No. 19-5921

In The
Supreme Court of the United States

LISA M. MONTGOMERY,

Petitioner,

v.

UNITED STATES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND BRIEF OF *AMICUS CURIAE* THE ETHICS BUREAU AT YALE IN SUPPORT OF PETITIONER

Lawrence J. Fox
Counsel of Record
George W. and Sadella D. Crawford
Visiting Lecturer in Law
YALE LAW SCHOOL
127 Wall Street
New Haven, Connecticut 06511
(203) 432-9358
lawrence.fox@yale.edu

Counsel for Amicus Curiae ***Dated: October 15, 2019***

THE LEX GROUP[DC] ♦ 1050 Connecticut Avenue, N.W. ♦ Suite 500, #5190 ♦ Washington, D.C. 20036
(202) 955-0001 ♦ (800) 856-4419 ♦ www.thelexgroup.com

Motion for Leave to File Brief of the Ethics Bureau at Yale as *Amici Curiae* in Support of Petitioners

Pursuant to Rule 37.2(b) of the Rules of this Court, the Ethics Bureau at Yale ("the Bureau") moves for leave to file the attached amicus curiae brief in support of the petition for certiorari in this case.

The Bureau is a clinic comprised of fourteen law students and is supervised by Lawrence Fox, an experienced litigator and expert in professional responsibility. The clinic drafts amicus briefs in cases concerning professional responsibility; assists defense counsel with ineffective assistance of counsel claims relating to the professional responsibility of lawyers; and offers ethics advice and counsel on a pro bono basis to not-for-profit legal service providers, courts, and law school clinics. This Court accepted the Bureau's most recent amicus brief on January 10, 2019.

The case before this Court raises issues implicating the professional responsibility of defense counsel and judges, as well as the integrity of the judiciary as a whole. The Bureau has an abiding interest in ensuring that the lawyer-client relationship is sufficiently protected, and exists in a manner conducive to generating trust between client and lawyer. This is an even more pressing concern in the criminal context, and the need to clarify that indigent defendants with appointed counsel are protected against the arbitrary removal of counsel is therefore all the greater. Trust in one's lawyer is fundamental to the ability to mount an adequate defense, as without trust the client may never share crucial information for the defense with his or her

lawyer. Further, without safeguards on arbitrary judicial removal of counsel, a lawyer's obligation to zealously advocate for his or her client is unacceptably undercut by the need to avoid removal for any reason—or no reason—whatsoever. The Bureau hopes that this brief will assist this Court in deliberating the issues of legal ethics raised in this case.

Petitioner has consented to the filing of this brief, and counsel for proposed amicus made a good-faith effort to obtain the consent of Respondent to the filing of their brief as well. On Wednesday, October 9, 2019, the Bureau sent notice and a request for consent for the filing of an amicus curiae brief to Counsel for the Respondent. On October 11, Counsel for Respondent informed the Bureau that the request had been replied to via postal mail the previous day, but could not inform the Bureau of its answer electronically. As of filing, the Bureau has not yet received Respondent's answer in the mail. The Bureau will update the Court when it receives that answer.

Accordingly, proposed amicus respectfully requests that the Court grant the motion for leave to file an amicus curiae brief.

Respectfully submitted,

/s/ Lawrence J. Fox
Lawrence J. Fox
Counsel of Record
George W. and Sadella D. Crawford Visiting Lecturer in Law Yale Law School
127 Wall Street
New Haven, Connecticut 06511
(203) 432-9358
lawrence.fox@yale.edu

Table of Contents

Page

Table of Authorities

Page(s)

Cases

Constitutional Provisions

Rules

Other Authorities

Interest of Amicus Curiae[1]

The Ethics Bureau at Yale is a clinic composed of fourteen law students supervised by an experienced practicing lawyer, lecturer, and ethics teacher. The Bureau has drafted *amicus* briefs in matters involving lawyer and judicial conduct and ethics; has assisted defense counsel with ineffective assistance of counsel claims implicating issues of professional responsibility; and has provided assistance, counsel, and guidance on a pro bono basis to not-for-profit legal service providers, courts, and law schools.

Amicus has no direct interest in the outcome of this litigation. Because this case implicates the protection of the relationship between an appointed counsel and client, the Bureau believes it might assist the Court in resolving the important issues presented.

[1] Pursuant to Rule 37.6, *Amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *Amicus* and its counsel made a monetary contribution to its preparation or submission. The Ethics Bureau at Yale is a student clinic of Yale Law School. The views expressed herein are not necessarily those of Yale University or Yale Law School.

Summary of Argument

The Sixth Amendment right to counsel, decades of this Court's and lower courts' jurisprudence, and long-standing principles of professional responsibility make clear that a district court judge cannot terminate appointed counsel without affording an opportunity to contest the reasons for termination. To have this Court decide otherwise would allow trial courts to breach one of the most important rights of a criminal defendant: the right to continued representation by the counsel of one's choice. The right to continued representation by appointed counsel is separate from initial choice of counsel, and must be protected to ensure trust and open communication between client and counsel.

The relevant facts are straightforward. After Lisa Marie Montgomery was arrested, the trial court appointed various lawyers to represent her, including federal public defenders lacking in substantial capital defense experience, and Judy Clarke, a nationally renowned Capital Resource Counsel lawyer. Petition for a Writ of Certiorari at 2-6. Subsequently, the district court terminated the appointment of Ms. Clarke and barred her from contacting Mrs. Montgomery; the reasons why are disputed because the district court denied Mrs. Montgomery's request for an evidentiary hearing. *Id*. at 6-7. After a new defense team was formed, Mrs. Montgomery was convicted of first-degree murder and sentenced to death. *Id*. at 10.

"The right to select counsel of one's choice" is at the root of the Sixth Amendment. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 147-48 (2006). While an indigent defendant has no right to initial choice of appointed attorney, *Wheat v. United States*, 486 U.S.

153, 159 (1988), with respect to a defendant's interest in "continued representation . . . there is no distinction between indigent defendants and nonindigent defendants." *Lane v. State*, 80 So. 3d 280, 295 (Ala. Crim. App. 2010). Further, attorney-client law—which delineates the scope of the Sixth Amendment right to counsel, *see, e.g.*, *McCoy v. Louisiana*, 138 S. Ct. 1500, 1509-10 (2018)—clarifies that so long as the client wishes the representation to continue, the client has a right against termination. *See* Model Rules of Prof'l Conduct r. 1.16(b); Restatement (Third) of the Law Governing Lawyers § 32(3) (Am. Law Inst. 2000); *id.* cmt. c. Disqualification is a disfavored remedy under the law governing attorney-client relations, and should only be resorted to when no other remedy appears adequate. *See, e.g.*, *Freeman v. Chi. Musical Instrument Co.*, 689 F.2d 715, 721 (7th Cir. 1982); *In re Nitla S.A. de C.V.*, 92 S.W.3d 419, 422 (Tex. 2002). The district court's stated reason for dismissing Ms. Clarke, that she was communicating poorly with co-counsel, *see* Order at 4, *Montgomery v. United States*, No. 12-08001-CV-SJ-GAF (W.D. Mo. Dec. 21, 2015), ECF No. 173, fails to meet this high standard.

Differentiating between the rights of the wealthy and of the indigent with respect to termination of counsel also runs afoul of the Fifth Amendment's Due Process Clause and the Fourteenth Amendment's Equal Protection Clause. Had Mrs. Montgomery hired her counsel, the Sixth Amendment would guarantee that her choice of attorney was protected against arbitrary removal. *Gonzalez-Lopez*, 548 U.S. at 144. Failure to extend the same treatment to those who lack the means to hire counsel impermissibly bifurcates the treatment of criminal defendants on the basis of wealth. "Both equal protection and due process emphasize the

central aim of our entire judicial system—all people charged with crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American court.'" *Griffin v. Illinois*, 351 U.S. 12, 17 (1956) (quoting *Chambers v. Florida*, 309 U. S. 227, 241 (1940)). The rules of professional conduct provide that a lawyer's ethical obligations are to his or her client, regardless of who pays for the lawyer's services. *See Weaver v. State*, 894 So. 2d 178, 188-89 (Fla. 2004); Model Rules of Prof'l Conduct r. 1.8(f). To ensure that this is the case, the attorney-client relationship must be as inviolable between a client and an appointed attorney as it is between a client and an attorney who has been retained. *Smith v. Superior Court of L.A. Cty.*, 440 P.2d 65, 74 (Cal. 1968). Further, every lawyer is obligated to act with "commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." Model Rules of Prof'l Conduct r. 1.3 cmt. 1. Allowing arbitrary removal of appointed counsel would impermissibly require all appointed counsel to balance their duty to zealously advocate for their client against the probability of removal, should that zealous advocacy displease the trial judge. *Smith*, 440 P.2d at 74.

Finally, the district court improperly failed to hold an evidentiary hearing. In "all critical stages of the criminal proceedings" the "Sixth Amendment guarantees a defendant the right to have counsel present." *Montejo v. Louisiana*, 556 U.S. 778, 786 (2009). It is in precisely in circumstances such as Ms. Clarke's, where the facts are in dispute, that a hearing is needed to ensure that an extreme remedy is not employed on an unsound basis. Such a hearing, with counsel present, is necessary "to assure a meaningful 'defence'" as required by the Sixth Amendment. *United States v. Wade*, 388 U.S. 218, 225

(1967). It is also necessary to "provid[e] a record for appellate review" and thereby to ensure the fairness and adequacy of the proceedings at trial. *Chandler v. Fla.*, 449 U.S. 560, 577 (1981). It is these same purposes that animate the requirements of notice and an opportunity to be heard, the core of what due process requires. *Mathews v. Eldridge*, 424 U.S. 319 (1976).

In light of these considerations, *Amicus* urges this Court reverse the judgment of the court below.

Argument

I. The Current Split Among Lower Courts Imperils the Rights of Criminal Defendants to Continued Representation by Their Appointed Counsel.

A. Lower Courts Differ on Whether the Constitution Protects the Right to Continued Representation by Appointed Counsel.

The right of indigent defendants to continued representation by appointed counsel is of paramount importance, as the D.C., First, and Seventh Circuits have recognized. *See Harling v. United States*, 387 A.2d 1101, 1105 (D.C. Cir. 1978) ("[O]nce 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."); *United States v. Myers*, 294 F.3d 203, 206 (1st Cir. 2002) ("Once a court appoints an attorney to represent an accused . . . there must be good cause for rescinding the original appointment and interposing a new one"); *United States v. Gearhart*, 576 F.3d 459, 464 (7th Cir. 2009) ("The Sixth Amendment protects

a criminal defendant's right to a fair opportunity to secure the counsel of his choice . . . [and] implies the right to continuous representation by the counsel of one's choice.").

The vast majority of states have long shared this view. *See, e.g.*, *Smith*, 440 P.2d at 74 ("[O]nce counsel is appointed to represent an indigent defendant, whether it be the public defender or a volunteer private attorney, the parties enter into an attorney-client relationship which is no less inviolable than if counsel had been retained"); *English v. State*, 259 A.2d 822, 826 (Md. Ct. Spec. App. 1969) ("[O]nce counsel has been chosen, whether by the court or the accused, the accused is entitled to the assistance of that counsel at trial."); *Matter of Welfare of M.R.S.*, 400 N.W.2d 147, 152 (Minn. Ct. App. 1987) ("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 objection of both the defendant and counsel"); *Clements v. State*, 817 S.W.2d 194, 200 (Ark. 1991) ("where, as here, a trial court terminates the representation of an attorney, either private or appointed, over the defendant's objection and under circumstances which do not justify the lawyer's removal and which are not necessary for the efficient administration of justice, a violation of the accused's [Sixth Amendment] right to particular counsel occurs"); *People v. Johnson*, 547 N.W.2d 65, 69 (Mich. Ct. App. 1996) ("arbitrary, unjustified removal of a defendant's appointed counsel by the trial court during a critical stage in the proceedings, over the objection of the defendant, violates the defendant's Sixth Amendment right to counsel."); *Com. v. Jordan*, 733 N.E.2d 147, 152 (Mass. App. Ct. 2000) ("We disagree . . . [with] the claim that an indigent defendant has no cause to complain about the removal

of his attorney"); *State v. Huskey*, 82 S.W.3d 297, 305 (Tenn. Crim. App. 2002) ("any meaningful distinction between indigent and non-indigent defendants' right to representation by counsel ends once a valid appointment of counsel has been made"); *People v. Harlan*, 54 P.3d 871, 878 (Colo. 2002) ("[O]nce counsel is appointed, the attorney-client relationship 'is no less inviolable than if the counsel had been retained by the defendant.'" (quoting *People v. Isham*, 923 P.2d 190, 193 (Colo. Ct. App. 1995)).

Recently, a circuit split on the issue has developed. *See United States v. Basham*, 561 F.3d 302, 324 (4th Cir. 2009) ("[A]n indigent criminal defendant has no constitutional right to have a particular lawyer represent him. . . . Thus, the only right implicated . . . [is] the right to effective assistance of counsel." (internal quotation marks omitted)); *Daniels v. Lafler*, 501 F.3d 735, 739 (6th Cir. 2007) ("[A]n indigent defendant forced to rely on court-appointed counsel . . . has no choice-of-counsel right."); *United States v. Parker*, 469 F.3d 57, 61 (2d Cir. 2006) ("There is no constitutional right to continuity of appointed counsel."). This Court should resolve this split by clarifying that a trial judge may not remove a defendant's appointed counsel, against the wishes of that defendant, without a hearing that allows the defendant to contest the termination.

B. This Court Has Never Squarely Addressed the Termination of Appointed Counsel.

This Court has never directly addressed what rights defendants possess against the nonconsensual termination of appointed counsel. The Court's most relevant statement comes in *Gonzalez-Lopez*, which observed that "[n]othing we have said today casts any doubt or places any qualification upon our previous

holdings that limit the right to counsel of choice," including two holdings that "the right to counsel of choice does not extend to defendants who require counsel to be appointed for them." 548 U.S. at 151 (citing *Wheat*, 486 U.S. 153 and *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989)). But this comment, cited by the district court below, Order at 13, ECF 173, does not resolve the dispute at hand: it fails to distinguish between the right to have counsel of choice appointed, which the Sixth Amendment does not protect, and the right against nonconsensual termination of already appointed counsel, at issue in this case. Furthermore, the *Gonzalez-Lopez* comment is dicta: it does not purport to make new law, merely describing the holdings of past cases, and *Gonzalez-Lopez* concerned only the remedy for a Sixth Amendment violation, not the scope of the right. *Id.* at 152.

In turn, neither of the holdings *Gonzalez-Lopez* cites, *Wheat* and *Caplin & Drysdale*, governs the present question. Although those opinions contain ancillary discussion of appointed counsel, the cases concerned *retained* counsel. *See Caplin & Drysdale*, 491 U.S. at 620; Brief for Petitioner at 9, *Wheat*, 486 U.S. 153. Furthermore, each addressed the retention of new counsel, not the termination of already appointed counsel. *See Caplin & Drysdale*, 491 U.S. at 625 (rejecting petitioner's argument concerning "cases where the defendant will be unable to retain the attorney of his choice"); *Wheat*, 486 U.S. at 155 (discussing "petitioner's proposed substitution" of counsel).

The present case provides this Court an opportunity to clearly answer the question that its past opinions have discussed only obliquely and inconclusively. Doing so will clarify the inconsistent

and murky jurisprudence of the lower courts, establish federal uniformity, and provide a rule on which courts may rely to justly and efficiently conduct future criminal trials.

II. Removing a Defendant's Appointed Counsel, Against that Defendant's Wishes and Without a Hearing, Violates the Sixth Amendment.

A. The Sixth Amendment Right to Counsel Safeguards the Ability of All Defendants to Trust and Have Confidence in Their Attorneys.

"The right to select counsel of one's choice . . . [is] the root meaning of the [Sixth Amendment's] guarantee." *Gonzalez-Lopez*, 548 U.S. at 147-48. Its centrality speaks to "the necessarily close working relationship between lawyer and client, the need for confidence, and the critical importance of trust" in the attorney-client relationship. *Luis v. United States*, 136 S. Ct. 1083, 1089 (2016) (citing *Powell v. Alabama*, 287 U.S. 45, 53 (1932)). Of course, the right "for the defendant to secure counsel of choice has limits": courts may properly require that counsel who is incompetent or has a conflict of interest be removed. *Id*. But Mrs. Montgomery's claim implicates the core of this right, not its exceptions.

Defendants with appointed counsel have an equal right as those who hire counsel to "confidence" and "trust" in their "close working relationship between lawyer and client." *Id*. "The right to counsel of choice . . . not only 'protects a criminal defendant's right to a fair opportunity to secure the counsel of his choice' initially, but also 'implies the right to continuous representation by the counsel of one's choice.'" *Lane*, 80 So. 3d at 294 (quoting *Gearhart*, 576 F.3d at 464). While an indigent defendant has no

right to initial choice of appointed attorney, *Wheat*, 486 U.S. at 159, with respect to a defendant's interest in "continued representation . . . there is no distinction between indigent defendants and nonindigent defendants." *Lane*, 80 So. 3d at 295.

"Trust and good communication are crucial" both "when a client has resources and privately retains a lawyer" and "when a client is indigent and obtains counsel appointed by the court." *State v. McKinley*, 860 N.W.2d 874, 880 (Iowa 2015). Because "opportunities for establishing trust and effective communication are generally enhanced over time through interpersonal contact," removing a defendant's appointed attorney against the defendant's wishes implicates the Sixth Amendment. *Id.*

> Often, the outcome of a criminal trial may hinge upon the extent to which the defendant is able to communicate to his attorney the most intimate and embarrassing details of his personal life. Complete candor in attorney-client consultations may disclose defenses or mitigating circumstances that defense counsel would not otherwise have uncovered.

McKinnon v. State, 526 P.2d 18, 22 (Alaska 1974). "Once established, the interest in maintaining a relationship of trust with counsel is of no less importance to an indigent client than to one with ample resources to hire counsel." *McKinley*, 860 N.W. at 880. Impecunity cannot "preclude recognition of an indigent defendant's interest in continued representation by a particular attorney who has been appointed to represent him" and "with whom he has

developed a relationship of trust and confidence." *Morris v. Slappy*, 461 U.S. 1, 22, 23 n.5 (1983) (Brennan, J., concurring). Allowing defense counsel to be nonconsensually terminated improperly infringes on this interest. *See Myers*, 294 F.3d at 206.

B. The Law of Attorney-Client Relations Further Demonstrates that Ms. Clarke's Termination Violated the Sixth Amendment

1. The Court's Interpretation of the Sixth Amendment Should be Guided by the Law of Attorney-Client Relations

The primary rules regulating the conduct of attorneys and their relations with clients are the rules of professional conduct that each state has adopted, typically based on the ABA's Model Rules of Professional Conduct. Because these rules constitute a detailed body of law concerning the rights and obligations of lawyers and clients, this Court's Sixth Amendment jurisprudence often turns to attorney-client law to delineate the scope of the right to counsel. For example, this Court has used attorney-client law to evaluate claims of denial of effective assistance of counsel, defining the effective assistance required by the Sixth Amendment in terms of the standards of professional conduct imposed upon lawyers. *See, e.g.*, *McCoy*, 138 S. Ct. at 1509 (citing Model Rules of Prof'l Conduct r. 1.2(a)); *Wheat*, 486 U.S. at 160 (citing the Model Code and Model Rules of Professional Conduct); *Nix v. Whiteside*, 475 U.S. 157, 166-170 (1986) (citing multiple provisions of the Canons of Professional Ethics, Model Code of Professional Conduct, and Model Rules of Professional Conduct).

In addition to regulating the quality of a legal representation, attorney-client law regulates when a legal representation may end through withdrawal or disqualification. *See* Model Rules of Prof'l Conduct r. 1.16; Restatement (Third) of the Law Governing Lawyers § 6 cmt. i. Because withdrawal and disqualification are litigated relatively frequently—more frequently than the nonconsensual termination of appointed counsel—they have given courts greater opportunities to consider when clients' rights to continue employing counsel may be overridden by court order. This jurisprudence, which reflects sustained judicial reflection on the value of choice of counsel and when it must yield in the interests of justice, should guide how this Court understands the contours of the right to counsel that the Constitution protects. As with its use of the rules of professional conduct in interpreting the effective assistance of counsel, the Court's determination of whether the Sixth Amendment includes a right against nonconsensual termination should look to how that right is protected by the law governing lawyers.

2. Attorney-Client Law Protects the Right Against Nonconsensual Termination of an Attorney-Client Relationship, Not the Right to Counsel of Choice

In denying Mrs. Montgomery's § 2255 motion, the district court characterized her Sixth Amendment argument as resting on a claim of entitlement to "counsel of choice." Order at 13, ECF 173 (quoting *Gonzalez-Lopez*, 548 U.S. at 151). After quoting *Gonzalez-Lopez*'s statement that the right to counsel of choice does not extend to litigants requiring appointed attorneys, the district court observed that Mrs. Clarke was appointed, and concluded straightaway that no Sixth Amendment violation

occurred. *Id.* This conclusion, however, elides the distinction between the right to create an attorney-client relationship and the right against the nonconsensual termination of that relationship—a distinction central to attorney-client law, which stringently protects only the latter right. Mrs. Montgomery does not claim the right to require appointment of counsel of choice but rather the right to continue being represented by an already appointed lawyer. The Sixth Amendment protects this latter right, one enshrined in attorney-client law.

Just as the Sixth Amendment does not demand that attorneys work for any client who wishes to hire them, attorney-client law does not guarantee individuals the right to be accepted as a client by the lawyer of their choice. And just as clients have no general obligation to employ a particular lawyer, lawyers are generally free to accept or decline employment as they wish. *See* Restatement (Third) of the Law Governing Lawyers § 14 cmt. b ("Lawyers generally are as free as other persons to decide with whom to deal . . . . A lawyer, for example, may decline to undertake a representation that the lawyer finds inconvenient or repugnant."). Thus, before an attorney-client relationship begins, a client's rights are not violated if the client is unable to secure the representation of a particular lawyer.

Once a representation begins, however, attorney-client law grants the client a comprehensive set of rights against the lawyer. In particular, because a client may suffer substantial harm from desertion, the law obligates the lawyer to continue the representation. Restatement (Third) of the Law Governing Lawyers § 32 cmt. c ("[A] lawyer who undertakes a representation ordinarily should see it through to the contemplated end of the lawyer's

services when failure to do so would inflict burdens on the client."). While lawyers are not absolutely barred from withdrawal, it is permitted only in a few enumerated conditions. *See* Model Rules of Prof'l Conduct r. 1.16(b); Restatement (Third) of the Law Governing Lawyers § 32(3); *id.* cmt. c ("[T]he general rule is that a lawyer must persist despite unforeseen difficulties and carry through the representation to its intended conclusion, with the limited exceptions stated in Subsection (3)."). A client is always free to terminate a representation, *id.* § 32(1), but so long as the client wishes it to continue, attorney-client law ordinarily protects the right against termination.

This right against nonconsensual termination of a representation was at issue in *Gonzalez-Lopez*. Mr. Gonzalez-Lopez hired Joseph Low to represent him shortly after he was arraigned. *United States v. Gonzalez-Lopez*, 399 F.3d 924, 926-27 (8th Cir. 2005). Two months after this attorney-client relationship began, the district court barred Mr. Low from representing Mr. Gonzalez-Lopez at trial. *Id.* at 927-28. Mr. Gonzalez-Lopez's complaint did not concern his right to retain his chosen attorney, and he did not ask the court to compel Mr. Low to represent him. Rather, the analysis turned on whether the district court could terminate an already existing attorney-client relationship. The choice denied Mr. Gonzalez-Lopez was not the choice of which counsel to employ but rather the choice to keep counsel already employed.

Mrs. Montgomery's complaint is analogous to Mr. Gonzalez-Lopez's. She, too, claims neither the right to require a particular lawyer to represent her nor the right to the court's assistance in compelling that representation. Rather, she objects that the district court terminated an already existing

attorney-client relationship against her wishes. Ms. Clarke could have declined to represent Mrs. Montgomery, and the district court could have chosen to appoint a different lawyer, but once Ms. Clarke's representation commenced Mrs. Montgomery gained certain rights against its nonconsensual termination. By terminating Ms. Clarke over Mrs. Montgomery's objections, the district court infringed upon her rights in just the same way as the decision to terminate Mr. Low as Mr. Gonzalez-Lopez's lawyer did.

The Sixth Amendment gives defendants no right to demand that the Court appoint a particular lawyer as defense counsel. It is a mistake, however, to conclude that a defendant therefore has no right against the termination of counsel. As attorney-client law demonstrates, the right against termination is central to the attorney-client relationship in a way that the right to retain a particular lawyer is not. Just as attorney-client law grants all clients—even those in ordinary civil litigation—the right to choose whether their lawyer shall continue a representation, so too must the Sixth Amendment grant clients facing potential criminal punishment the same right.

3. A Client's Interest in Continuing a Representation May Be Overridden Only When Serious Lawyer Misconduct Has Occurred

The Sixth Amendment grants no *absolute* right against the nonconsensual termination of appointed counsel. Sufficiently weighty countervailing interests may overcome a client's interest in maintaining an attorney-client relationship: courts may terminate or disqualify retained counsel over the objections of both client and lawyer. *See, e.g.*, *United States v. Dolan*, 570 F.2d 1177, 1179 (3d Cir. 1978); Restatement

(Third) of the Law Governing Lawyers § 6(8). Courts exercise such powers, however, only when a lawyer has engaged in unethical conduct that threatens the integrity of trial. This Court should adopt a similar standard to govern when the Sixth Amendment permits nonconsensual termination of appointed counsel—a standard that Ms. Clarke's conduct did not meet.

The law of disqualification represents a thorough judicial determination of when the interests of fair and efficient justice outweigh a client's interest in maintaining an attorney-client relationship. Because "[t]he costs imposed on the client . . . can be substantial," *id.* cmt. i, when a lawyer is removed nonconsensually, disqualification is a disfavored remedy "appropriate only when less-intrusive remedies are not reasonably available," *id.* State and federal courts thus disqualify only when no other remedy is adequate. *See, e.g.*, *Freeman*, 689 F.2d at 721 ("[D]isqualification . . . is a drastic measure which courts should hesitate to impose except when absolutely necessary."); *In re Estate of Myers*, 130 P.3d 1023, 1025 (Colo. 2006) ("[D]isqualification is a severe remedy that should be avoided whenever possible. . . . [A] court is therefore obliged to impose less severe sanctions whenever they would be adequate for that purpose." (citations omitted)).[2]

---

[2] Courts do, of course, have greater powers to remove lawyers when clients do not object. In justifying its termination of Ms. Clarke, the district court relied primarily on *United States v. Orleans-Lindsey*, 572 F. Supp. 2d 144 (D.D.C. 2008). *See* Order at 11-13, ECF 173. As the opinion in *Orleans-Lindsey* stressed, however, Mr. Orleans-Lindsey did not object to the termination of the representation either at the time or the plea hearing, when explicitly asked. *Orleans-Lindsey*, 572 F. Supp. 2d at 174. The fact that a court may terminate a defendant's legal

Since disqualification is so disfavored, it is typically employed only when a lawyer has engaged in serious ethical misconduct that threatens the integrity of court proceedings or the rights of a client. The rules of professional conduct guide courts' determinations of when such misconduct has occurred. *See In re Dressler Industries, Inc.*, 972 F.2d 540, 543 (5th Cir. 1992) ("Our source for the standards of the profession has been the canons of ethics developed by the American Bar Association."); *In re Users Systems Services, Inc.*, 22 S.W.3d 331, 334 (Tex. 1999) (holding that the rules "do not determine whether counsel is disqualified in litigation, but they do provide guidelines and suggest the relevant considerations"). Restatement (Third) of the Law Governing Lawyers § 6 cmt. i (describing disqualification as the standard remedy if a lawyer is conflicted or might disclose confidential client information). Although the precise verbal formulae courts employ differ, they broadly agree that disqualification is inappropriate absent misconduct of this sort.[3]

---

representation *with his approval* clearly does not undermine Mrs. Montgomery's claim that the district court erred in terminating her legal representation *over her objections*.

[3] The Second Circuit instructs that disqualification "should ordinarily be granted only when a violation of the Canons of the Code of Professional Responsibility poses a significant risk of trial taint." *Glueck v. Jonathan Logan, Inc.*, 653 F.2d 746, 748 (2d Cir. 1981) (citation omitted). The Fifth Circuit has required "'a reasonable possibility that some specifically identifiable impropriety' actually occurred," *United States v. Kitchin*, 592 F.2d 900, 903 (5th Cir. 1979) (quoting *Woods v. Covington County Bank*, 537 F.2d 804, 813 (5th Cir. 1976)). Delaware permits trial courts to disqualify only when "the challenged conduct prejudices the fairness of the proceedings, such that it adversely affects the fair and efficient administration of justice." *In re Appeal of Infotechnology, Inc.*, 582 A.2d 215, 216 (Del. 1990).

This restriction, notably, applies even in civil cases, where the Sixth Amendment does not apply, and where the consequences of disqualification are far less grave than in criminal matters. *See supra* note 3. Furthermore, when criminal courts decide on disqualification, they understand the balance struck between the interests of the client and the interests of justice to follow from the value the Sixth Amendment places on the client's interest in the continuation of an already existing attorney-client relationship. *See, e.g.*, *Kitchin*, 592 F.2d at 903. That is, throughout American law, courts view the attorney-client relationship as sufficiently important that an ongoing representation must yield—over the objections of client and lawyer—only to seriously unethical lawyer misconduct; in criminal matters, when the Sixth Amendment is implicated, courts understand that this requirement follows from the constitutional right to counsel. This Court should not exempt the termination of appointed counsel from this otherwise universal requirement. It would be highly incongruous were the Constitution to afford weaker protection to the attorney-client relationships of indigent criminal defendants under threat of punishment than ordinary civil litigants are afforded by the law governing lawyers. Indigent criminal defendants' interest in continuing attorney-client relationships is no weaker, and the state's interest in the administration of justice is no stronger, than in the other circumstances where termination requires unethical conduct. The right to counsel generally includes a right against nonconsensual termination, including in criminal cases; the Sixth Amendment protects the right to counsel in those cases, and it should therefore be understood to encompass the right against nonconsensual termination as well.

Furthermore, although the courts that have considered termination of appointed counsel have differed in their reasoning, *see supra* part I.A, the actual holdings of these cases support the standard proposed here: appointed counsel has been terminated only when the counsel's conduct violated ethical rules in a manner undermining the integrity of the trial. The Fourth Circuit has terminated appointed counsel who may have been called to testify at trial. *Basham*, 561 F.3d at 322-23; *cf.* Model Rules of Prof'l Conduct r. 3.7(a). The Sixth Circuit has terminated appointed counsel who failed to file basic motions, including a motion to suppress incriminating evidence, that any competent lawyer would have pursued. *Daniels*, 501 F.3d at 738; *cf.* Model Rules of Prof'l Conduct r. 1.1. The Second Circuit has terminated appointed counsel whose adversarial proceeding against the district court created a conflict of interest. *Parker*, 469 F.3d at 59; *cf.* Model Rules of Prof'l Conduct r. 1.7. Though these courts sometimes employed broader language, none has *held* that counsel could be nonconsensually terminated for conduct falling short of an ethical violation.

Ms. Clarke's conduct fell short of this level. The district court did not claim that Ms. Clarke violated any ethical prohibition, much less one threatening the fairness of trial. Order at 4, ECF 173. Instead, Ms. Clarke communicated poorly with co-counsel. *Id.* That failure is insufficiently serious to override a client's right against the nonconsensual termination of a legal representation.

III. Removing a Defendant's Appointed Counsel, Against That Defendant's Wishes and Without a Hearing, Violates the Fifth and Fourteenth Amendments.

A. Construing Protections Against Removal of Counsel to Apply Only to Those with the Means to Hire Attorneys Would Raise Grave Constitutional Concerns.

"[T]he Sixth Amendment guarantees a defendant the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire." *Luis*, 136 S. Ct. at 1089 (alteration in original) (quoting *Caplin & Drysdale*, 491 U.S. at 624). Had Mrs. Montgomery hired counsel, the Sixth Amendment would protect her choice of attorney against arbitrary removal. *See Gonzalez-Lopez*, 548 U.S. at 144. Failure to extend the same treatment to those without the means to hire counsel would impermissibly bifurcate the treatment of criminal defendants on the basis of wealth. "Both equal protection and due process emphasize the central aim of our entire judicial system—all people charged with crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American court.'" *Griffin*, 351 U.S. at 17 (quoting *Chambers*, 309 U. S. at 241). "Nothing about indigent defendants makes their relationships with their attorneys less important, or less deserving of protection, than those of wealthy defendants." *Slappy*, 461 U.S. at 22 (1983) (Brennan, J., concurring).

The rules of professional conduct state that a lawyer's ethical obligations are to the client, regardless of who pays for the lawyer's services. *See* Model Rules of Prof'l Conduct r. 1.8(f); *Weaver v. State*, 894 So. 2d at 188-9 ("[T]he attorney-client

relationship is independent of the source of compensation because an attorney's responsibility is to the person he represents rather than the individual or entity paying for his services."). Thus,

> once counsel is appointed to represent an indigent defendant, whether it be the public defender or a volunteer private attorney, the parties enter into an attorney-client relationship which is no less inviolable than if counsel had been retained. To hold otherwise would be to subject that relationship to an unwarranted and invidious discrimination arising merely from the poverty of the accused.

Smith, 440 P.2d at 74. "To allow trial courts to remove an indigent defendant's court-appointed counsel with greater ease than a non-indigent defendant's retained counsel would stratify attorney-client relationships based on defendants' economic backgrounds." *Weaver*, 894 So. 2d at 189.

B. Arbitrary Removal of Counsel Unlawfully Interferes with Lawyers' Obligations to Effectively Advocate for their Clients.

Lawyers must act with "commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." Model Rules of Prof'l Conduct r. 1.3 cmt. 1. This rule has constitutional foundations. A lawyer's conflict of interest, for example, can run afoul of a defendant's right to due process and to counsel. *Wood v. Georgia*, 450 U.S. 261, 271 (1981). Removal of defense counsel similarly implicates these two constitutional protections:

> if the advocate must labor under the threat that, at any moment, if his argument or advocacy should incur the displeasure or lack of immediate comprehension by the trial judge, he may be summarily relieved as counsel on a subjective charge of incompetency by the very trial judge he is attempting to convince, his advocacy must of necessity be most guarded and lose much of its force and effect.

Smith, 440 P.2d at 74 (quotation omitted). As a result, the threat of arbitrary removal of appointed counsel not only undermines indigent defendants' trust in their appointed counsel, but also impermissibly interferes with appointed counsels' ability to serve as zealous and effective advocates for their clients.

IV. The District Court was Required to Conduct an Evidentiary Hearing Before Terminating Ms. Clarke

The district court improperly terminated Ms. Clarke's representation by failing to afford her an evidentiary hearing. In "all critical stages of the criminal proceedings" the "Sixth Amendment guarantees a defendant the right to have counsel present." *Montejo*, 556 U.S. at 786. Whenever the removal of a lawyer turns on disputed facts, trial courts must hear evidence and make factual findings before issuing a ruling. *See, e.g.*, *In re Estate of Myers*, 130 P.3d at 1027 ("While we have never imposed a mechanical hearing requirement on motions to disqualify, justification for this extreme remedy will often require particularized factual findings."). Because the district court terminated Ms. Clarke on the basis of her co-counsel's allegations without

informing her of their substance, Order at 4-5, ECF 173, the district court could not have known whether those allegations were disputed or true. In these circumstances a hearing is needed to ensure that such an extreme remedy is not employed on an unsound basis.

Beyond being necessary "to assure a meaningful 'defence'" *Wade*, 388 U.S. at 225, a hearing with counsel is also necessary to "provid[e] a record for appellate review" and thereby to ensure fairness and adequacy at trial. *Chandler*, 449 U.S. at 577. There is a pressing need for this Court to clarify that the Constitution generally requires a hearing with the defendant's counsel present before that counsel can be removed against his or her own wishes and those of the counsel's client. Notice and an opportunity to be heard are always at the core of what due process requires. *Eldridge*, 424 U.S. 319. But these rights are especially important in capital cases, where there must be "heightened concern for fairness and accuracy" in "review of the process requisite to the taking of a human life." *Ford v. Wainwright*, 477 U.S. 399, 414 (1986).

Conclusion

For these reasons, the petition for writ of certiorari should be granted.

Respectfully Submitted,

/s/ Lawrence J. Fox

Lawrence J. Fox
Counsel of Record
George W. and Sadella D. Crawford
Visiting Lecturer in Law Yale Law School
127 Wall Street
New Haven, Connecticut 06511
(203) 432-9358
lawrence.fox@yale.edu