No. 19-5921

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

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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I. Introduction

The government's Brief in Opposition misconstrues the issue at hand and ultimately answers a question different from the Question Presented. Mrs. Montgomery does not claim a right to the appointment of her counsel of choice. Rather, her claim is that disrupting an established attorney/client relationship between an indigent client and appointed counsel is no less a violation of the Sixth Amendment simply because she is poor, than is the disruption of a wealthy criminal defendant's relationship with retained counsel. Pet. at 3. *See also*, *Patterson v. Illinois*, 487 U.S. 285, 290 n.3 (1988) ("Once an accused has a lawyer, a distinct set of constitutional safeguards aimed at preserving the sanctity of the attorney-client relationship takes effect.") This case asks the question: Are there two tiers of Sixth Amendment protection under the constitution? One for the rich and another for everyone else? The government ignores this issue entirely, reframing the issue to obfuscate that which is at stake.

Several factual statements recounted in the Government's Brief in Opposition are disputed. But those disputes are irrelevant to this Court's resolution of the legal question which has split the lower courts.[1] The district court's erroneous conclusion on the merits of the Question Presented in the petition resulted in a denial of an evidentiary hearing in the district court. Because the issue was resolved summarily,

[1] See Mot. Leave to File Amicus Brf., Ethics Bureau at Yale at 5-9 discussing circuit split.

the facts as pled by Mrs. Montgomery's are presumed to be true and all inferences drawn in her favor.[2]

II. Two tiers of justice? The government fails to address the constitutional inequities presented.

The BIO confuses counsel of choice on initial appointment from the right of a criminal defendant to be free from the disruption of her established attorney/client relationship with her preferred lawyer. *Compare* Pet. at i, with BIO at I.

A. The undisputed facts demonstrate the need for certiorari.

The undisputed facts squarely present a purely legal question this Court should resolve.

- Mrs. Montgomery was psychotic, suicidal, and severely mentally ill. Dr. Logan Testimony, ECF. 222 at 929; Dr. Hutchison Testimony, ECF. 222 at 1022-25; E. Hrg. Exs. 37, 39.
- The jail psychiatrist administered strong anti-psychotic medications to stabilize her with only marginal improvement. Declaration of Dr. Linda McCandless (treating psychiatrist); E. Hrg. Ex. 73 at 2; 4/25/06 Tr., E. Hrg. Ex. 67 at 2.
- Mental health experts advised the lawyers that Mrs. Montgomery required hospitalization for her mental illness. Logan Testimony, ECF 222 at 929, 1022-25; E. Hrg. Exs. 37, 39.
- Federal public Defender David Owen, whose bruised ego led him to the judge's chambers, had no death penalty experience, no experience with

[2] For example, the government questions the factual statement that Mrs. Montgomery was in tears when she was brought into court after the abrupt termination of Judy Clarke. BIO at 8, n.2. *First*, Supreme Court Rule 14 does not require record citation in the petition. *Second*, see 4/25/06 Tr., E. Hrg. Ex. 67 at 3 (Susan Hunt states to the Court "You saw her in court on Friday, she's a mess." Hunt goes on to tell the Court that Mrs. Montgomery is "devastated."); ECF 151-4, April 28, 2006 email from Holly Jackson to Susan Hunt at 1 "(Kevin [Mrs. Montgomery's husband] (per his conversation with Ron [investigator]) mentioned to me that Lisa broke down in court, cried, and could not verbally agree with the decision to remove Judy.*"). See also*, Holly Jackson testimony, ECF 219, E. Hrg. Tr. at 714 (describing Mrs. Montgomery as "sobbing," "inconsolable" "incoherent" and "devastated" by the removal of Ms. Clarke.)

mentally ill clients, and was not qualified to represent Mrs. Montgomery. Owen Testimony, R. 224 at 2137. [3]

- The local attorney who served as co-counsel and was nominally learned counsel, informed the judge she had no experience with mentally ill clients and was not qualified to represent Mrs. Montgomery without the assistance of Ms. Clarke. Susan Hunt Testimony, ECF 218 at 397; E. Hrg. Ex. 60.[4]
- Judy Clarke was brought in because of her experience in capital cases, generally, and expertise in mental health and mentally ill clients, specifically. Hunt Declaration, E. Hrg. Ex. 60 at 5; Owen Declaration, E. Hrg. Ex. 62 at 4-5.[5]
- The court's removal of Ms. Clarke left two lawyers who had clearly, succinctly, and unequivocally stated to the court they were unqualified. Owen Testimony, R. 224 at 2137; Hunt Testimony, R. 218 at 397; E. Hrg. Ex. 60.
- Ms. Hunt, the local attorney designated as lead counsel by the court, was not in the room when the court removed Ms. Clarke. May 6, 2013 Tr., ECF 53 at 16; David Owen Declaration, E. Hrg. Ex. 62 at 8-9.
- No one consulted with Mrs. Montgomery about possible changes in the attorney team before the closed-door meeting with the judge.[6] Owen Declaration, E. Hrg. Ex. 62 at 9.
- Mrs. Montgomery did not know about the meeting until the coup was a fait accompli. *Id.*

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[3] The government refers to this lawyer as "primary counsel." BIO at 14, 21, 23, 25, 16. He was not. *See* Owen Testimony, ECF 224, E. Hg Tr. at 2137 (Mr. Owen was not capital qualified and did not have expertise in mental health cases, "no expertise, no"); Hunt testimony, ECF 218, E. Hrg. Tr at 391 (Owen joined Susan Hunt, who was appointed "lead" counsel by the court).

[4] Ms. Hunt's role as counsel varies in the record. The official order of appointment calls her additional counsel. Order Appointing Additional Counsel, Crim. ECF 16. The BIO incorrectly states that this order designated Ms. Hunt as learned counsel. BIO at 5. Elsewhere Ms. Hunt is referred to a lead counsel. The district court told Ms. Hunt that she was "in charge." E. Hrg. Ex. 67, at 13. National death penalty expert Richard Burr, who consulted with the team, puts it this way, "Susan Hunt was 'learning' counsel, she was not learned." Burr Testimony, ECF. 219, E. Hrg. Tr. at 548. Whatever Ms. Hunt was on paper, Judy Clarke was learned counsel in practice.

[5] Ms. Clarke successfully represented Susan Smith (mother who drowned her young children by driving car into a lake), Theodore Kaczynski (the Unabomber), Eric Rudolph (Olympic Park Bomber), Zacarias Moussaoui (9-11 co-conspirator), and Jared Loughner (Tucson mass murderer who killed six people including a federal judge and severely injured Rep. Gabby Giffords). Ms. Clarke's experience in negotiating plea agreements in high profile cases was of crucial value to Mrs. Montgomery whose litigation goal was life imprisonment.

[6] It is unclear that this lawyer requested Clarke's removal in that closed door session. He denies it. E. Hrg. Ex. 62 at 8.

- Neither did Ms. Clarke. *Id.* at 8-9.
- Neither did Ms. Hunt. *Id.*
- Ms. Hunt never asked the court to remove Ms. Clarke. *Id.*
- Ms. Hunt twice asked the court to allow Ms. Clarke to come back to the team. E. Hrg. Exs. 67, 68.
- Ms. Hunt presented Mrs. Montgomery's letter to the court in support of her request to bring Ms. Clarke back to the team. E. Hrg. Ex. 68 at 16.
- The court denied Ms. Hunt's request without hearing from Ms. Clarke or Mrs. Montgomery stating that he would not reconsider his decision to remove Ms. Clarke and that Mrs. Montgomery's preference was irrelevant. *See* 4/25/06 Tr., E. Hrg. Ex. 67 at 5 (acknowledging that Mrs. Montgomery "is not a person who understood all of that."); *Id.* at 10-11 (rejecting request to bring Ms. Clarke back to the team including offer of San Diego Federal Public Defender's office to take the case and allow Ms. Clarke to continue with representation);[7] and 5/3/06 Tr., E. Hrg. Ex. 68 at 18 ("Lisa Montgomery doesn't get to pick who her attorneys are.").

B. BIO ignores the tension between *Gonzales-Lopez* and *Morris v. Slappy*.

If Mrs. Montgomery was a monied defendant the answer in this case would be simple: *United States v. Gonzales-Lopez*, 548 U.S. 140 (2006), demands reversal. The BIO does not dispute this point. BIO at 15, 18. If Ms. Clarke was an attorney in private practice who offered her services *pro bono* the result would be the same. Again, on this point, the government agrees. Id. at 15, 18, 22. How then can the constitution tolerate a different result simply because of bureaucratic red tape imposed by the Administrative Office of the Courts?

[7] The BIO questions whether the San Diego office would have assigned Ms. Clarke to the case. BIO at 18. Respectfully, the government misunderstands the way the Capital Resource Counsel project works. The record clearly supports that the San Diego office would assign the case to Clarke. But that is irrelevant and only serves to obscure the salient facts which the government ignores.

The project that employed Clarke was established by the Office of Defender Services expressly to fulfill congressional intent to provide enhanced rights of representation in capital cases. Judy Clarke Testimony, E. Hrg. Tr. at 617-620. For budgetary reasons its employees are attached to various federal public defender offices throughout the country but are allowed to appear in any federal court involving a prosecution under the Federal Death Penalty Act. *Id.* CRC lawyers bring experienced investigators and paralegals into the case at no cost to the court or the federal defender office. *Id. See also* Burr testimony, ECF 219 at 542.

CRC lawyers, like all federal public defenders, are prohibited from engaging in the private practice of law. And here is where the tension between *Gonzales-Lopez* and *Morris v. Slappy*, 461 U.S. 1 (1983), manifests. What is the principled distinction between a private pro bono lawyer and a CRC lawyer willing to serve? The BIO offers no distinction between the two. There is none.

Mrs. Montgomery does not dispute that there are important principles of judicial economy and prudential reasons that an indigent defendant does not get to choose the lawyer appointed to her in the first instance. None of those principles apply to the removal of a lawyer already appointed. The court had not only accepted Ms. Clarke as a necessary member of the defense team, Ms. Clarke and the services of the CRC were free. Ms. Clarke was willing to serve. Mrs. Montgomery did not want to lose her. The removal of Ms. Clarke resulted in substantial delay. The only basis ever provided for the court's rejection of Ms. Clarke as counsel was parochial preference for local counsel. BIO at 12.

The government supports its position for a two-tiered Sixth Amendment by misconstruing this Court's decision in *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989). The government claims that *Caplin & Drysdale*, stands for the proposition that the Sixth Amendment rights of indigent defendants are circumscribed, i.e., less than that of their wealthy counterparts. BIO at 15. *Caplin & Drysdale* does not support their claim.

Caplin & Drysdale held only that the forfeiture statute did not interfere with the defendant's Sixth Amendment right to counsel of choice. 491 U.S. at 632. There, the defendant's ill-gotten gains were forfeited. He had no funds other than those which were rightfully taken from him. Likening the scenario to a robbery suspects desire to use the proceeds from his robbery to hire a lawyer, the Court held that the Sixth Amendment does not create a right to "spend another person's money "to hire a lawyer "even if those funds are the only way that that defendant will be able to retain the attorney of his choice." *Id.* at 626.

Unlike the defendant in *Caplin & Drysdale*, Mrs. Montgomery did not seek to spend another person's money. Unlike the defendant in *Wheat v. United States,* 486 U.S. 153 (1988), she did not insist on the appointment of a counsel she could not afford. She merely asked for the right to continue her established relationship with appointed counsel whose services are free to her and the court. Disrupting that relationship violates the Sixth Amendment. Mrs. Montgomery's economic status does not make the violation less than the violation in *Gonzales-Lopez*—and the

already established relationship between Mrs. Montgomery and her counsel, Ms. Clarke, makes the violation more egregious.

The government's argument does not answer the question: Is the court entitled to disrupt the established attorney/client relationship of an indigent defendant and her lawyer when it may not do so for the rich defendant and his lawyer? Is the indigent's relationship with her lawyer entitled to the same respect under the constitution? If not, in what other ways is Sixth Amendment jurisprudence firmly established only for the wealthy? Are the secrets of an indigent defendant less protected than those of the wealthy? Does *Gideon v. Wainwright*, 372 U.S. 335 (1963) provide counsel that may be unilaterally removed without notice or process? And what of the defendant who secures *pro bono* counsel? This Court's cases are clear that a court may not erroneously disrupt that relationship without running afoul of the Sixth Amendment's guarantees. Why should Mrs. Montgomery be treated any differently?

As a capital defendant, entitled to an enhanced right to counsel and due process, Mrs. Montgomery's attorney-client relationship with Ms. Clarke deserved more constitutional protection than the defendant in *Gonzales-Lopez. Martel v. Clair*, 565 U.S. 648, 659 (2012) (§ 3599 "aims in multiple ways to improve the quality of representation afforded to capital petitioners."). Other than to make the astonishing argument that a § 2255 movant has no right to appeal the violation of federal law,[8] the government largely dismisses Mrs. Montgomery's reliance on 18 U.S.C. § 3599.

[8] 28 U.S.C. § 2255 provides that a federal criminal defendant may collaterally challenge her conviction and sentence for, *inter alia*, violation of "the laws of the United States."

While violating the statute is a subsidiary question to that presented in the petition, the statute is also important in understanding Mrs. Montgomery's Fifth and Sixth Amendment rights. Because death is qualitatively different from any other sentence imposed there is a heightened need to ensure reliability in sentencing. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). For this reason, Congress intended for federal capital defendants to receive "enhanced rights of representation." *See Martel*, 556 U.S. at 659. Section 3599 codifies the right to enhanced representation by circumscribing ways representation can be disrupted, including by the courts. That the government has a different view demonstrates the debatability of the issue.

C. The lower courts are split.

The government alleges that three of the cases relied on by Petitioner were resolved on "nonconstitutional" grounds. BIO at 19. *Amadeo v. Zant*, 259 Ga. 2nd 469 (1989) clearly and unequivocally cites to the Sixth Amendment at the outset of its analysis. The court was presented with two Sixth Amendment theories. The issue the court did not decide was whether the Sixth Amendment required the appointment of counsel with prior capital experience in every capital case. The court did conclude that the "desirability of involving local lawyers was outweighed by the defendant's relationship of trust and confidence the defendant had with his prior counsel." *Id*.

The *Amadeo* court found persuasive the opinion of another case cited by Mrs. Montgomery, *Harris v. Superior Court*, 19 Cal. 3d 786 (Cal. 1977). *Harris* analyzed

its holding in light of the Sixth and Fourteenth Amendments as interpreted in *Faretta v. California*, 422 U.S. 806 (1975). Further it drew heavily from the decision in *Drumgo v. Superior Court*, 506 P.2d 1007 (Cal. 1973) which states that its analysis is based on constitutional and statutory grounds. *Id.* at 1009. *Harris* held that a defendant's statement of personal preference was entitled to consideration and failure to do so absent "countervailing considerations of comparable weight" was an abuse of discretion. *Id*. at 327.

Davis v. Cain, 662 So.2d 453 (La. 1995), while a post-conviction case, is no less relevant. There the court held that the lower court erred on remand in failing to re-appoint death penalty expert Denise LeBouef and the Loyola Death Penalty Resource Center who had already invested a number of hours in the case resulting in a successful appeal. Noting that Ms. LeBouef stated she would not be seeking compensation and finding determinative "[a]ny other appointed attorney will have to invest much time and considerable resources to match her knowledge of the facts and legal issues." *Id.* Thus, Louisiana found a court errs in failing to appoint *pro bono* counsel because of counsels' undeniable expertise and experience with the case: it follows that Louisiana would not permit removal of expert *pro bono* counsel out of a preference for an incompetent local counsel.

The government cites *Magana v. Superior Court*, 231 Cal. Rptr. 3d 882, 898 (Cal. Ct. App. 2018) for the proposition that *Smith v. Superior Court of Los Angeles County*, 68 Cal.2d 547 (1967) cited by Petitioner is no longer good law. BIO at 22. *Magana*, relies on *People v. Jones*, 91 P.3d 939 (Cal. 2004), for the proposition that

Smith was superseded by *Wheat*. *Magana* 231 Cal. Rptr. at 898. *Magana* is not only distinguishable from the issues presented here, quoting the *Magana* court's assessment of *Smith* as an across-the-board repudiation of the holding of *Smith* is disingenuous. *Wheat* only superseded *Smith* if the court's interference in the attorney-client relationship was occasioned by a conflict of interest. *Jones*, 91 P. 3d at 945. *Smith* otherwise remains good law as demonstrated by the California Court of Appeals—the court Respondent says found *Smith* to have been abrogated—continuing to quote *Smith* post-*Magana*. *See e.g.*, *Sacher v. Sacher*, 2019 WL 2337393 (Cal. Ct. App. 2019) (unpublished opinion, quoting *Smith's* holding that the relationship between indigent defendant and appointed counsel is no less inviolable than had counsel been retained).

The government's attempt to discount the Texas cases cited by Mrs. Montgomery is unavailing. The government suggests that the cases are limited to instances of *sua sponte* removal of counsel. BIO at 23. The government agrees these cases hold that an appointed attorney may not be removed absent a "principled" reason. Exactly. Here there was no principled reason for removing the only qualified attorney at the request of the least qualified attorney leaving Mrs. Montgomery with two admittedly unqualified attorneys. If, after a hearing—which is the *sine qua non* of principled decision making—the court determined it was necessary to remove or change counsel, the court could have weighed the varying experience of counsel, the requirements posed by the complexity of the case, and Mrs. Montgomery's relationship with each, and determined which combination of counsel

would be most effective in protecting Mrs. Montgomery's rights and the court's interest in the administration of justice. Absent a deliberative process, the trial court has stated that it removed Ms. Clarke solely based on preference for local counsel. This is not a constitutionally principled reason for interference in the attorney-client relationship in a capital case.

As pointed out by *amici*, a split among the circuits has developed –the D.C., First, and Seventh Circuits versus the Second, Fourth, Sixth, and Eighth Circuits – which requires this Court's resolution. Mtn. Leave to File Amicus Curiae Brf. at 5-9 (noting that a majority of states agree with the D.C., First, and Second Circuits).

D. No default occurred. Government's argument is a red herring.

As explained in the petition, Mrs. Montgomery's claim was preserved. The government argues that Mrs. Montgomery had an obligation to speak out at the *pro forma* court appearance held the day after the court's abrupt removal of Ms. Clarke. As discussed, even the court acknowledged that Mrs. Montgomery did not understand what was going on in the courtroom. E. Hrg. Ex. 67 at 5. At the time of the court appearance, Ms. Hunt informed the court that she and Owen had only spoken with Ms. Clarke at the courthouse as court proceedings were about to begin. E. Hrg. Ex. 66 at 3. They told the court she was upset. From the descriptions of the witnesses "upset" was a euphemism. It suggests disagreement. How would the government ask a mentally ill, devastated, inconsolable defendant on trial for her life to further interpose her objection?

The following week, Susan Hunt went to the court to "revisit" the decision to remove Ms. Clarke. E. Hrg. Ex. 67 at 3. She implored the court to bring Ms. Clarke back into the case. E. Hrg. Ex. 67. She tried again the next week on May 3. E. Hrg. Ex. 68. She offered various options and offered Mrs. Montgomery's written letter supporting the request. E. Hrg. Ex. 68 at 16. The court refused. E. Hrg. Ex. 67 at 10, Ex. 68 at 25. A few weeks later the court directed Ms. Hunt to withdraw because the federal public defender decided he no longer wanted to work with Ms. Hunt because of her insistence on bringing Ms. Clarke back into the case. E Hrg. Tr. at 419.

The government imagines that Ms. Clarke consented to her removal and this somehow constitutes a default. Ms. Clarke never consented.[9] The court never heard from Ms. Clarke, because the court barred her from all communication with her client and stripped her of her right to appear as counsel in the district. Had Ms. Clarke attempted to file anything she would have violated a court order — and potentially subjected to bar proceedings for representing a client without consultation. Moreover, it is not Ms. Clarke's Sixth Amendment right at issue.

Mrs. Montgomery could not raise this issue on appeal because she was represented by her trial attorney. As explained, Pet. at 11, n.8, for trial counsel to raise this issue would have been a challenge to his own appointment: it was a conflict of interest. Further, the district court prevented a full record by not holding

[9] E. Hrg. Ex.3, Clarke declaration at 8-9 (Clarke had made a plan to heal the division of the team. After her removal, San Diego federal defender office agreed to take the case with Ms. Clarke as counsel and Ms. Hunt as co-counsel). *See also* E. Hrg. Ex. 68 at 10.

a hearing. The issue required evidence outside the trial record which was provided to the court supporting Mrs. Montgomery's § 2255 motion. It has long been the case that a defendant is not required to raise Sixth Amendment issues requiring extra record evidence on direct appeal. *Martinez v. Ryan*, 566 U.S. 1, 13 (2012)

III. The government's suggestion that the right to counsel is not fundamental and the deprivation thereof not entitled to due process protections is indefensible.

The BIO suggests that due process principles are inapplicable here. BIO at 26. The Sixth Amendment "right to counsel is the foundation to our adversary system." *Martinez*, 566 U.S. at 12. The deprivation of that right through the removal of clearly qualified and preferred counsel without notice and a hearing defies due process principles in violation of the Fifth and Sixth Amendments.

The government alleges that the court took all factors in consideration. BIO at 12. That assertion is belied by the record. A court cannot consider what it does not know.

For example, the government takes it as a given that the Judy Clarke-led team required the removal of one lawyer. BIO at 26. This is far from a given. For the to determine whether removal of any lawyer was required the would have had to hold a hearing. Had the court conducted a full and fair hearing, it is entirely plausible that it would have determined a personality was not a principled reason to remove any of the lawyers and the team could have worked out its differences to remain intact.[10]

[10] *See* Declaration of Judy Clarke, E. Hrg. Ex. 3 at 7. After noting that divisions in the team were present before she joined, Ms. Clarke state "Capital cases are always difficult, but I have managed to

But even if the legal team needed a personnel change, Mrs. Montgomery had a right to notice and a hearing before her relationship with Ms. Clarke was disrupted. It is not sufficient that the court heard from the ego-stricken lawyer with no relevant experience, as the government suggests. BIO at 26. A hearing would have permitted the court to consider the steps that Ms. Clarke had taken in representing Mrs. Montgomery, the progress being made, and the obstacles faced. A hearing would have provided the information necessary to make a principled decision. At the very least, due process requires that the desire of the defendant be weighed by the court before it disrupts an on-going established attorney-client relationship.

IV. Conclusion

In this capital case Mrs. Montgomery has been denied an appeal on constitutional claims debatable among jurists of reason.

WHEREFORE, the petition should be granted. Alternatively, the Court, or a member of it, should issue a certificate of appealability.[11]

work with a number of teams through the tense and exhausting disputes that inevitably arise when the consequences are life and death, the pace of the work is overwhelming, and the issues complex and multi-dimensional."

[11] 28 U.S.C. § 2253 permits a single justice or judge to issue a COA.

Respectfully submitted,

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