No. 19-

IN THE
Supreme Court of the United States

LISA MARIE MONTGOMERY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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September 2019

CAPITAL CASE
QUESTION PRESENTED

1. In a federal capital trial case, may a federal district court judge, consistent with the Fifth and Sixth Amendments, terminate the appointment of learned counsel—who has established a close, trusting, and professional relationship with the defendant—via an in chambers off the record meeting in the absence of learned counsel and the defendant and without notice to the defendant and learned counsel?

2. Whether petitioner is entitled to a certificate of appealability on her Sixth Amendment denial of counsel claim where appellate courts in California, Georgia, Louisiana, and Texas are in conflict with the decision of the lower court?

PARTIES TO THE PROCEEDING

Lisa Marie Montgomery, petitioner on review, was the movant/appellant below.

The United States of America, respondent on review, was the respondent/appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Lisa Marie Montgomery respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Eighth Circuit denying a certificate of appealability in this capital case brought under 28 U.S.C. § 2255 (2018).

OPINIONS AND ORDERS BELOW

On March 3, 2017, the United States District Court for the Western District of Missouri (Fenner, J.), denied relief and a certificate of appealability ("COA") on all claims in Mrs. Montgomery's Amended Motion to Vacate, Set Aside, or Correct a Sentence under 28 U.S.C. § 2255. The memorandum opinion and order is unreported and attached as Appendix C. Pet. App. 3a-131a. Earlier, on December 21, 2015, the district court denied relief on specified claims, granting an evidentiary hearing, and reserving ruling on a COA. That memorandum opinion and order is unreported and attached as Appendix D. Pet. App. 132a-197a. On January 25, 2019, the United States Court of Appeals for the Eighth Circuit also denied a COA. That order is not reported and attached as Appendix B. Pet. App. 2a. On April 10, 2019, the United States Court of Appeals for the Eighth Circuit denied a timely petition for panel rehearing and rehearing en banc. That order is not reported and attached as Appendix A. Pet. App. 1a.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals denying a petition for rehearing en banc was entered on April 10, 2019. Pet. App. 1a. On June 18, 2019,

Justice Gorsuch extended the time in which to file a petition for writ of certiorari to and including September 7, 2019.[1] The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and 28 U.S.C. § 2253 (any justice may grant a certificate of appealability).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment, U.S. Const. amend. V, provides "[n]o person shall…be deprived of life, liberty, or property, without due process of law."

The Sixth Amendment, U.S. Const. amend. VI, provides "[i]n all criminal prosecutions the accused shall enjoy the right to have the Assistance of Counsel for his defense."

28 U.S.C. § 2253(c)(2) provides "[a] certificate of appealability may issue…only if the applicant has made a substantial showing of the denial of a constitutional right."

INTRODUCTION

In *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006), this Court held the denial of counsel of choice violates the "root meaning" of the Sixth Amendment and is structural error. In *Morris v. Slappy*, 461 U.S. 1 (1983), this Court held a trial court did not abuse its discretion in denying a continuance motion when the defendant's appointed counsel became ill and new counsel was appointed six days before trial.

[1] September 7, 2019, fell on a Saturday. This petition is being filed on the next business day.

The en banc Texas Court of Criminal Appeals held in *Buntion v. Harmon*, 827 S.W.2d 945 (Tex. Crim. App. 1992), that replacement of appointed trial counsel in a capital case over the objection of the defendant and his trial counsel violated the Sixth Amendment right to counsel. This is what happened here. The trial court, without notice or a hearing, unilaterally revoked the appointment of learned counsel and forbade any contact between learned counsel and the defendant, against the wishes of (or notice to) the defendant and learned counsel.

This case presents a question of exceptional importance over which the lower courts disagree and highlights the tension between this Court's decisions in *Gonzazlez-Lopez* and almost forty-year old *Morris*. Is the established attorney/client relationship between an indigent capital defendant and her appointed learned counsel less deserving of protection than the relationship between the well-heeled and his retained counsel? Does an indigent defendant have no vested interest in her trusted counsel? Once counsel is appointed is the court free to remove that counsel out of hand?

STATEMENT OF THE CASE

A. Relevant Pre-Trial Proceedings

On December 18, 2004, Lisa Marie Montgomery was arrested for kidnapping resulting in death in violation of 18 U.S.C. § 1201(a)(1). Mrs. Montgomery immediately confessed.

In the days following her arrest, Mrs. Montgomery was remorseful and suicidal. The court appointed the federal public defender to represent Mrs.

Montgomery. The federal public defender assigned attorney Anita Burns to the case. The Court also appointed a lawyer from the Criminal Justice Act ("CJA") panel, Susan Hunt, as "additional" counsel. Crim. ECF 16.[2] Concerned for Mrs. Montgomery's well-being and psychotic mental state, and inexperienced in cases involving mentally ill defendants, the two attorneys engaged a mitigation specialist, Bret Dillingham, and two mental health experts as consultants to the defense team—Dr. William Logan and Dr. Marilyn Hutchison. Dr. Hutchison and Dr. Logan both concluded that Mrs. Montgomery was psychotic and should be hospitalized. They noted that the jail psychiatrist was treating Mrs. Montgomery with psychotropic medications, but questioned the ability of the jail to care for Mrs. Montgomery given her severe symptoms. Mr. Dillingham noted signs of dissociation, psychosis, and trauma.

Four months into the case, attorney Anita Burns complained of her supervisor's behavior to the Federal Defender "FPD" for the Western District of Missouri, Ray Conrad. As a result, she was removed from the case and her supervisor, Dave Owen, replaced her on the team. Owen had never tried a capital case and had no experience with mentally ill defendants. Owen terminated the services of Hutchison, Logan, and Dillingham, the mitigation specialist and mental health experts.

[2] The United States District Court for the Western District of Missouri does not generate Page ID numbers. References to the electronic filings in the criminal case will be designated "Crim. ECF." References to the §2255 proceedings will be designated "ECF."

Three months later, Owen and Hunt determined that they were not qualified to represent Mrs. Montgomery. They sought assistance from the Federal Death Penalty Resource Project ("FDPRC") and the Capital Resource Counsel ("CRC"). The CRC is composed of a specialized group of attorneys, investigators, and mitigation specialists who provide support (and in some cases direct representation) in federal capital trial cases. The projects staff are mainly salaried employees in individual defender offices who work out of district to assist a local federal public defender ("FPD") appointed in a federal capital prosecution. The project is funded by the Administrative Office of the Courts as part of the, then, Office of Defender Services ("ODS"). The project's staff receive no compensation from the court or the local federal defender office.

At Owen and Hunt's request, a meeting took place in Oklahoma City between FDPRC attorney Richard Burr and CRC attorney Judy Clarke, as well as Mr. Owen and Ms. Hunt. At the end of the meeting Owen and Hunt asked Ms. Clarke to join the team as learned counsel.[3] She agreed. When Ms. Clarke joined the team as

[3] *Guide to Judiciary Policy*, Vol 7 Defender Services, Part A Guidelines for Administering the CJA and Related Statutes, Chapter 6: Federal Death Penalty and Capital Habeas Corpus Representations, § 620.30 (b) Evaluating the Qualifications of Counsel for Considered for Appointment, instructs "(1) Courts should ensure that all attorneys appointed in federal death penalty cases are well qualified, by virtue of their prior defense experience, training, and commitment, to serve as counsel in this highly specialized and demanding litigation." Beyond these baseline requirements for appointed counsel, *18 U.S.C. § 3005 (2018) requires trial courts to appoint at least one attorney "learned in the law of capital cases."* § 620.30(b)(2) defines learned counsel as an attorney with "distinguished prior experience in the trial, appeal, or post-conviction review of federal death penalty cases, or distinguished prior experience in state death penalty trials, appeals, or post-conviction review that, in combination with co-counsel, will assure high-quality representation."

learned counsel, two seasoned mitigation experts from the CRC, David Freedman and Deb Garvey, also joined the team.

As Ms. Clarke joined the team, Hunt and Owen were terminating the second mitigation specialist that they had retained, Lisa Rickert. On his own, Owen hired his cousin's neighbor, who he met at a party, to be the paralegal on the case. Hunt and Owen retained Holly Jackson as a mitigation specialist. The team was now complete.

The new team began to meet often. Clarke, Freedman, and Garvey began to educate the team on the prevailing professional norms in capital cases. Records were gathered, witnesses interviewed, and the team met with Mrs. Montgomery often. Mrs. Montgomery continued to be remorseful and accept responsibility. As she had from the beginning, she expressed a willingness to plead guilty.

The team knew that Mrs. Montgomery was traumatized, dissociative, and psychotic. They suspected she had brain damage. Ms. Clarke persuaded psychologist Judith Hermann, the leading expert in trauma in the country, to consult with the team. But the consultation never happened because within days of the consultation agreement, learned counsel Ms. Clarke was removed from the case.

The stories vary.[4] But Mr. Owen had begun to chafe at Ms. Clarke's leadership role with the team. On April 20, 2006, Mr. Owen and his boss Ray Conrad were in the judge's chambers discussing Mr. Owen's feelings. Also present

[4] Mrs. Montgomery's request for an evidentiary hearing was denied in the lower court, preventing further factual development.

was the magistrate assigned to the case. No court reporter was present.[5] The defendant, Lisa Montgomery, was unaware of the meeting. Learned counsel Judy Clarke, and lead counsel, Susan Hunt, were unaware of the meeting. Exactly what was said in the meeting (and who said it) is not known as the witnesses' stories diverge. For example, the magistrate recalled that Ray Conrad did all of the talking. The district court and Dave Owen both say Conrad was there. Conrad swore under oath that he was not present.

Whatever was said, the judge "terminated" the appointment of Ms. Clarke "effective immediately." Crim. ECF 79. The court also entered an order "that telephone communication between [Montgomery and Clarke] is to be prohibited while the defendant remains in custody." Crim. ECF 80. The court instructed the jail "to take all steps necessary to prohibit telephonic communication, including blocking incoming or outgoing telephone calls, to or from the following telephone numbers: [listing of four telephone numbers associated with Ms. Clarke and the CRC team.]"

At the time of this off the record meeting, Ms. Clarke was in Kansas City conducting investigation in the case. She had plans to visit Mrs. Montgomery at the jail later in the afternoon, together with FPD investigator Ron Ninemire. Made aware of the planned client visit, the judge called the jail and ordered them to bar Ms. Clarke from the facility. Ms. Clarke learned about the judge's order from the guards who refused her entrance to the jail. Ninemire was permitted to visit.

[5] 18 U.S.C. § 3599(f) requires that any ex parte proceeding about CJA matters "shall be transcribed and made part of the record available for appellate review."

The next day, the district court had Mrs. Montgomery brought into the courtroom with her remaining counsel, Owen and Hunt. Ninemire was also present. The court told Mrs. Montgomery that it had terminated Ms. Clarke as her lawyer. Mrs. Montgomery was in tears. Ninemire informed the court that Mrs. Montgomery was "upset."

Within the week, Ms. Hunt and Mr. Owen were in the judge's chambers, this time with a court reporter. Ms. Hunt told the court that neither she nor Owen were qualified to represent Montgomery because neither had "had a serious mental health case." E. Hrg. Exhibit 67, April 25, 2006 Transcript, p. 5. Owen stated, "I don't have the level of experience necessary to handle Lisa, I will say that." *Id.* at 6

Ms. Hunt said it was a mistake to remove Clarke. Ms. Hunt said that Mrs. Montgomery was "a mess" and "[s]he feels devastated, betrayed, lied to, everything." *Id.* Owen agreed. *Id.*

Hunt stated that it was in the client's best interest to bring Clarke back into the case. The court said, "I am not inclined to do that." *Id.* at 10. And then, "I am not inclined to want Miss Clark [sic] to be involved in it. For whatever that is worth to you, that tells you what you need to try and do." *Id.* at 11. Hunt told the court that as a result of Clarke's termination the case would not be ready for trial as scheduled. The court suggested that it understood.[6]

On May 3, 2006, Susan Hunt filed, under seal, a letter written to the court by Mrs. Montgomery. Crim. ECF 84. In her letter, Mrs. Montgomery explained that

[6] As a result of the Clarke termination, the mitigation specialist hired by the FPD, Holly Jackson, resigned from the case.

"due to a history of problems with lawyers in family courts, I have not trusted lawyers, even the ones appointed to me in this case. I have struggled greatly with being able to trust them." Mrs. Montgomery continued, "I've already lost several team members without explanation: Anita Burns, one of the first attorneys appointed, and then Lisa Rickert, an investigator. Because of these losses, I have had to struggle with trusting that members of my team would stay after building a relationship with them." Mrs. Montgomery stated, "Of all the lawyers I have had to date, I have felt the most comfortable with Judy." According to Mrs. Montgomery, "I have felt she answered me in ways I could understand and I had started to feel a part of what was going on." Mrs. Montgomery felt that Judy Clarke "truly cared" about her well- being and "being able to find an attorney that understands me and I in turn understand them is a difficult task. I felt I had found that combination in Judy."

Mrs. Montgomery said she had been looking forward to seeing Ms. Clarke on April 20, but "only minutes before the visit, I found out she had been removed from my defense team. No explanation was given to me. When I asked what was going on, I feel [sic] that information was being withheld from me." Mrs. Montgomery stated that she wondered if she had done something wrong as she was unaware of any problems with Ms. Clarke, "either with the rest of the defense team or myself." Mrs. Montgomery said that she had been in a state of shock since learning of the termination of Ms. Clarke. She had been having trouble sleeping, did not want to get out of bed, had been missing activities, and had been having trouble eating. The

unilateral termination of Ms. Clarke had caused her to lose all hope. "With Judy gone, it's difficult to have any confidence in the future of my case. Particularly since *the decision to remove her was made without any input from me or any prior knowledge of it by me. Am I to now expect the same thing to happen in any other decisions to be made?*" Mrs. Montgomery concluded that "Throughout this past week, Susan [Hunt] has shown a genuine concern for how I was feeling about this decision and I appreciate her effort to do so." The letter did not mention Mr. Owen.

Another week passed. Owen and Hunt were back in chambers, this time Owen stated that he could not work with Hunt. After the in chambers gathering, the district court called Hunt and instructed her to file a motion to withdraw. She did. Two new CJA panel attorneys, John O'Connor and Fred Duchardt, were appointed. Duchardt took the leadership role on the team. He refused to file a motion to reconsider the termination of Clarke's appointment. The October 2006, trial date was continued.

In October 2008, Mrs. Montgomery was convicted of first degree murder and sentenced to death. At the end of the penalty phase, Dave Owen called Susan Hunt exclaiming, "Lisa's story is not being told." ECF 151-2, p. 17.

B. Initial Collateral Review Proceedings Pertinent to the Questions Presented

After an unsuccessful appeal, new counsel were appointed to investigate and prepare a collateral attack on Montgomery's conviction and sentence. They filed a 238 page "Motion For Collateral Relief To Vacate, Set Aside, Or Correct Sentence And For A New Trial" with 283 supporting exhibits. ECF 32. The motion was

amended once. ECF 71.[7] The motion and amended motion raised the Sixth Amendment *Gonzalez-Lopez* denial of counsel claim, and related claims. ECF 32 at 16-54; ECF 71 at 15-19.

On December 21, 2015, the district court summarily dismissed the *Gonzalez-Lopez* claims. The district court ruled that Mrs. Montgomery did not have the right to a meaningful relationship with her appointed counsel, that he had full discretion to terminate counsel, that the principles of *Morris* controlled the question, and that *Gonzalez-Lopez* had no applicability in this context because Clarke was appointed, not retained. The Court further ruled that Mrs. Montgomery's preference for Clarke was not a factor. Instead, the Court's decision to terminate Clarke was based on "communication issues between defense team members," the judge's "preference for local counsel," "significant personality conflict," and "the FPD's recommendation." Pet. App. 144a.[8] The Court denied a hearing.

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[7] The exhibits to the amended motion were originally filed on disc with the Court. Later, after the court unsealed all of the documents in the case, they were filed in the electronic record. ECF 151-166.

[8] The Court also found that the claim was waived because no formal motion to reconsider was filed. But the record reflects that Ms. Hunt asked the court to bring Ms. Clarke back into the case. Mrs. Montgomery wrote to the court expressing her desire to have Ms. Clarke as her attorney. The court was equally clear that it would not reconsider its decision. Indeed, Ms. Hunt was terminated after she raised the possibility of reconsidering Clarke's termination. Parties need not file futile pleadings to preserve error for review. Moreover, no motion to terminate Ms. Clarke was filed, yet the court acted based on whatever it was told in the unrecorded meeting with Owen and Conrad. The court further suggests that the failure to file a petition for writ of mandamus constituted waiver. But this Court has never held that a party must file an interlocutory appeal to preserve error. Mr. Duchardt's failure to file a motion to reconsider or raise the issue on appeal likewise does not constitute a waiver. Mr. Duchardt had an actual conflict of interest which prohibited him from raising the claim since to do so would be to challenge his own appointment. Bringing Clarke back into the case would have caused him to loose a substantial sum of money and/or called into question the legitimacy of his payment. *United States v. Cronic*, 466 U.S. 64 (1984); see also *Page v. United States*, 884 F.2d 300, 301 (7th Cir. 1989); Rule 1.7(1), ABA Model Rules of Professional Responsibility ("[I]f the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice.") 2255 proceedings represented the first opportunity for Mrs. Montgomery to challenge the court's order. Moreover, Mrs. Montgomery raised and preserved an

The Court did find that many of Mrs. Montgomery's allegations were enough to warrant an evidentiary hearing. The hearing started on October 31, 2016 and concluded on November 10, 2016. Hunt, Owen, Clarke, Freedman, and Garvey testified at the hearing about their work in the case, observations of Mrs. Montgomery's severe mental disease, and other matters, but were prohibited from testifying about any matter touching on the denial of counsel claim.

On March 3, 2017, the Court entered its final order in the case denying all claims for relief and denying a certificate of appealability. Pet. App. 3a. Mrs. Montgomery filed a timely notice of appeal and a 933 page application for certificate of appealability with the United States Court of Appeals for the Eighth Circuit. The government filed a 383 page response. Mrs. Montgomery replied. On January 25, 2019 a panel of the Eighth Circuit denied a certificate of appealability in a four sentence order, the relevant portion of which states, "The court has carefully reviewed the original file of the district court, and the application for certificate of appealability is denied." Pet. App. 2a. Mrs. Montgomery moved for rehearing, which was denied. Pet. App. 1a.

REASONS FOR GRANTING THE PETITION

I. This case exposes tension between *United States v. Gonzalez-Lopez* and *Morris v. Slappy.*

"I found out she had been removed from my defense team. No explanation was given to me."

ineffective assistance of appellate counsel claim the denial of which was wrapped up in the merits analysis of the denial of counsel claim.

"[T]he decision to remove her was without input from me or any prior knowledge of it by me."

A. The Sixth Amendment right to counsel is the core of the Sixth Amendment

The right to the effective assistance of counsel and the right to the choice of counsel are qualitatively different. The right to choice of counsel is fundamental. "The right to select counsel of one's choice … has been regarded as the root meaning of the [Sixth Amendment] constitutional guarantee." *Gonzalez-Lopez*, 548 U.S. at 147-48. The right to counsel of choice respects the agency of the accused. It preserves the ability of the defendant to choose the counsel she thinks will represent her best. *Id.* There is a presumption in favor of counsel of choice. So much so that when retained counsel of choice is wrongfully denied, the error is structural.[9] "Deprivation of the right is 'complete' when the defendant is erroneously prevented from being represented by the lawyer [she] wants, regardless of the quality of the representation [she] received." *Id.* at 148.

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[9] Different attorneys will pursue different strategies with regard to investigation and discovery, development of the theory of defense, selection of the jury, presentation of the witnesses, and style of witness examination and jury argument. And the choice of attorney will affect whether and on what terms the defendant cooperates with the prosecution, plea bargains, or decides instead to go to trial. In light of these myriad aspects of representation, the erroneous denial of counsel bears directly on the "framework within which the trial proceeds," *Fulminante*, *supra*, at 310, 111 S.Ct. 1246—or indeed on whether it proceeds at all. It is impossible to know what different choices the rejected counsel would have made, and then to quantify the impact of those different choices on the outcome of the proceedings. Many counseled decisions, including those involving plea bargains and cooperation with the government, do not even concern the conduct of the trial at all. Harmless-error analysis in such a context would be a speculative inquiry into what might have occurred in an alternate universe.

Gonzalez-Lopez, 548 U.S. at 150.

Does a poor accused have any say in the continuation of the attorney/client relationship? The lower courts disagree.

In *Morris*, a post-conviction case, the issue in federal court was whether a California trial court abused its discretion in denying a motion for continuance resulting in a Sixth Amendment violation. The defendant in *Morris* was appointed a public defender who became sick six days before trial. A substitute public defender was assigned the case. The substitute attorney represented to the court that he was ready for trial. The defendant asked for a continuance so that his original attorney could be available for trial. The Ninth Circuit granted habeas relief finding that the denial of a continuance violated the defendant's Sixth Amendment right to counsel. Recognizing the difficulties with scheduling trials, this Court held "broad discretion must be granted trial courts on matters of continuances; only an unreasoning and arbitrary 'insistence upon expeditiousness in the face of a justifiable request for delay' violates the right to the assistance of counsel." *Morris*, 461 U.S. at 11–12. In that context, this Court held that the Ninth Circuit created a right to a "meaningful relationship with counsel" that did not exist in the Sixth Amendment.

Here, the court did not face a counsel who was obstructing its docket. By terminating Clarke, the case was delayed another two years. And the court knew that its action, not the defendant's or her lawyer's, would engender delay.

The facts here are in line with *Gonzalez-Lopez*. Mr. Gonzalez-Lopez, a federal defendant in the Eastern District of Missouri, at first had two retained attorneys: local attorney John Fahle and California-barred attorney Joseph Low. Low sought

admission pro hac vice which was provisionally granted and then revoked. Gonzalez-Lopez informed the court that he preferred Low to Fahle. Low again requested admission pro hac vice which was denied. Ultimately Fahle withdrew and Gonzalez-Lopez retained a third attorney who represented him at trial. In this Court, "the Government [agreed] as it had previously 'the Sixth Amendment guarantees a defendant the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire, or **who is willing to represent the defendant even though he is without funds**.' " *Gonzalez-Lopez*, 548 U.S. at 144 (quoting *Caplin & Drysdale v. United States*, 491 U.S. 617, 624–625 (1989)) (emphasis added).

Here, the court terminated Ms. Clarke's appointment, revoked her pro hac vice status, and ordered that she have no contact with Mrs. Montgomery. Ms. Clarke was willing to represent Mrs. Montgomery even though she was without funds. Ms. Clarke was not being compensated by the court. That said, given the court's order, she was prohibited from representing, or even communicating with, Mrs. Montgomery.[10] The district court was unequivocal that he would not let Clarke back in the case.

Without doubt, if Ms. Clarke had been a private attorney willing to represent Mrs. Montgomery pro bono, under *Gonzalez-Lopez*, the court's denial of her

[10] To the extent that the district court faults Ms. Clarke for failing to file a motion for reconsideration, it is the court's actions which made this task impossible. It is hard to imagine how Ms. Clarke could be expected to file a motion for reconsideration without the ability to communicate with her (former) client to obtain permission for any legal filing. Indeed, had she done so, Ms. Clarke would have violated the district court's order and be subject to contempt proceedings. She also was no longer admitted to the bar to practice in the court.

representation would be structural error. Should it make a difference that Ms. Clarke was a salaried public defender? The court was not compensating Clarke. Clarke wanted to stay on the case. Local counsel, Susan Hunt, was willing to work with Clarke. Why then retain the inexperienced local federal public defender and exclude the only attorney on the case who had the experience to handle a case of this magnitude? Are communication difficulties and personality conflicts enough to disrupt this attorney/client relationship? And if they are, is it not arbitrary to choose the inexperienced attorney over the experienced attorney simply because the court prefers "local" counsel? Especially so in a death penalty case? The actions are all the more arbitrary when the Court failed to conduct a hearing before terminating Clarke, barring her from the jail, and blocking all telephone communication. By its actions, and in its order denying relief, the court considered anything Ms. Clarke and Mrs. Montgomery would say irrelevant.[11]

B. The right to counsel is essential in a capital case

The appointment of counsel in federal death penalty cases is governed by 18 U.S.C. § 3599(e) which states:

> Unless replaced by similarly qualified counsel upon the attorney's own motion or upon motion of the defendant, each attorney so appointed shall represent the defendant throughout every subsequent stage of available judicial proceedings.

[11] FDPRC counsel Burr, who was aware of the team's progress, testified, "I did not see Judy Clarke objectively engaging in any behavior that a rational person in a defense team would react negatively to." Tr. Vol. 3, 606, Burr Testimony.

The legislative purpose behind the passage of 18 U.S.C. § 3599 was to provide "enhanced rights of representation" to individuals facing the death penalty. *Martel v. Clair*, 565 U.S. 648, 659 (2012). In *Martel*, this Court explained:

> In 1988, Congress enacted the legislation now known as § 3599 to govern appointment of counsel in capital cases, thus displacing § 3006A for persons facing execution (but retaining that section for all others). See Anti–Drug Abuse Act, 102 Stat. 4393–4394, 21 U.S.C. §§ 848(q)(4)–(10) (1988 ed.) (recodified at 18 U.S.C. § 3599 (2006 ed. and Supp. IV)). The new statute grants federal capital defendants . . . in light of what it calls "the seriousness of the possible penalty and . . . the unique and complex nature of the litigation." § 3599(d) (2006 ed.). . . [T]he statute aims in multiple ways to improve the quality of representation afforded to capital petitioners and defendants alike. Section 3599 requires lawyers in capital cases to have more legal experience than § 3006A demands. Compare §§ 3599(b)–(d) with § 3006A(b). Similarly, § 3599 authorizes higher rates of compensation, in part to attract better counsel. Compare § 3599(g)(1) with § 3006A(d) (2006 ed. and Supp. IV). And § 3599 provides more money for investigative and expert services. Compare §§ 3599(f) (2006 ed.), (g)(2) (2006 ed., Supp. IV), with § 3006A(e) (2006 ed. and Supp. IV). As we have previously noted, those measures "reflec[t] a determination that quality legal representation is necessary" in all capital proceedings to foster "fundamental fairness in the imposition of the death penalty." *McFarland*, 512 U.S. at 855, 859, 114 S.Ct. 2568.

Martel, 565 U.S. at 659

18 U.S.C. § 3599(e) does not permit the sua sponte removal of counsel. The only contemplated circumstances for the removal of counsel are where the attorney seeks to withdraw or the client asks for the attorney's removal. In those situations, courts have held that an attorney still may not be relieved of her obligation to continue as counsel unless the Court makes a specific finding that the interests of justice would be served by removal of counsel. *Martel,* 565 U.S. at 663.

> [T]he "interests of justice" standard contemplates a peculiarly context-specific inquiry. So we doubt that any attempt to provide a general definition of the standard would prove helpful. In reviewing substitution

> motions, the courts of appeals have pointed to several relevant considerations. Those factors may vary a bit from circuit to circuit, but generally include: the timeliness of the motion; the adequacy of the district court's inquiry into the defendant's complaint; and the asserted cause for that complaint, including the extent of the conflict or breakdown in communication between lawyer and client (and the client's own responsibility, if any, for that conflict).

Id. No context-specific inquiry was made here.

The district court's termination of Mrs. Montgomery's attorney/client relationship with the only qualified attorney on her team is arbitrary in light of § 3599 and Congressional intent to provide enhanced rights to representation for capital defendants.

Solid research and scholarly study re-enforce the need for qualified counsel in death penalty cases, making the termination of such an attorney without a hearing arbitrary. After years of comprehensive study, in 2003 the American Bar Association promulgated the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* ("ABA Guidelines.") Though the Guidelines are not "inexorable commands," *Bobby v. Van Hook*, 558 U.S. 4, 17 (2009), they do provide guidance as to matters of importance in the representation of the capitally accused. Guideline 10.5, Relationship with the Client, states "A. Counsel at all stages of the case should make every appropriate effort to establish a relationship of trust with the client and should maintain close contact with the client." *ABA Guidelines*, 31 Hofstra L. Rev. 913, 1005 (2003). The commentary to Guideline 10.5 explains more:

> Establishing a relationship of trust with the client is essential both to overcome the client's natural resistance to disclosing the often personal

> and painful facts necessary to present an effective penalty phase defense, and to ensure that the client will listen to counsel's advice on important matters such as whether to testify and the advisability of a plea.

Id. at 1008.

Petitioner does not suggest that the ABA Guidelines establish a constitutional right to a relationship of trust with appointed counsel. But given the importance of the right to counsel in a capital case, the established attorney/client relationship between appointed learned counsel and her client should not be disrupted because of a personality conflict with local counsel. *Gonzalez-Lopez* should govern in this scenario. For the Constitution does not tolerate one system of justice for the rich and another for the poor. The issue presented is debatable among reasonable jurists. Mrs. Montgomery was entitled to an appeal on this claim. 28 U.S.C. § 2253.

II. Lower courts are split on whether a court may disrupt an established attorney/client relationship between the indigent accused and her court-appointed counsel without violating the Sixth Amendment right to counsel.

The opinions of the Texas Court of Criminal Appeals support Mrs. Montgomery's denial of counsel claim. That court held while it is true that an indigent defendant does not have the right to demand a particular attorney be appointed to her case, "[o]nce counsel has been validly appointed to represent an indigent defendant and the parties enter into an attorney-client relationship it is no less inviolate than if counsel is retained." *Stearnes v. Clinton*, 780 S.W.2d 216, 221-22 (Tex. Crim. App. 1989). The court explains that the Constitution does not permit the inviolate relationship between attorney and client to be disturbed by the court

over the objection of the attorney and client absent extraordinary circumstances. Once an established attorney-client relationship exists, no valid distinction can be made between the rights of the wealthy to retained counsel and the rights of the poor to appointed counsel. Indeed, "to hold otherwise would be to discriminate between retained and appointed counsel without a semblance of rationality." *Id.* at 223. This is so, the *Stearnes* court explains, "because the 'attorney's responsibility is to the person he has undertaken to represent rather than to the individual or agency which pays for the service.'" *Stearnes*, 780 S.W.2d at 222 (quoting *Smith v. Superior Court of L.A. County*, 440 P.2d 65, 74 (Cal. 1968)). Relying on *Harling v. United States*, 387 A.2d 1101, 1102 (D.C. Cir. 1978), *Stearnes* holds that because "a defendant has the right to retain counsel of his choice and establish an attorney-client relationship. It logically follows . . . that once an attorney is appointed the same attorney-client relationship is established and it should be protected." *Id.*

Thus, in conflict with the district court here, the lower courts have held "the power of the trial court to appoint counsel to represent indigent defendants does not carry with it the concomitant power to remove counsel at its discretionary whim." *Id.* For, "once an attorney is serving under a valid appointment by the court and an attorney-client relationship has been established, the court may not arbitrarily remove the attorney over the objections of both the defendant and his counsel." *Id.* at 221 (citing *Harling*, 387 A.2d at 1102); *see also Matter of Welfare of M.R.S.*, 400 N.W.2d 147, 152 (Minn. Ct. App. 1987). To hold that a court has greater power to remove appointed counsel than it does retained counsel of choice "would be to

subject that relationship to an unwarranted and invidious discrimination arising merely from the poverty of the accused." *Smith v. Superior Court of L.A. County*, 68 Cal. 2d 547, 561 (1968). The constitution does not permit this discrimination.

Unlike the district court here, courts in California, Georgia, Louisiana, and Texas have all held that the relationship between appointed counsel and the defendant is an important consideration in determining counsel's continuing appointment. The courts have held that a defendant's preference for appointed counsel should be considered when it is supported by "objective considerations" such as a "relationship of trust and confidence" between the defendant and counsel. *Harris v. Superior Court of Alameda Cty.*, 567 P.2d 750, 752 (Cal. 1977) (holding that trial court abused its discretion in denying defendant's preferred choice of counsel, when supported by objective considerations); *Amadeo v. State*, 384 S.E.2d 181, 183 (Ga. 1989) (finding that the trial court's refusal to appoint attorneys who had represented the defendant was an abuse of discretion given the prior counsel's knowledge of the defendant's case and the developed relationship and trust between prior counsel and the defendant); *Davis v. Cain*, 662 So. 2d 453, 454 (La. 1995) (finding that the trial court's denial of a motion for appointment of counsel was an abuse of discretion).

Contrary to the district court opinion here, the Texas Court of Criminal appeals has held that a court's preferences and feelings cannot justify the denial of appointed counsel in a situation such as this.

> Given the fundamental nature of an accused's right to counsel, we cannot agree that a trial judge's discretion to replace appointed trial

> counsel over the objection of both counsel and defendant extends to a situation where the only justification for such replacement is the trial judge's personal "feelings" and "preferences." See *Stearnes, supra.* There must be some principled reason, apparent from the record, to justify a trial judge's sua sponte replacement of appointed counsel under these circumstances. Because no such principled reason is evident in the instant case, we find that relator has satisfied the second prerequisite to mandamus relief.

Buntion, 827 S.W.2d at 949 (footnote omitted).

Relying on decades of precedent, the en banc Texas Court observed the importance of the attorney/client relationship to the Sixth Amendment right to counsel.

> Once the attorney-client relationship is established, any potential disruption of the relationship is subject to careful scrutiny. Thus, it is well-settled that the attorney-client relationship may not be severed by either the attorney or the client without justifying the severance to the trial court. See *Ward v. State*, 740 S.W.2d 794, 797 (Tex.Cr.App.1977) (although trial counsel does not become a defendant's "counsel for life", the attorney-client relationship must be maintained if so doing will protect defendant's rights—even if the appointment was for the trial only); *Thomas v. State*, 550 S.W.2d 64 (Tex.Cr.App.1977) (defendant may not sever an existing relationship unless he is able to demonstrate adequate cause); *Solis v. State*, 792 S.W.2d 95 (Tex.Cr.App.1990) (attorney may not withdraw simply on the grounds of personality conflicts or disagreements); *Steel v. State*, 453 S.W.2d 486, 487 (Tex.Cr.App.1970) (allowing an attorney to bow out whenever he chooses would frustrate the accused's right to adequate representation); *Viges v. State*, 508 S.W.2d 76 (Tex.Cr.App.1974) (even if an appointed attorney wishes to withdraw and the client refuses to cooperate with the attorney, denial of the motion to withdraw is not error if the client is provided adequate representation); see also, Texas Rules of Disciplinary Conduct 1.15(c) (When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation).

Buntion, 827 S.W.2d at 949 n.3.

The Texas courts have similarly rejected the district court's reasoning that since Mrs. Montgomery had other counsel the denial of her counsel of choice was not

error. "[A]n attorney is appointed to represent a defendant rather than as an aid or assistant to other appointed counsel. … [A]bsent a principled reason apparent from the record, a trial judge does not have discretion to replace appointed trial counsel over the objection of both counsel and the defendant." *Stotts v. Wisser*, 894 S.W.2d 366, 367–68 (Tex. Crim. App. 1995). Indeed, in direct agreement with Mrs. Montgomery, the *Stotts* court held "[t]he trial judge determines which attorney to appoint and once the appointment is made, the trial judge may not remove that counsel without some principled reason. *Stotts*, 894 S.W.2d at 368 *see also Morales v. State*, No. 06-04-00055-CR, 2004 WL 2913128, at *1 (Tex. App.—Texarkana Dec. 17, 2004) (same).

III. An in chambers off the record meeting that results in the termination of an established attorney/client relationship without notice to the defendant or her learned counsel is incompatible with fundamental notions of due process.

Notice and an opportunity to be heard are the core features of this Court's due process jurisprudence. *Mathews v. Eldridge*, 424 U.S. 319 (1976).

> For more than a century the central meaning of procedural due process has been clear: "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." *Baldwin v. Hale*, 1 Wall. 223, 233, 17 L.Ed. 531. See W*indsor v. McVeigh*, 93 U.S. 274, 23 L.Ed. 914; *Hovey v. Elliott*, 167 U.S. 409, 17 S.Ct. 841, 42 L.Ed. 215; *Grannis v. Oredean*, 234 U.S. 385, 34 S.Ct. 779, 58 L.Ed. 1363. It is equally fundamental that the right to notice and an opportunity to be heard "must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62.

Fuentes v. Shevin, 407 U.S. 67, 80 (1972); *see also Mullane v. Cent. Hanover Bank & Tr. Co., 33*9 U.S. 306, 314 (1950) ("An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably

calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.") This Court requires the highest level of due process in criminal cases. "The body of criminal due process precedents is highly protective of defendants in many regards." Niki Kuckes, *Civil Due Process, Criminal Due Process*, 25 Yale L. & Pol'y Rev. 1, 14 (2006).

In criminal cases, the right to notice and a hearing is intertwined with the right to counsel. In *Montejo v. Louisiana*, 556 U.S. 778 (2009), this Court reaffirmed "once the adversary judicial process has been initiated, the Sixth Amendment guarantees a defendant the right to have counsel present at all critical stages of the criminal proceedings." *Id.* at 786 (citing *United States v. Wade*, 388 U.S. 218, 227–28 (1967); *Powell v. Ala.*, 287 U.S. 45, 57 (1932)). The lawyer's role is to protect the interest of the client rather than pursue a personal agenda.

Mrs. Montgomery was denied all attributes of due process during the off the record meeting. She was not provided notice and she was not heard. And because her learned counsel was not provided notice or a chance to be heard, the district court terminated the attorney/client relationship without anyone advocating for the wishes of Mrs. Montgomery.

IV. Whether, without notice or a hearing, a court may terminate an established attorney/client relationship against the wishes of the defendant and her counsel is debatable among jurists of reason.

A 2255 movant is entitled to a COA if she shows that her claims are reasonably debatable among jurists of reason. *Miller-El v. Cockrell*, 537

U.S. 322, 336 (2003). The COA standard is not difficult to meet. "[A] claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003). In *Buck v. Davis*, 137 S. Ct. 759 (2017), the Court explains, "the only question is whether . . . '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.'" *Id.* at 773 (quoting *Miller-El*, 537 U.S. at 327).

In *Buck*, the Court describes the inquiry as "limited" and instructs "[t]his threshold question should be decided without 'full consideration of the factual or legal bases adduced in support of the claims.'" *Id.* (quoting *Miller-El*, 537 U.S. at 336). This is so, the Court held, because the COA inquiry is not "coextensive with a merits analysis." *Id.* When a court of appeals bypasses the COA "process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction." *Id.* (quoting *Miller-El*, 537 U.S. at 336-37).

When a claim is denied on procedural grounds without reaching the merits of the claim, movants are entitled to a COA where "jurists of reason would find it debatable whether the "[motion] states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Mrs. Montgomery's denial of counsel claim is reasonably debatable where courts in California, Georgia, Louisiana, and Texas decided the issue differently than the district court here. Moreover, where this case presents an issue that exposes tension between decisions of this Court and the decisions of these lower courts, the issue is reasonably debatable and deserving of full appellate review.

Also critical to this Court's analysis is the fact that because this case is brought under 28 U.S.C. § 2255 the denial of a COA forecloses all appellate review of Mrs. Montgomery's Sixth Amendment denial of counsel claim. *Compare Trevino v. Thaler*, 569 U.S. 413 (2013); *Martinez v. Ryan*, 566 U.S. 1 (2012). A collateral attack on a federal conviction under 28 U.S.C. § 2255 is quasi-criminal and quasi-civil. A state habeas under 28 U.S.C. §2254 is purely civil. A state defendant in a federal habeas proceeding has presumably received one full round of appellate review of his state post-conviction claims. Mrs. Montgomery, a federal death row inmate, will receive no appellate review of her constitutional claims. A federal movant should be entitled to at least as much process as a state habeas petitioner.

In capital cases, this Court has long required heightened due process to secure reliability and fundamental fairness. To ensure the requisite degree of reliability, the Court requires additional safeguards not present in noncapital cases. *Reid v. Covert*, 354 U.S. 1, 45-46 (1957) (Frankfurter, J., concurring) ("It is in capital cases especially that the balance of conflicting interests must be weighted most heavily in favor of the procedural safeguards of the Bill of Rights."). "Death, in its finality, differs more from life imprisonment than a 100-year prison term differs

from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). "In capital proceedings generally, [the Supreme] Court has demanded that fact-finding procedures aspire to a heightened standard of reliability." *Ford v. Wainwright*, 477 U.S. 399, 411 (1986); *see also Caldwell v. Mississippi*, 472 U.S. 320, 343 (1985) (O'Connor, J., concurring); *Beck v. Ala.*, 447 U.S. 625, 638 (1980); *Lockett v. Ohio*, 438 U.S. 586, 605 (1978); *Gardner v. Fla.*, 430 U.S. 349, 357-58 (1977). "In death penalty cases, any doubts as to whether the COA should issue are resolved in favor of the petitioner." *Moore v. Quarterman*, 534 F.3d 454, 460 (5th Cir. 2008). The requirement for heightened due process supports Mrs. Montgomery's entitlement to a certificate of appealability.

CONCLUSION

For these reasons, the petition for writ of certiorari should be granted. Alternatively, this Court should grant a certificate of appealability and remand the case to the United States Court of Appeals for the Eighth Circuit for further proceedings.

Respectfully submitted,

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