[A]n acquittal in a criminal case does not preclude the Government from relitigating an issue when it is presented in a subsequent action governed by a lower standard of proof.") (citation omitted). Although Watts addressed a challenge to consideration of acquitted conduct based on double jeopardy

principles, rather than the Sixth Amendment, its clear import is that sentencing courts may take acquitted conduct into account at sentencing without offending the Constitution.

United States v. Booker, 543 U.S. 220, 223 (2005), confirms that a judge may constitutionally base a defendant's sentence on conduct that was not found by the jury, so long as the sentence is at or below the statutory maximum. In discussing the type of information that a sentencing court could consider under the advisory Guidelines, Booker made no distinction between acquitted conduct and other relevant conduct. See, e.g., id. at 252 (emphasizing the need to consider all relevant conduct to achieve "the sentencing statute's basic aim of ensuring similar sentences for those who have committed similar crimes in similar ways"). To the contrary, after emphasizing the judge's "broad discretion in imposing a sentence within a statutory range," id. at 233, Booker cited Watts for the proposition that "a sentencing judge could rely for sentencing purposes upon a fact that a jury had found unproved (beyond a reasonable doubt)," id. at 251 (emphasis omitted).

Petitioner contends (Pet. 3) that this Court's decision in Nelson v. Colorado, 137 S. Ct. 1249 (2017) "directly conflicts" with Watts. But Nelson has no bearing on petitioner's Sixth Amendment claim. In Nelson, this Court addressed whether Colorado's Exoneration Act, which permitted the state to retain conviction-related fees unless and until the defendant instituted a civil proceeding and proved her innocence by clear and convincing

evidence, violated the Fourteenth Amendment's guarantee of due process. Id. at 1252. The Court struck down the Exoneration Act, holding that Colorado's scheme failed the due process balancing test set forth in Mathews v. Eldridge, 424 U.S. 319 (1976). See 137 S. Ct. at 1255, 1257-1258. Nelson's conclusion that, as a matter of due process, "a State may not impose anything more than minimal procedures on the refund of exactions dependent upon a conviction subsequently invalidated," id. at 1258, in no way calls into question the longstanding principle that the Sixth Amendment allows courts to consider acquitted conduct at sentencing.

Contrary to petitioner's contention (Pet. 4), the courts of appeals are uniform on this issue. Every court of appeals with criminal jurisdiction has held, since Booker, that a district court may consider acquitted conduct for sentencing purposes. See United States v. Gobbi, 471 F.3d 302, 313-314 (1st Cir. 2006); United States v. Vaughn, 430 F.3d 518, 526-527 (2d Cir. 2005), cert. denied, 547 U.S. 1060 (2006); United States v. Ciavarella, 716 F.3d 705, 735-736 (3d Cir. 2013), cert. denied, 134 S. Ct. 1491 (2014); United States v. Grubbs, 585 F.3d 793, 798-799 (4th Cir. 2009), cert. denied, 559 U.S. 1022 (2010); United States v. Farias, 469 F.3d 393, 399-400 & n.17 (5th Cir. 2006), cert. denied, 549 U.S. 1272 (2007); United States v. White, 551 F.3d 381, 386 (6th Cir. 2008) (en banc), cert. denied, 556 U.S. 1215 (2009); United States v. Waltower, 643 F.3d 572, 575-578 (7th Cir.), cert. denied, 565 U.S. 1019 (2011); United States v. High Elk, 442 F.3d 622, 626

(8th Cir. 2006); United States v. Mercado, 474 F.3d 654, 656-658 (9th Cir. 2007), cert. denied, 552 U.S. 1297 (2008); United States v. Magallanez, 408 F.3d 672, 683-685 (10th Cir.), cert. denied, 546 U.S. 955 (2005); United States v. Siegelman, 786 F.3d 1322, 1332-1333 & n.12 (11th Cir. 2015), cert. denied, 136 S. Ct. 798 (2016); United States v. Settles, 530 F.3d 920, 923-924 (D.C. Cir. 2008), cert. denied, 555 U.S. 1140 (2009).

In addition, this Court has repeatedly and recently denied petitions for writs of certiorari challenging the reliance on acquitted conduct at sentencing. See, e.g., Thurman v. United States, No. 18-5528, 2018 WL 3892886 (Oct. 1, 2018); Rayyan v. United States, No. 18-5390, 2018 WL 3633057 (Oct. 1, 2018); Muir v. United States, 138 S. Ct. 2643 (2018) (No. 17-8893); Okechuku v. United States, 138 S. Ct. 1990 (2018) (No. 17-1130); Soto-Mendoza v. United States, 137 S. Ct. 568 (2016) (No. 16-5390); Montoya-Gaxiola v. United States, 137 S. Ct. 371 (2016) (No. 15-9323); Davidson v. United States, 137 S. Ct. 292 (2016) (No. 15-9225); Krum v. United States, 137 S. Ct. 41 (2016) (No. 15-8875); Bell v. United States, 137 S. Ct. 37 (2016) (No. 15-8606); Siegelman v. United States, 136 S. Ct. 798 (2016) (No. 15-353). The same result is appropriate here.

c. Petitioner further contends (Pet. 3) that the decision below conflicts with the Ninth Circuit's decision in United States v. Pimentel-Lopez, 828 F.3d 1173 (2015), opinion amended and superseded, 859 F.3d 1134 (2016). That is incorrect. In Pimentel-

Lopez, the Ninth Circuit held that the district court had erred when it made a drug-quantity finding at sentencing that exceeded the jury's special finding that the quantity of drugs involved in the conspiracy was "less than 50 grams." 859 F.3d at 1140. The Ninth Circuit explained that Watts was "inapplicable" in that scenario because the jury did not merely acquit the defendant on a charge involving a particular drug quantity, but rather had made an affirmative finding beyond a reasonable doubt that the defendant was responsible for less than a certain amount. Id. at 1141. In the court's view, because the district court lacked the power to make a finding that was "inconsisten[t]" with the jury's special verdict, it was bound to the jury's drug-quantity determination. Id. at 1141-1142.

Pimentel-Lopez does not support petitioner's claim of Sixth Amendment error in the different circumstances of this case. Here, there is no inconsistency between the jury's special findings and the district court's drug-quantity calculations. Whereas the jury in Pimentel-Lopez found the defendant responsible for "less than 50 grams," 859 F.3d at 1140 (emphasis added), the jury here found that petitioner participated in a conspiracy involving "five (5) grams or more" of methamphetamine, D. Ct. Doc. 278, at 3 (emphasis added). The court's determination, by a preponderance of the evidence, that petitioner was accountable for 14 grams of methamphetamine thus did not conflict with any jury finding; the jury's findings placed no ceiling on the quantity of

methamphetamine for which petitioner could be held responsible. The Ninth Circuit would therefore have rejected petitioner's claim of sentencing error. See Pimentel-Lopez, 859 F.3d at 1142 ("[A] jury finding that does not set an upper boundary would leave the district court free to find a greater quantity in determining the sentencing range.").

In any event, to the extent that Pimentel-Lopez suggests that a district court may not make a drug-weight finding in excess of a jury's, it is inconsistent with Watts. Indeed, every court of appeals to consider the issue other than the Ninth Circuit has held that a district court may impose a sentence based on a drug-quantity determination greater than that found by the jury, so long as the sentence does not exceed the statutory maximum for the offense of conviction. See United States v. Smith, 751 F.3d 107, 117 (3d Cir.), cert. denied, 135 S. Ct. 383 (2014); United States v. Webb, 545 F.3d 673, 677 (8th Cir. 2008), cert. denied, 556 U.S. 1194 (2009); United States v. Florez, 447 F.3d 145, 156 (2d Cir.), cert. denied, 549 U.S. 1040 (2006); United States v. Magallanez, 408 F.3d 672, 683-685 (10th Cir. 2005); United States v. Goodine, 326 F.3d 26, 32-34 (1st Cir. 2003), cert. denied, 541 U.S. 902 (2004); United States v. Smith, 308 F.3d 726, 743-745 (7th Cir. 2002).

2. Petitioner contends (Pet. 6-8) that the district court violated his Sixth Amendment rights by failing to appoint him substitute counsel at the post-trial, pre-sentencing hearing in which petitioner sought to dismiss his trial attorney for rendering

ineffective assistance. Petitioner maintains (Pet. 6) that he was "actually and constructively denied counsel" at that hearing because he and his counsel had opposing interests. Petitioner's argument lacks merit, and further review is not warranted.

a. The Sixth Amendment provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to have the assistance of counsel for his defence." After the right to counsel has attached, a defendant is entitled "to have counsel present at all critical stages of the criminal proceedings." Missouri v. Frye, 566 U.S. 134, 140 (2012) (quoting Montejo v. Louisiana, 556 U.S. 778, 787 (2009)). "[C]ritical stage[s]" are "proceedings between an individual and agents of the State (whether formal or informal, in court or out) that amount to trial-like confrontations, at which counsel would help the accused in coping with legal problems or meeting his adversary." Rothgery v. Gillespie Cnty., 554 U.S. 191, 212 n.16 (2008) (citations, ellipsis, and internal quotation marks omitted). "Critical stages include arraignments, postindictment interrogations, postindictment lineups, and the entry of a guilty plea." Frye, 566 U.S. at 140.

Petitioner incorrectly asserts (Pet. 6) that this Court in Marshall v. Rodgers, 569 U.S. 58 (2013) (per curiam), recognized as a critical stage a post-trial, pre-appeal motion for a new trial. Marshall considered a California court's denial of a defendant's request to reappoint counsel to help him file a motion for a new trial, where the defendant had previously waived his

right to counsel, and concluded that the denial was not contrary to any "clearly established Federal law" under 28 U.S.C. 2254(d)(1). See 569 U.S. at 63. In addressing whether a defendant who has waived counsel has a clearly established right to reappointment of counsel, this Court "assumed, without so holding," that a motion for a new trial was a critical stage, id. at 61, and cautioned that it "expresse[d] no view on the merits of the underlying Sixth Amendment principle," id. at 64.

Marshall thus did not establish any principle of law that supports petitioner's claim. Indeed, petitioner's claim, unlike the one in Marshall, does not even involve a motion for a new trial. After trial, petitioner filed a pro se motion for judgment of acquittal and new trial, but he did not raise his trial counsel's ineffectiveness as a ground for relief. See D. Ct. Doc. 289 (Mar. 8, 2012); see also D. Ct. Doc. 292 (Mar. 15, 2012) (denying petitioner's motion). Nor did he argue, then or later, that he was stymied in his ability to pursue such a motion by the lack of effective counsel at any stage of the proceedings.

Petitioner did move after trial "to dismiss" his trial attorney "and have new counsel appointed to [his] court proceedings." D. Ct. Doc. 297, at 1. But the subsequent hearing, during which the district court considered whether to discharge the trial attorney, was not a critical stage of his criminal proceedings. The hearing was not an adversarial confrontation between the defendant and the government, nor did a "trial-like"

confrontation take place. Rothgery, 554 U.S. at 212 n.16 (citation omitted). To the contrary, the hearing consisted solely of questions posed by the court to trial counsel to determine whether petitioner should receive new counsel for his sentencing. See 6/7/12 Tr. 3-7. Petitioner has identified no decision in which such a hearing has been deemed a critical stage of the criminal proceedings.

Even if the new-counsel hearing could be considered a critical stage at which petitioner was denied counsel, moreover, any error had no effect on the outcome. Petitioner obtained all the relief he sought at the hearing because the district court dismissed petitioner's trial attorney and appointed new counsel for his sentencing. See 6/7/12 Tr. 7; see also D. Ct. Doc. 330, at 2. And to the extent that petitioner claims any ineffectiveness outside the context of that hearing, he could and did raise those allegations in his Section 2255 motion, and the district court denied them on the merits, Pet. App. D3-D6. See id. at A1-A2 (court of appeals denying certificate of appealability).

b. Petitioner incorrectly contends (Pet. 7) that "[m]any circuits are in dispute" over whether a defendant is entitled to the appointment of counsel at a hearing in which he seeks a new trial based on the allegation that his trial attorney was ineffective. The courts of appeals have consistently held that a pre-appeal motion for a new trial is a "critical stage" at which the defendant must have the benefit of appointed counsel. See, e.g., McAffe v. Thaler, 630 F.3d 383, 391 (5th Cir.) (per curiam),

cert. denied, 565 U.S. 1057 (2011); Kitchen v. United States, 227 F.3d 1014, 1019 (7th Cir. 2000); Williams v. Turpin, 87 F.3d 1204, 1210 & n.5 (11th Cir. 1996); Robinson v. Norris, 60 F.3d 457, 460 (8th Cir. 1995), cert. denied, 517 U.S. 1115 (1996); Menefield v. Borg, 881 F.2d 696, 699-700 (9th Cir. 1989). But no court has found that a motion to dismiss counsel prior to sentencing -- the only motion at issue here -- is a critical stage requiring the appointment of substitute counsel.

In any event, this case would be an unsuitable vehicle to address whether the district court should have appointed substitute counsel for petitioner at the hearing at which petitioner sought trial counsel's dismissal. Petitioner did not raise that Sixth Amendment objection on direct review, nor did he assert it as a ground for relief in his Section 2255 motion. Petitioner first raised his substitute-counsel claim on appeal from the district court's denial of his Section 2255 motion, see 17-7119 C.A. Doc. 15-1 (Oct. 23, 2017), but the court of appeals denied a certificate appealability without addressing it, see Pet. App. A2. Finally, as noted above, petitioner prevailed at the hearing whose procedure he challenges.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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