No. 19-5921

IN THE SUPREME COURT OF THE UNITED STATES

LISA M. MONTGOMERY, PETITIONER

v.

UNITED STATES OF AMERICA

(CAPITAL CASE)

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED

Whether the court of appeals correctly determined that petitioner's challenge to the denial of her motion for collateral relief under 28 U.S.C. 2255, which the district court denied in relevant part on the ground that the court's termination of the appointment of one member of petitioner's three-member appointed defense team did not abridge a Sixth Amendment right to counsel of petitioner's choice or require a pre-termination hearing, did not warrant a certificate of appealability.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (W.D. Mo.):

United States v. Montgomery, No. 5:05-cr-6002 (Apr. 4, 2008)

Montgomery v. United States, No. 4:12-cv-8001 (Mar. 3, 2017)

United States Court of Appeals (8th Cir.):

United States v. Montgomery, No. 08-1780 (Apr. 5, 2011)

In re Montgomery, No. 13-2958 (Oct. 17, 2013)

In re Montgomery, No. 14-2437 (July 11, 2014)

In re Montgomery, No. 14-2725 (Aug. 13, 2014)

Montgomery v. United States, No. 17-1716 (Jan. 25, 2019)

Supreme Court of the United States:

Montgomery v. United States, No. 11-7377 (Mar. 19, 2012)

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OPINIONS BELOW

The judgment of the court of appeals (Pet. App. 2a) is unreported. The orders of the district court (Pet. App. 3a-131a, 132a-197a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 25, 2019. A petition for rehearing was denied on April 10, 2019. (Pet. App. 1a). On June 18, 2019, Justice Gorsuch extended the time within which to file a petition for a writ of certiorari to and including September 7, 2019, and the petition was filed on

September 9, 2019 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Missouri, petitioner was convicted of kidnapping resulting in death, in violation of 18 U.S.C. 1201(a). 05-cr-6002 Judgment 1 (Apr. 4, 2008). The district court imposed a capital sentence. Id. at 2. The court of appeals affirmed, 635 F.3d 1074 (2011), and this Court denied certiorari, 565 U.S. 1263 (2012). The district court subsequently denied petitioner's motion to vacate her sentence under 28 U.S.C. 2255, Pet. App. 3a-131a, 132a-197a, and denied a certificate of appealability (COA), id. at 130a-131a. The court of appeals denied petitioner's application for a COA and dismissed her appeal. Id. at 2a.

1. In April 2004, petitioner and Bobbie Jo Stinnett, both of whom were involved in breeding rat terriers, met at a dog show. Stinnett maintained a website to promote her dog-breeding business, which she ran out of her home. In the spring of 2004, Stinnett became pregnant and shared that news with her online community, including petitioner. 635 F.3d at 1079.

Around that time, petitioner, who was herself unable to become pregnant because she had been sterilized years earlier, falsely began telling people that she was pregnant. Petitioner said that she had tested positive for pregnancy, and she began wearing maternity clothes and behaving as if she were pregnant.

Petitioner's second husband and her children were unaware of her sterilization and believed that she was pregnant. 635 F.3d at 1079-1080.

On December 15, 2004, when Stinnett was eight months pregnant, petitioner contacted Stinnett via instant message using an alias and expressed interest in purchasing a puppy from her. The women arranged to meet the following day. The following day, petitioner drove from her home in Melvern, Kansas, to Stinnett's home in Skidmore, Missouri, carrying a white cord and sharp kitchen knife in her jacket. 635 F.3d at 1079.

When petitioner arrived, she and Stinnett initially played with the puppies. But sometime after 2:30 p.m., petitioner attacked Stinnett, using the cord to strangle her until she was unconscious. Petitioner then cut into Stinnett's abdomen with the knife, which caused Stinnett to regain consciousness. A struggle ensued, and petitioner again strangled Stinnett with the cord, this time killing her. Petitioner then extracted the fetus from Stinnett's body, cut the umbilical cord, and left with the baby. Stinnett's mother arrived at Stinnett's home shortly thereafter, found her daughter's body covered in blood, and called 911. Stinnett's mother said the scene looked as if Stinnett's "stomach had exploded." 635 F.3d at 1079-1080.

The next day, December 17, 2004, state law-enforcement officers arrived at petitioner's home, where petitioner was sitting on the couch, holding the baby. Sergeant Randy Strong explained that

they were investigating Stinnett's murder and asked about the baby. Petitioner initially claimed that she had given birth at a clinic in Topeka, but later admitted that was a lie and altered her story. Petitioner then claimed to Sergeant Strong that, unbeknownst to her husband, she had given birth at home with the help of two friends because the family was having financial problems. When asked for her friends' names, petitioner said that they had not been physically present but had been available by phone if difficulties arose. Petitioner asserted that she had given birth in the kitchen and discarded the placenta in a creek. 635 F.3d at 1080.

At some point, petitioner requested that the questioning continue at the sheriff's office. Once there, petitioner confessed that she had killed Stinnett, removed the baby from her womb, and abducted the child. The baby was returned to her father. 635 F.3d at 1080.

2. On December 17, 2004, the government filed a criminal complaint charging petitioner with kidnapping resulting in death, in violation of 18 U.S.C. 1201(a)(1). 12/17/04 Compl.[1] On December 28, 2004, federal authorities arrested petitioner, and a magistrate judge promptly appointed the Office of the Federal Public Defender (FPD) for the Western District of Missouri to serve as

[1] Unless otherwise indicated, citations in this brief to pre-2012 district court filings refer to the filings in No. 05-cr-6002 (W.D. Mo.), while citations to such filings made in or after 2012 refer to the filings in No. 12-cv-8001 (W.D. Mo.).

petitioner's counsel. 12/28/04 Order; see 12/28/04 D. Ct. Docket Entry (noting arrest); Pet. App. 133a.

Shortly thereafter, in January 2005, a federal grand jury indicted petitioner on one count of kidnapping resulting in death. 1/12/05 Indictment 1. The indictment included special findings (id. at 1-4) required under the Federal Death Penalty Act of 1994, 18 U.S.C. 3591 et seq., for charges as to which a capital sentence is sought. See also 3/13/07 Superseding Indictment 1-3.

When a defendant is indicted for a capital offense, 18 U.S.C. 3005 requires that a federal court "shall promptly, upon the defendant's request, assign 2 [defense] counsel, of whom at least 1 shall be learned in the law applicable to capital cases." On January 20, 2005, eight days after petitioner's indictment, a magistrate judge appointed attorney Susan Hunt as "learned counsel pursuant to [Section] 3005." Pet. App. 133a; see 1/20/05 Order. The District's First Assistant FPD, David Owen, later assumed the FPD's representation in the case and joined Hunt as defense counsel. Pet. App. 133a.

In October 2005, the clerk of the district court granted Owen's motion to admit pro hac vice Assistant Public Defender Judy Clarke, a capital defense attorney in San Diego's FPD Office, as additional counsel for petitioner. Pet. App. 134a; see id. at 135a; 10/6/05 Pet. for Admis.; 10/7/05 D. Ct. Docket Entry. Almost immediately after Clarke's appointment, she and Owen began having difficulty working together. Pet. App. 134a. In early November

2005, Hunt, Owen, and Clarke met at a restaurant to discuss the case. Ibid. At that meeting, Clarke loudly told Owen that he was "stupid" and did not have the experience or ability to make decisions in the case. Ibid.; see Gov't C.A. Resp. to Request for COA (Gov't C.A. Resp.) 179-180. Thereafter, Owen's and Clarke's relationship further deteriorated. Pet. App. 134a. Owen found Clarke to be abusive and demeaning, while Clarke found Owen to be controlling and inexperienced, ibid., labeling him a "country bumpkin." Gov't C.A. Resp. 181 (citation omitted). According to Clarke, the "drama that infected" the defense team "was definitely detrimental" to petitioner's representation. Id. at 182 n.88 (citations omitted).

By April 2006, Hunt, Owen, and Clarke met to discuss the friction among the defense team's members. Pet. App. 134a. They discussed the possibility that Clarke would withdraw from the case, and Hunt and Owen agreed to raise the matter with the district court the next day. Ibid. On the next day, April 20, 2006, Owen and the Federal Public Defender (Ray Conrad) met with the district court to discuss the defense team's problematic working relationship. Id. at 134a-135a. The attorneys recommended that the court terminate Clarke's appointment. Id. at 135a. By the end of the meeting, it had become clear to the court "that there was a significant breakdown in communication within the defense team and that serious personality conflicts between the various members of the defense team existed," causing the team to become unproductive.

Ibid. The court accordingly terminated Clarke's appointment in an order stating:

> Upon good cause shown, and finding that it is no longer necessary for Judy Clarke, Federal Defenders of San Diego, Inc., to continue in a pro h[a]c vice status as additional counsel representing the defendant herein, the appointment of Judy Clarke in this cause is hereby terminated effective immediately.

Ibid. (quoting 4/20/06 Order).

One day later, on April 21, 2006, the district court held an ex parte hearing about the termination of Clarke's appointment, which was attended by petitioner, attorneys Hunt and Owen, and FPD investigator Ron Ninemire. Pet. App. 135a. The court explained to petitioner that it had determined that Clarke's participation in petitioner's case was "no longer necessary and/or helpful" to petitioner. 4/21/06 Tr. 1 (12-cv-8001 Doc. 113-1). The court informed petitioner that she was still represented by two other capable and experienced attorneys and asked petitioner if she wanted to speak with the court about the matter. Id. at 1-2. Petitioner indicated that she did not. Id. at 2. When the court asked Hunt and Ninemire if petitioner had expressed to them any concerns, they responded that petitioner was "upset" but had not expressed any "problems" or "concerns" about the matter. Id. at 3. The court stated that it was understandable that someone in petitioner's position "might be apprehensive" about the situation, but reiterated its conclusion that Clarke's removal was "in [petitioner's] best interest." Id. at 4. The court again gave

petitioner the opportunity to speak, but the record indicates that petitioner did not do so. Ibid.[2]

On April 25, 2006, the district court again met with Hunt and Owen to discuss Clarke's removal. Pet. App. 136a. Hunt expressed concern over petitioner's state of mind, and informed the court that petitioner "feels like this decision was made for her." 4/25/06 Tr. 4 (Section 2255 Hrg. Ex. 67). The court explained that, from its perspective, Clarke "was [the] third attorney" appointed to the case and, given that Clarke was working poorly with the rest of the defense team, the court believed that it was necessary to terminate her appointment. Id. at 4-5. Hunt informed the court that Clarke had experience with mental-health issues and that, as a result of her termination, the team lacked counsel with such experience. Id. at 5-6. Hunt also noted that the defense's mitigation expert was associated with Clarke and had indicated that she was not inclined to work on petitioner's case further. Id. at 6, 8-9. Owen told the court that he was "not asking to get off this case" but stated that "[his] office will not work with Judy Clark[e] ever again." Id. at 10-11.

Hunt then proposed two possible solutions to the district court: (1) the FPD could withdraw from the case and the court could reinstate Clarke as counsel, or (2) the FPD could remain in the case, and the court could provide the defense team additional

[2] The certiorari petition asserts (Pet. 8), without citation, that petitioner "was in tears" during the hearing. The hearing transcript does not provide support for that assertion.

time to find a mental-health expert and new mitigation expert. Pet. App. 136a. The court stated that it "was very hesitant to have Judy Clark[e] involved in [the case in] the first place" and was not inclined to reappoint her. 4/25/06 Tr. 13; see Pet. App. 136a.

On May 3, 2006, the district court met with attorneys Hunt, Owen, and Conrad to discuss petitioner's representation. Pet. App. 136a. Hunt informed the court that, earlier that day she had filed a letter from petitioner in which petitioner expressed her "concern about [Clarke's] removal" and the fact that she had not been notified about it at the time. 5/3/06 Tr. 16-17 (Section 2255 Hrg. Ex. 68). Petitioner's letter did not request that Clarke be reinstated. Gov't C.A. Resp. 214. Hunt reiterated that the defense team had not worked well together, and stated that, in her view, "the blame lies with everyone." 5/3/06 Tr. 17.

Hunt and Owen then informed the district court that there were now problems between the two of them too, and that neither could work effectively with the other. Pet. App. 136a. Owen suggested that the FPD withdraw to resolve the issue. 5/3/06 Tr. 26. Hunt, however, stated her view that it "would be in [petitioner's] best interest" for the FPD to remain and for her to withdraw, because the case would "require a lot of resources," which the FPD could provide, and because the FPD had the necessary experience and history with the case to proceed without her. Id. at 21, 33.

On May 12, 2006, the magistrate judge granted Hunt's motion to withdraw and appointed John O'Connor as "learned counsel." Pet. App. 136a. The magistrate judge also appointed Fred Duchardt as additional counsel in the "interests of justice." Ibid. (citation omitted). Neither Clarke, nor Hunt, nor any of petitioner's other attorneys filed any request that Clarke be reinstated as counsel. Id. at 136a-137a.

After trial, the jury unanimously found petitioner guilty of kidnapping resulting in death and recommended a capital sentence. 635 F.3d at 1085. The district court sentenced petitioner in accord with that recommendation. Ibid. On appeal, petitioner raised multiple issues for review but did not challenge the district court's termination of Clarke's appointment. See 08-1780 Pet. C.A. Br. 54-56; id. at 56-147. The court of appeals affirmed, 635 F.3d 1074, and the Court denied certiorari, 565 U.S. 1263 (No. 11-7377).

3. In 2012, petitioner sought postconviction relief under 28 U.S.C. 2255. Pet. App. 132a. As relevant here, petitioner asserted that the district court's termination of Clarke's appointment deprived petitioner of her Sixth Amendment right to counsel of her choice and should have occurred after a formal hearing. Id. at 139a, 145a. The government argued that petitioner had "forfeited" that challenge by "fail[ing] to raise [it] at trial and on direct appeal" and that, in any event, the court's termination of Clarke's appointment did not violate petitioner's rights. 2/2/15 Gov't Opp. to Am. Sec. 2255 Mot. 51; see id. at 2, 6, 62-

67, 71-78. The district court did not address forfeiture and, instead, rejected petitioner's challenge on the merits. Pet. App. 139a-148a. And after holding an evidentiary hearing on unrelated claims, the court denied Section 2255 relief. Id. at 3a, 131a.

As relevant here, the district court rejected petitioner's argument that terminating Clarke's appointment violated petitioner's Sixth Amendment right to counsel of her choice. Pet. App. 139a-145a. The court explained that United States v. Gonzalez-Lopez, 548 U.S. 140 (2006), recognized that a "defendant [who] can afford to hire an attorney" has a Sixth Amendment "right to choose that counsel," but that "'the right to counsel of choice does not extend to defendants who,'" like petitioner, "'require counsel to be appointed for them.'" Pet. App. 144a (quoting Gonzalez-Lopez, 548 U.S. at 151). The court thus determined that Gonzalez-Lopez, which held that a defendant need not show prejudice to prevail on a claim that he was erroneously deprived of his Sixth Amendment right to counsel of his choice, 548 U.S. at 146, did not support petitioner's challenge to Clarke's termination, because Clarke was appointed to represent petitioner. Pet. App. 144a. The court further determined that federal statutory provisions governing the appointment and replacement of counsel confirmed that the court had authority to terminate Clarke's appointment in the circumstances here. Id. at 142a-143a.

The district court emphasized that petitioner was at all times represented by at least two attorneys once Hunt had been appointed

as "learned counsel" under Section 3005; that Clarke's subsequent appointment was "not necessary to comply with statutory obligations"; and that Clarke was instead "appointed to aid in [petitioner's] defense in the interests of justice." Pet. App. 142a-143a. The court noted that "[n]o one denies that [petitioner's] defense team was dysfunctional following Clarke's appointment" and that "[petitioner's] defense was being impacted." Id. at 141a-142a. The court thus explained that after it had "[c]onsider[ed] all of the surrounding circumstances," including "[Section] 3005's direction to consider the FPD's recommendation" and the judicial district's "preference for local counsel," the court had "determined that terminating Clarke's appointment to the case was the most appropriate way" to "ensure [petitioner] continued with an effective team of attorneys" once "it became clear that Clarke's appointment was no longer in the interests of justice due to the breakdown in communication between her and other defense team members." Id. at 141a, 143a. The court added that Clarke never made "any effort to remain on the case" and had appeared to "consent[] to the termination of her appointment," and that no "other attorney associated with the case" had "filed a motion to reconsider or requested a hearing on the matter." Id. at 144a-145a.

The district court also rejected petitioner's contention that she was entitled to a hearing before the court terminated Clarke's appointment. Pet. App. 145a. The court explained that petitioner had identified "no cases," and the court was aware of no decisions,

holding that a trial court must "hold[] a hearing" before "remov[ing] an appointed attorney on that attorney's motion to withdraw, co-counsel's motion to remove, or a court's sua sponte removal" of appointed counsel. Ibid. The court acknowledged that some state courts had determined that a trial court must have "principled reasons" for replacing appointed counsel sua sponte. Ibid. (citation omitted). But the court stressed that those decisions do not indicate that a hearing is required and that, in this case, it had "principled reasons" for terminating Clarke's appointment. Ibid.

4. The district court later determined that a COA was not warranted. Pet. App. 130a. Section 2253 requires that a federal prisoner obtain a COA to appeal a "final order in a proceeding under [S]ection 2255." 28 U.S.C. 2253(c)(1)(B). A COA may issue "only if" the prisoner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. 2253(c)(2). "Where a district court has rejected the constitutional claims on the merits," the prisoner must "demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 484 (2000). The district court denied a COA based on its determination that "the merits of [petitioner's] claims [were] not debatable among jurists or deserving of further proceedings." Pet. App. 130a-131a.

The court of appeals denied petitioner's application for a COA and dismissed petitioner's appeal in a four-sentence judgment. Pet. App. 2a.

ARGUMENT

Petitioner contends (Pet. 12-23, 26) that the court of appeals erred in denying a COA on her claim that the district court violated her Sixth Amendment right to counsel of her choice by terminating Clarke's appointment. Petitioner further contends (Pet. 23-24, 26-27) that the court of appeals erred in denying a COA on her claim that the Fifth Amendment's Due Process Clause required a hearing at which she was personally present before terminating Clarke's appointment on the recommendation of petitioner's primary counsel. A COA may issue "only if" the prisoner has made "a substantial showing of the denial of a constitutional right." 28 U.S.C. 2253(c)(2). Where, as here, "a district court has rejected [a prisoner's] constitutional claims on the merits," the prisoner "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 484 (2000); see Miller-El v. Cockrell, 537 U.S. 322, 338 (2003). The court of appeals correctly denied petitioner's COA application, and its decision does not conflict with any decision of this Court or any other court of appeals. In any event, certiorari would be unwarranted for the additional reason that petitioner procedurally

defaulted her claims by failing to raise them on direct review. No further review is warranted.

1. The court of appeals correctly denied a COA on petitioner's Sixth Amendment claim, because reasonable jurists would not debate that petitioner lacked a Sixth Amendment right to choose to keep Clarke as her appointed counsel.

a. The Sixth Amendment guarantees that, "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence." U.S. Const. Amend. VI. "[A]n element of this right is the right of a defendant who does not require appointed counsel to choose who will represent him." United States v. Gonzalez-Lopez, 548 U.S. 140, 144 (2006); cf. Wheat v. United States, 486 U.S. 153, 159 (1988) (explaining that that "right to choose one's own counsel is circumscribed in several important respects"). A defendant "who require[s] counsel to be appointed," however, has no "right to counsel of choice." Gonzalez-Lopez, 548 U.S. at 151; see id. at 154 (Alito, J., dissenting); Wheat, 486 U.S. at 159. Defendants who receive appointed counsel "have no cognizable [Sixth Amendment] complaint so long as they are adequately represented by attorneys appointed by the courts," which fully discharges the Sixth Amendment "right to adequate representation" by counsel. Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 624 (1989). That right guarantees the effective assistance of counsel in a criminal prosecution, but it does not confer any additional right to develop "rapport with [an

appointed] attorney" or "a 'meaningful relationship'" with such counsel. Morris v. Slappy, 461 U.S. 1, 13-14 (1983).

Petitioner's Sixth Amendment right to counsel in this case was satisfied by the appointment of effective attorneys to represent her. The district court appointed multiple counsel for petitioner's defense. Under 18 U.S.C. 3005, a district court must, on a capital defendant's request, promptly assign to her defense two "counsel, of whom at least [one] shall be learned in the law applicable to capital cases" and must, in making such appointments, "consider the recommendation of the Federal Public Defender organization * * * in the district." 18 U.S.C. 3005. The district court here complied with those statutory requirements when it appointed the FPD Office for the Western District of Missouri as petitioner's counsel and separately appointed Hunt as "learned counsel pursuant to 18 U.S.C. § 3005." Pet. App. 133a. Hunt and Owen, the District's First Assistant Public Defender, then served as petitioner's statutorily required counsel. Ibid.; see id. at 142a-143a; p. 5, supra. Roughly six months after Owen had joined Hunt as defense counsel, the district court granted Owen's motion to admit Clarke pro hac vice to serve as an additional appointed counsel for petitioner, even though "Clarke's appointment was not necessary to comply with [any] statutory obligations." Pet. App. 134a, 142a.[3] But after Clarke's addition to the defense team

[3] Petitioner repeatedly suggests (Pet. 3, 5-7, 23-24) that the district court appointed Clarke as "learned counsel" under Section 3005. But the district court made clear that it appointed

resulted in significant problems, the court found it "no longer necessary" for Clarke to "continue in a pro h[a]c vice status as additional counsel representing [petitioner]" and accordingly terminated its prior "appointment of Judy Clarke" as such counsel. Id. at 135a (quoting 4/20/06 Order).

Because Clarke had been appointed as supplementary counsel for petitioner, petitioner did not herself retain Clarke's services. It follows that no reasonable jurist would debate that petitioner lacked a Sixth Amendment right to "right to counsel of choice" that might have been arguably violated by terminating Clarke's appointment. As the Court has explained, "the right to counsel of choice does not extend to defendants who require counsel to be appointed for them." Gonzalez-Lopez, 548 U.S. at 151; accord Caplin & Drysdale, Chartered, 491 U.S. at 624; Wheat, 486 U.S. at 159.

b. Petitioner errs in contending (Pet. 14) that "[t]he facts here are in line with Gonzalez-Lopez." In Gonzalez-Lopez, the defendant himself hired an attorney (Low) to represent him, but the district court repeatedly denied Low's applications for admission pro hac vice. 548 U.S. at 142-143. The court of appeals determined, and the government did not dispute, that "the District

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Hunt as learned counsel. Pet. App. 133a. And one of petitioner's own filings -- jointly submitted by Hunt, Owen, and Clarke -- confirms that the court appointed "Hunt as counsel 'learned in the law of capital cases'" "pursuant to 18 U.S.C. § 3005," and later appointed Clark as a supplemental attorney for the defense team. 12/17/05 Pet. Mot. to Amend Scheduling Order 13-15, 26 (emphasis omitted).

Court [had] erroneously deprived [Gonzalez-Lopez] of his counsel of choice." Id. at 144. On review, this Court considered the government's argument that a Sixth Amendment violation in that context is not complete unless a defendant's substitute counsel is constitutionally ineffective, which requires a showing of prejudice. Ibid. The Court rejected that contention. The Court instead determined that a Sixth Amendment violation is complete once an erroneous deprivation of a defendant's right to counsel of choice has occurred, id. at 146-148, and that the "erroneous deprivation of the right to counsel of choice" is a structural error not subject to harmless-error review, id. at 150.

Gonzalez-Lopez does not support petitioner's Sixth Amendment claim here, because it involved counsel directly retained by a defendant, not counsel appointed by a court. Indeed, Gonzalez-Lopez confirms that petitioner lacks a colorable Sixth Amendment claim by recognizing that "the right to counsel of choice does not extend to defendants [like petitioner] who require counsel to be appointed for them." 548 U.S. at 151 (emphasis added). Although petitioner asserts (Pet. 15) that "Clarke was willing to represent [petitioner] even though [petitioner] was without funds," petitioner provides no support for that assertion. Clarke was an Assistant FPD employed by the San Diego Federal Defenders, Pet. App. 49a, and petitioner offers no reason to conclude that that geographically distant federal defender office would have assigned

Clarke to petitioner's case without a court appointment, particularly where the local FPD Office was unwilling to collaborate with Clarke in petitioner's defense. Moreover, as the district court explained, "[b]y all appearances, Clarke consented to the termination of her appointment and acknowledged that it was appropriate." Id. at 145a.

c. Petitioner errs in suggesting (Pet. 19-23, 26) that it is "reasonably debatable" whether terminating Clarke's appointment violated a Sixth Amendment right to counsel of choice because "California, Georgia, Louisiana, and Texas" courts purportedly would have found such a violation, Pet. 26. None of the state decisions resolves a materially similar Sixth Amendment claim involving the termination of appointed counsel or demonstrates that state courts would reach a different result under the Sixth Amendment.

Petitioner relies (Pet. 21) on a trio of cases involving the appointment of counsel -- rather than the termination of appointed counsel -- each of which determined that, as a nonconstitutional matter, such appointments lie in the sound discretion of the trial court. In Harris v. Superior Court, 567 P.2d 750 (Cal. 1977), for instance, the Supreme Court of California stated that "[a]n indigent defendant's preference for a particular attorney" should "be considered by the trial court in making an appointment" but that "the matter rests wholly within the sound discretion of the trial court," which, "'in the absence of positive law or fixed rule'"

governing the matter, must "'exercise * * * discriminating judgment within the bounds of reason.'" Id. at 756 (citation omitted). Applying that nonconstitutional standard, the court found an abuse of discretion where "'objective' considerations" surrounding the appointment decision "heavily outweighed" the "factors relied upon by the [trial] court." id. at 758. The Supreme Court of Georgia in Amadeo v. State, 384 S.E.2d 181 (Ga. 1989), in turn, "adopt[ed] the conclusion of the Harris court" that appointment decisions may be reviewed for abuses of discretion, while emphasizing that "'the Sixth Amendment does not grant a[n indigent] defendant'" who has a right to "'appointed counsel'" the "'additional right to counsel of his own choosing.'" Id. at 182-183 (citation omitted) (finding abuse of discretion where factors favoring the requested appointment "clearly outweighed" the factor the trial court had invoked). And Davis v. Cain, 662 So.2d 453 (La. 1995) (per curiam), similarly reversed an appointment where the trial court chose counsel based on a consideration that was itself erroneous. Id. at 454. None of the three decisions suggests that the termination of Clarke's appointment violated the Sixth Amendment.

Petitioner also relies (Pet. 19-23) on the Supreme Court of California's decision Smith v. Superior Court, 440 P.2d 65 (Cal. 1968), and three Texas decisions that build on Smith, see Stearnes v. Clinton, 780 S.W.2d 216, 220-221 (Tex. Crim. App. 1989); Buntion v. Harmon, 827 S.W.2d 945 (Tex. Crim. App. 1992); Stotts v. Wisser, 894 S.W.2d 366 (Tex. Crim. App. 1995). It is unclear whether those

decisions necessarily rest on the Sixth Amendment. But even if they do, none suggests any disagreement with a decision to terminate the appointment of supplementary counsel where, as here, the defendant's primary counsel affirmatively requested that termination in light of their inability to work constructively with such counsel.

In Smith, the Supreme Court of California determined that a trial court had erred in ordering the replacement of appointed counsel based on the trial court's stated concern that counsel -- who had been appointed to represent the defendant on appeal, secured a reversal, and was thoroughly familiar with the case -- might not be competent to try the case on remand. 440 P.2d at 66-69, 72-75. The state supreme court stated that the question before it was whether the trial court "possesse[d] a nonstatutory, inherent power to make such an order over the objections of the defendant and his attorney," id. at 72, and concluded that the trial court lacked such "inherent power[]" to remove appointed counsel "in circumstances in which a retained counsel could not be removed," id. at 74-75. "[T]he constitutional guarantee of the defendant's right to counsel," the court added, "requires that his advocate, whether retained or appointed, be free in all cases of the threat that he may be summarily relieved as 'incompetent' by the very trial judge he is duty-bound to attempt to convince of the rightness of his client's cause." Ibid.

The Supreme Court of California has since observed that it is "far from clear whether" its 1968 decision in Smith was "grounded on the state Constitution; or on the federal Constitution"; or on other non-constitutional grounds. People v. Jones, 91 P.3d 939, 944-945 (Cal. 2004). And the court explained that if Smith had been based on the Sixth Amendment, it would now be "superseded by [this Court's later] decision in Wheat" to the extent Smith is "inconsistent" with Wheat's description of the right to counsel. Id. at 945.[4] The State's intermediate appellate court has thus determined that "Smith is no longer good authority." Magana v. Superior Court, 231 Cal. Rptr. 3d 882, 898 (Cal. Ct. App. 2018). Even if it were good law, Smith's view that a trial judge cannot remove appointed counsel over the express "objections of the defendant and his attorney" based on the judge's dubiously grounded "subjective opinion that the attorney is 'incompetent' because of ignorance of the law," 440 P.2d at 66, 72; see id. at 66-69, does not address the circumstances here, where the "breakdown in communication between [Clarke] and other defense team members" necessitated removal of at least one appointed counsel, Pet. App. 143a; see id. at 146a, and where, "[b]y all appearances, Clarke

[4] Cf. Wheat, 486 U.S. at 159, 164 (determining that the Sixth Amendment right to retain counsel of choice "is circumscribed," does not allow a defendant to "insist on representation by an attorney he cannot afford," and does not prevent a court from declining to allow the defendant to retain his choice of counsel based on a showing of a "serious potential for conflict" of interest if that attorney were to represent the defendant).

consented to the termination of her appointment," id. at 145; see id. at 144a, 146a.

The three Texas decisions -- Stearns, Buntion, and Stotts -- have required only that a trial court must have a "principled reason" to remove appointed counsel sua sponte. Stearns relied on Smith to conclude that a trial court lacks authority to "arbitrarily remove" appointed counsel "over the objections of the defendant and counsel." 780 S.W.2d at 225-226, see id. at 220-221; see also id. at 224 (finding that trial court's reasons were "both illogical and unreasoned"). Buntion applied the rule in Stearns to determine that a "principled reason, apparent from the record," must support a trial judge's sua sponte exercise of his "discretion to replace appointed trial counsel over the objection of both counsel and defendant." 827 S.W.2d at 949 (stating that a "judge's personal 'feelings' and 'preferences'" are insufficient). And Stotts simply applied Buntion's requirement of a "principled reason" apparent from the record to overturn the removal of appointed counsel where "no such principled reason [was] evident." 894 S.W.2d at 367-368. None of those decisions would suggest that the district court acted impermissibly here, where it followed the recommendation of petitioner's primary counsel to terminate Clarke's appointment (see p. 6, supra); it premised the termination on the principled reason that it was necessary to ensure a "cohesive defense team"; and "[n]o one" disputed that the "defense team [had become] dysfunctional following Clarke's appointment." Pet. App. 142a, 145a.

d. Petitioner's reliance (Pet. 16-19) on statutory provisions regarding "[t]he appointment of counsel in federal death penalty cases," Pet. 16, does not support certiorari of the Sixth Amendment question that she presents to this Court, see Pet. i. The statute that petitioner discusses (18 U.S.C. 3599) cannot alter the scope of a constitutional right to counsel of choice. Moreover, a COA may issue "only if" petitioner has made "a substantial showing of the denial of a constitutional right," 28 U.S.C. 2253(c)(2), not a statutory one. Congress enacted that requirement to modify the prior judge-made standard, which required "'a substantial showing of the denial of a federal right,'" by narrowing the COA inquiry only to constitutional claims. Slack, 529 U.S. at 480, 483 (taking "due note [of] the substitution of the word 'constitutional'" for "the word 'federal'") (citations omitted). Thus, to the extent that petitioner contends that the district court violated federal statutory provisions, that contention would not support a COA.

In any event, petitioner's statutory contentions lack merit. Petitioner contends (Pet. 17) that, under 18 U.S.C. 3599(e), counsel appointed to represent a capital defendant may be removed "only" where "the attorney seeks to withdraw or the client asks for the attorney's removal." But Section 3599(e) simply directs that, "[u]nless" counsel is replaced by similarly qualified counsel on motion of the attorney or defendant, "each attorney * * * appointed [to represent the defendant at one stage of the case]

shall represent the defendant throughout every subsequent stage of available judicial proceedings," including appeals, certiorari review, "all available post-conviction process," and clemency proceedings. 18 U.S.C. 3599(e). That provision simply "governs the scope of appointed counsel's duties," Harbison v. Bell, 556 U.S. 180, 185 (2009), requiring counsel to continue the representation unless excused. It does not limit a court's authority to replace appointed counsel where, as here, the court determines that the interests of justice requires such removal. Indeed, if petitioner were correct, a court would be powerless to remove appointed counsel, unless that attorney herself or the defendant requests such removal, even if the court has correctly determined based on counsel's performance that her continued representation in the capital proceeding would almost certainly be constitutionally ineffective. Section 3599(e) imposes no such rule.

2. The court of appeals also correctly denied a COA on petitioner's contention (Pet. 23-24) that her due process rights were violated because she was "not provided notice" or an opportunity to be "heard" when the district court discussed Clarke's appointment with petitioner's primary counsel and granted such counsel's recommendation to terminate that appointment.

This Court has explained that "[i]n the field of criminal law, * * * 'the Due Process Clause has limited operation'" "'beyond the specific guarantees enumerated in the Bill of Rights.'" Medina v. California, 505 U.S. 437, 443 (1992) (brackets and citation

omitted). As such, only procedures that "offend[] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental" will deprive a criminal defendant of due process. Id. at 446 (quoting Patterson v. New York, 432 U.S. 197, 202 (1977)); see Nelson v. Colorado, 137 S. Ct. 1249, 1255 (2017) (reaffirming that "Medina 'provides the appropriate framework'" for procedural due process within "'the criminal process'") (citation and brackets omitted).

Petitioner appears to contend that the district court should have provided notice of its intent to terminate Clarke's appointment directly to petitioner and then provided petitioner herself an opportunity to be heard, rather than hearing from her counsel. See Pet. 23-24. But the district court permissibly heard from petitioner's primary attorneys, who had a duty to represent petitioner's interests and who themselves recommended that the court terminate Clarke's appointment. See p. 6, supra; cf. Fed. R. Crim. P. 49(b) ("[S]ervice on a party represented by an attorney * * * must be made on the attorney instead of the party, unless the court orders otherwise."); Fed. R. Crim. P. 49(c) (notice of court orders must be given "in a manner provided for in a civil action," which, under Fed. R. Civ. P. 5(b)(1), requires service on the party's attorney if the party is represented). Moreover, the district court held a formal hearing promptly thereafter, informed petitioner personally of its decision and asked petitioner if she

wanted to speak with the court about the matter, which she did not. See p. 7, supra.

Petitioner makes no attempt to show that the procedure followed by the district court to terminate Clarke's appointment in that manner violated due process by "offend[ing] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," Medina, 505 U.S. at 446 (citation omitted). Nor does petitioner cite any decision finding a due process violation in any materially similar context. See Pet. 23-24.

3. In any event, this case would be a poor candidate for review not only because it arises in the context of a COA denial, but also because petitioner procedurally defaulted her Sixth Amendment and due process claims by failing to raise them on her direct appeal. As a result, even if a COA were to issue, petitioner would be foreclosed from obtaining relief on those claims.

This Court has "consistently affirmed that a collateral challenge may not do service for an appeal." United States v. Frady, 456 U.S. 152, 165 (1982) (citing cases). "Where a defendant has procedurally defaulted a claim by failing to raise it on direct review, the claim may be raised in habeas only if the defendant can first demonstrate either 'cause' and actual 'prejudice,' or that [s]he is 'actually innocent.'" Bousley v. United States, 523 U.S. 614, 622 (1998) (citations omitted); see Dretke v. Haley, 541 U.S. 386, 393 (2004).

Petitioner did not argue in her direct appeal that terminating Clarke's appointment violated the Sixth Amendment or due process. 08-1780 Pet. C.A. Br. 54-56; id. at 56-147. The government therefore maintained on collateral review both in district court, see p. 10, supra, and in its opposition to petitioner's COA application in the court of appeals, Gov't C.A. Resp. 213, that petitioner had procedurally defaulted those arguments. Nothing prevented petitioner from raising her claims on direct appeal, as the defendant in Gonzalez-Lopez did, and petitioner has not shown cause or prejudice, much less actual innocence, to excuse that default. Cf. United States v. Gonzalez-Lopez, 399 F.3d 924, 926 (8th Cir. 2005) (raising right-to-counsel-of-choice claim on direct appeal), aff'd, 548 U.S. 140 (2006).[5] No further review is warranted.

[5] Although a defendant may raise a claim of constitutionally ineffective counsel for the first time in a collateral attack, Massaro v. United States, 538 U.S. 500, 509 (2003), petitioner has not sought review of such a claim in this Court and has instead correctly emphasized (Pet. 13) that the "right to the effective assistance of counsel and the right to the choice of counsel are qualitatively different."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 2020