

IN THE SUPREME COURT OF THE UNITED STATES

TIMOTHY MIERS, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly affirmed the denial of petitioner's counsel's motion to withdraw before sentencing, where he cannot establish that he was denied effective assistance of counsel in violation of the Sixth Amendment under Strickland v. Washington, 466 U.S. 668 (1984).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A5) is not published in the Federal Reporter but is reprinted at 686 Fed. Appx. 838.

JURISDICTION

The judgment of the court of appeals was entered on April 28, 2017. A petition for rehearing was denied on June 27, 2017 (Pet. App. C1-C2). The petition for a writ of certiorari was filed on September 25, 2017. 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 Southern District of Florida, petitioner was convicted of kidnapping, in violation of 18 U.S.C. 1201(a)(1), and two counts of interstate domestic violence, in violation of 18 U.S.C. 2261 (Supp. II 2015). He was sentenced to life imprisonment. The court of appeals affirmed. Pet. App. A1-A5.

1. Petitioner was a long-distance truck driver who transported goods across the eastern United States. Pet. App. A2. Petitioner invited his girlfriend, J.C.M., to join him on several long-distance trips, and they took six trips together. Ibid. At the beginning of their sixth trip, on August 15, 2014, petitioner learned that J.C.M. had been intimate with another man. Id. at A2-A3. Petitioner became aggressive and hit her on her face, but they reconciled after he apologized. Id. at A3.

Between August 17 and 19, petitioner and J.C.M. traveled from New York to Boston, and then south toward Florida. Pet. App. A3. J.C.M. testified at trial that, on August 17, petitioner “changed totally” and threatened her and her family when she asked if she could be dropped off. Ibid. Petitioner also told J.C.M. that he had hurt his previous girlfriends, including that he had killed an ex-girlfriend and would do the same to J.C.M.; that he had thrown another ex-girlfriend, R.D., out of a moving truck; that he had

hit yet another ex-girlfriend; and that he had beaten his ex-wife so hard that she became disabled. Ibid.

J.C.M. testified at trial that, for several days, petitioner raped, bound, and physically and verbally abused her. Pet. App. A3. On August 19, petitioner stopped at a truck stop in Virginia, where he and J.C.M. entered private showers. Ibid. There petitioner locked her up against her will and strangled, beat, and spit on her. Ibid. After leaving the truck stop, they continued to drive, and petitioner beat J.C.M. until she admitted infidelity. Ibid. Petitioner then strangled J.C.M., bound her with duct tape, gagged her, and told her he was going to kill her. Id. at A3-A4. The abuse continued, and petitioner filmed while he raped and demeaned her. Id. at 4. J.C.M. was finally able to escape when they arrived in Medley, Florida, on August 21. Ibid.

2. A grand jury in the Southern District of Florida returned an indictment charging petitioner with kidnapping, in violation of 18 U.S.C. 1201(a)(1), and two counts of interstate domestic violence, in violation of 18 U.S.C. 2261. See Pet. App. A2. After a jury trial, petitioner was convicted on all counts. Id. at A4.

The Presentence Investigation Report (PSR) recommended a base offense level of 32 under the Sentencing Guidelines; a two-level enhancement because J.C.M. sustained serious bodily injury; a one-level enhancement because J.C.M. was not released before seven days had elapsed; and a six-level enhancement because J.C.M. was

sexually exploited. Pet. App. A4. The PSR recommended a total offense level of 41 and a criminal history category of VI, resulting in an advisory Guideline range of 360 months to life imprisonment. Ibid.

Petitioner did not file any objections to the PSR before they were due. After that deadline, and less than two weeks before sentencing, petitioner's appointed counsel moved to withdraw, citing a breakdown in communication. Pet. App. A4; see Gov't C.A. Br. 48-49.

At the sentencing hearing, the district court asked petitioner to describe his reasons for his dissatisfaction with his counsel. Sent. Tr. 2-12. Petitioner complained primarily about counsel's performance and investigation during the trial. Ibid. The court then denied the motion, explaining that:

There is no justification as a matter of law that would justify the granting of [petitioner's] counsel to withdraw.

I understand he is dissatisfied with the result in this case. Having sat through trial and heard the evidence, there was overwhelming evidence of [petitioner's] guilt.

It had nothing to do with counsel that was appointed by the Court; who was appeared before the Court on numerous occasions, and has demonstrated his competence consistently and his zealous advocacy on behalf of all his clients at all times. He is excellent counsel, and anyone would be privileged to have him represent them.

* * *

I find no basis to believe there was -- that there is a total lack of communication between counsel. And I find there is no other justification to grant the motion.

Id. at 14-15. The court also denied a continuance requested by petitioner. Pet. App. A4. And the court refused to accept various

motions that petitioner had attempted to file pro se, because he was represented by counsel. Sent. Tr. 15.

The district court then proceeded to sentencing. Petitioner's counsel did not make any objections to the PSR, explaining that when he had attempted to meet with petitioner regarding the PSR, petitioner refused and expressed concerns with his representation. Pet. App. A4. The court did, however, hear argument from petitioner directly regarding the potential sentence. Sent. Tr. at 20. And petitioner's counsel argued that he should receive a sentence at the low end of the range recommended by the Guidelines. Id. at 23. The court then found that all three sentencing enhancements recommended under the Guidelines applied, and sentenced petitioner to life imprisonment as to Count 1, and 120 months' imprisonment as to Counts 2 and 3, to be served concurrently. Pet. App. A4-A5.

3. On appeal, petitioner argued (as relevant here) that the district court had erroneously denied his counsel's motion to withdraw before sentencing. Pet. App. A11. The court of appeals rejected that argument. Id. at A11-A14. The court stated that, "[e]ven assuming that the district court abused its discretion by denying the motion" to withdraw, petitioner was still required to "'demonstrate that, in the context of the sentencing hearing, he was somehow prejudiced by trial counsel continuing to represent him,'" which required petitioner to "'show that counsel's

performance was not within the range of competence demanded of attorneys in criminal cases and that but for counsel's continued representation at the sentencing hearing, the result of the proceeding would have been different.'" Id. at A12 (quoting United States v. Calderon, 127 F.3d 1314, 1343 (11th Cir. 1997), cert. denied, 522 U.S. 1133, 523 U.S. 1033, and 523 U.S. 1144 (1998)). And the court determined that, "[e]ven if counsel's failure to object to the [PSR] constituted performance that was not within the requisite range of competence, * * * the sentence would have been the same" if different counsel had represented petitioner. Id. at A13.

Although the court of appeals found that the one-level enhancement for holding J.C.M. for seven days or more likely did not apply because the kidnapping began at the earliest on August 17, 2014 and ended on August 21, the court noted that the enhancement had not affected petitioner's sentencing range; eliminating that enhancement "would have left [petitioner] with an offense level of 40 and an identical guidelines range of 360 months' imprisonment to life imprisonment." Pet. App. A13-A14. And the court of appeals observed that the district court had concluded that all of the other sentencing enhancements were supported by "'substantial and overwhelming' evidence." Id. at A13 (quoting Sent. Tr. 24). The court of appeals additionally observed that the district court had "specifically considered" the

sentencing factors under 18 U.S.C. 3553(a) regarding a possible sentence “‘outside the otherwise applicable guideline range,’” and had taken into account the nature and circumstances of the offense, including petitioner’s “‘cruel, brutal[,] and degrading conduct towards the victim,’” as well as petitioner’s history and characteristics, “describing in detail his lengthy criminal history, and ultimately concluding that [petitioner] has had no respect for the law throughout his entire adult life, and that ‘[i]t is clear the only way to deter this defendant is to imprison him; otherwise he will commit further crimes.’” Id. at A14 (quoting Sent. Tr. 33).

ARGUMENT

Petitioner contends (Pet. 11-29) that the court of appeals erred in affirming the denial of his motion for substitution of counsel at sentencing on the ground that he could not show that he was denied effective assistance of counsel in violation of the Sixth Amendment. Petitioner argues that the court should have assessed any prejudice from the denial of his counsel’s motion by applying the standard of Chapman v. California, 386 U.S. 18, 24 (1967), rather than the standard of Strickland v. Washington, 466 U.S. 668, 694 (1984). But petitioner forfeited this argument by never raising it below. Even if the issue were not forfeited, the court of appeals applied the correct standard here because a defendant like petitioner, who has received constitutionally

adequate representation under Strickland, cannot establish a Sixth Amendment violation. Furthermore, this case would not be a suitable vehicle for assessing the question presented because the district court here correctly denied petitioner's counsel's motion to withdraw, and any error would not be prejudicial under any standard.

1. The Sixth Amendment guarantees a felony defendant the assistance of counsel at all critical stages of the criminal proceedings. See Montejo v. Louisiana, 556 U.S. 778, 787 (2009). If the defendant cannot afford an attorney, he is entitled to appointed counsel. Gideon v. Wainwright, 372 U.S. 335 (1963). An indigent defendant, however, has no right to counsel of his choosing. Caplin & Drysdale Chartered v. United States, 491 U.S. 617, 624 (1989); see also Wheat v. United States, 486 U.S. 153, 159 (1988) (noting that "a defendant may not insist on representation by an attorney he cannot afford"); United States v. Gonzalez-Lopez, 548 U.S. 140, 144 (2006). Nor does he have a right to a "meaningful relationship" with his counsel, so long as he is receiving adequate representation. Morris v. Slappy, 461 U.S. 1, 12, 14 (1983).

Section 3006A of Title 18, which governs the appointment of counsel for indigent federal defendants, provides that the "court may, in the interests of justice, substitute one appointed counsel for another at any stage of the proceedings." 18 U.S.C. 3006A(c).

“Because a trial court’s decision on substitution is so fact-specific, it deserves deference; a reviewing court may overturn it only for an abuse of discretion.” Martel v. Clair, 565 U.S. 648, 663-664 (2012). Even if, however, a district court abuses its discretion in declining to appoint new counsel, the courts of appeals agree that reversal of a conviction or sentence is not warranted unless the defendant was prejudiced.

Six circuits, including the court below, have held that because a motion by counsel to withdraw asserts an injury under the Sixth Amendment right to effective assistance of counsel, a defendant seeking to overturn the denial of such a motion must establish a violation of Strickland by showing that, with substitute counsel, the result of the proceeding would likely have been different. See, e.g., United States v. John Doe # 1, 272 F.3d 116, 123 (2d Cir. 2001) (“[I]f * * * the defendant receives competent representation from counsel, a court’s failure to inquire sufficiently or to inquire at all constitutes harmless error.”), cert. denied, 537 U.S. 851 (2002); United States v. Horton, 693 F.3d 463, 467 (4th Cir. 2012) (any error in denying a motion for new counsel was harmless where “there is clear evidence that [counsel] provided an adequate defense”); United States v. Zillges, 978 F.2d 369, 372 (7th Cir. 1992) (“[I]f a defendant is still afforded effective representation, an erroneous denial of a substitution motion is not prejudicial. By analogy, a district

court's failure to conduct a sufficient inquiry into a substitution motion does not constitute reversible error unless it resulted in a denial of this Sixth Amendment right."); Schell v. Witek, 218 F.3d 1017, 1026 (9th Cir. 2000) ("[T]he ultimate constitutional question the federal courts must answer here is not whether the state trial court 'abused its discretion' in not deciding [the defendant's] motion [for new counsel], but whether this error actually violated [the defendant's] constitutional rights * * * [because] a total lack of communication or other significant impediment that resulted in turn in an attorney-client relationship that fell short of that required by the Sixth Amendment."); United States v. Calderon, 127 F.3d 1314, 1343 (11th Cir. 1997) ("To successfully demonstrate prejudice, appellant must show that counsel's performance was 'not within the range of competence demanded of attorneys in criminal cases' and that 'but for' counsel's continued representation at the sentencing hearing, 'the result of the proceeding would have been different.'") (citation omitted), cert. denied, 522 U.S. 1133, 523 U.S. 1033, and 523 U.S. 1144 (1998); United States v. Graham, 91 F.3d 213, 222 (D.C. Cir. 1996) (the defendant's "claim to substitute counsel must fall with his claims to have received ineffective assistance from his court-appointed lawyer"), cert. denied, 519 U.S. 1136 (1997).

One circuit panel has disagreed and stated that it would apply the prejudice standard from Chapman, which requires the government to prove beyond a reasonable doubt that any error in the district court's denial of the motion to withdraw was harmless. United States v. Lott, 310 F.3d 1231, 1252 (10th Cir. 2002), cert. denied, 538 U.S. 936, and 538 U.S. 991 (2003); see Pet. App. A13 n.4 (noting that Lott disagreed with Calderon). The Tenth Circuit did not itself apply that standard, however, but instead announced it as part of its instructions to a district court on remand. Lott, 310 F.3d at 1250-1251. Nor have any subsequent panels applied that standard on appellate review of a claim like the one petitioner raises here.

2. The court of appeals in this case assumed for purposes of argument that the district court abused its discretion in denying petitioner's counsel's motion to withdraw at sentencing, but determined that any error was harmless because, applying the Strickland standard per circuit precedent, petitioner could not show that, even with different counsel, he would have received a different sentence. Pet. App. A12-A13. Petitioner now contends (Pet. 11-22) that, rather than invoke Strickland, the court of appeals should have applied Chapman and required the government to prove harmlessness beyond a reasonable doubt.

a. Petitioner's argument is forfeited, because his briefs to the court of appeals never argued that Chapman should govern a

prejudice analysis, or even cited Chapman at all. In fact, petitioner's opening brief and reply brief both treated Calderon -- which had used the Strickland standard -- as controlling. See Pet. C.A. Br. 41; Pet. C.A. Reply Br. 29. Nor did petitioner ask the court to rehear his case en banc in order to consider whether to modify Calderon. As a result, the question that petitioner now emphasizes in the petition was never pressed or passed on by the court below. This Court should follow its "normal practice" of denying review of issues not raised below. EEOC v. Federal Labor Relations Auth., 476 U.S. 19, 24 (1986) (per curiam); see OBB Personenverkehr AG v. Sachs, 136 S. Ct. 390, 397 (2015) (a party's argument "was never presented to any lower court and is therefore forfeited").

b. In any event, the court of appeals used the correct standard to assess any hypothetical prejudice arising from the district court's denial of counsel's motion to withdraw. For petitioner to show that he was entitled to new appointed counsel, his representation by existing counsel must have fallen below the standard required by the Sixth Amendment, because an indigent defendant does not have a right to a "meaningful relationship" with his appointed counsel, so long as he receives adequate representation. Morris, 461 U.S. at 14; see, e.g., Zillges, 978 F.2d at 372. And in order to establish that constitutional violation, Strickland requires petitioner to show that, with

different counsel, the result of his sentencing proceeding would likely have been different. Ibid.

Chapman is this Court's standard for determining whether, once a constitutional violation has been shown, that error was harmless. See, e.g., Rose v. Clark, 478 U.S. 570, 576 (1986) (Chapman applies to "errors of constitutional dimension"). Here, however, the court of appeals had no reason to apply Chapman because, under Strickland, petitioner failed to establish a Sixth Amendment violation in the first place. "The prejudice prong of Strickland * * * does not ask whether an error was harmless but whether there was an error at all." Weaver v. Massachusetts, 137 S. Ct. 1899, 1915-1916 (2017) (Alito, J., concurring in the judgment). Petitioner does not dispute the determination below that he was not prejudiced under Strickland, nor does he identify another error to which the Chapman standard would apply. Petitioner is thus wrong to contend (Pet. 14-17) that the decision below conflicts with Chapman or any other decision of this Court.

The Tenth Circuit's dicta in Lott, on which petitioner relies (Pet. 13), likewise identifies no sound reason for application of Chapman. The Tenth Circuit's reasoning appears, at bottom, to rest on the mistaken premise that a defendant's Sixth Amendment rights can be violated even if he is represented by constitutionally effective counsel. Lott, 310 F.3d at 1251. But contrary to the Tenth Circuit's assertion, see ibid., a defendant

in that circumstance is not similarly situated to a defendant who had no counsel at all. See Morris, 461 U.S. at 14 (no right to a “meaningful relationship” with counsel). Whether on direct appeal or collateral review, see Massaro v. United States, 538 U.S. 500, 509 (2003), an indigent defendant challenging the failure of the district court to appoint substitute counsel must establish under Strickland that he was deprived of effective counsel in violation of the Sixth Amendment.

3. Petitioner contends (Pet. 12-13) that the court of appeals’ decision conflicts with the decisions of several other circuits. Petitioner overstates the disagreement. As explained above, pp. 9-10, supra, six courts of appeals agree that, in a case like this one, a reviewing court should apply Strickland to determine whether the defendant has shown a violation of the Sixth Amendment that entitled him to substitute counsel. Contrary to petitioner’s claim (Pet. 12-13), no other court of appeals has adopted the approach suggested (but not applied) by the Tenth Circuit in Lott. In most of the other cases cited by petitioner, the court of appeals denied relief on the ground that the district court had not abused its discretion in denying the motion in question. See, e.g., United States v. Jones, 778 F.3d 375, 388 (1st Cir. 2015); United States v. Carreto, 583 F.3d 152, 158 (2d Cir.), cert. denied, 558 U.S. 1085 (2009) and 559 U.S. 963 (2010); United States v. Caban, 573 Fed. Appx. 172, 175 (3d Cir. 2014);

United States v. Austin, 812 F.3d 453, 455 (5th Cir. 2016); United States v. Pendleton, 832 F.3d 934, 942 (8th Cir. 2016). Those decisions do not conflict with the denial of relief here.

Petitioner also cites (Pet. 12-13) United States v. Powell, 847 F.3d 760 (6th Cir.), cert. denied, 138 S. Ct. 143 (2017), but that case involved retained counsel, not appointed counsel. The defendant was deprived of his right to retained counsel of choice, and harmless-error review did not apply. See id. at 777-778 (citing Gonzalez-Lopez, 548 U.S. at 144). And United States v. Blackledge, 751 F.3d 188, 197 (4th Cir. 2014), involved a civil commitment hearing and therefore did not implicate the Sixth Amendment.¹

4. Even if the question presented otherwise warranted this Court's review, this case would be a poor vehicle in which to address it, for multiple reasons.

a. The court of appeals did not resolve the threshold issue of whether the district court abused its discretion in denying petitioner's counsel's motion to withdraw; it merely assumed an error for purposes of argument. And the record shows that the district court did not, in fact, abuse its discretion. Courts reviewing the denial of a defendant's request for substitute

¹ Petitioner cites "United States v. Newman, 637 Fed. Appx. 649 (9th Cir. 2016)," Pet. 13 (capitalization altered), but the government has been unable to identify the case to which he refers.

appointed counsel, or of appointed counsel's request to withdraw, consider "the timeliness of the motion; the adequacy of the district court's inquiry into the defendant's complaint; and the asserted cause for that complaint, including the extent of the conflict or breakdown in communication between lawyer and client (and the client's own responsibility, if any, for that conflict)." Martel, 565 U.S. at 663-664; see Pet. App. A11-A12. Here, all of those factors weigh heavily against petitioner.

First, petitioner's pro se motion for a new trial and to continue sentencing (in which he complained of his counsel's performance) and counsel's motion to withdraw were both filed at a very late stage in the proceedings, after the deadline for objections to the PSR had passed, and less than two weeks before the sentencing hearing was initially scheduled. Second, the district court adequately inquired into petitioner's complaints about counsel and permitted lengthy argument before sentencing. See Sent. Tr. 2-18. And as the court observed, petitioner's complaints largely boiled down to petitioner being "dissatisfied with the result in this case," id. at 14, which "had nothing to do with counsel that was appointed by the Court," ibid. Rather, petitioner was convicted because "there was overwhelming evidence of [his] guilt." Ibid. Third, to the extent a breakdown in communications prevented petitioner's counsel from lodging objections to the PSR, that breakdown resulted from petitioner's

own unjustifiable refusal to meet with counsel to discuss such objections. See Sent. Tr. 17-19. A defendant “cannot force the appointment of new counsel by simply refusing to cooperate with his attorney, notwithstanding the attorney’s competence and willingness to assist.” Harding v. Davis, 878 F.2d 1341, 1344 n.2 (11th Cir. 1989); see also Romero v. Furlong, 215 F.3d 1107, 1114 (10th Cir.) (“A breakdown in communication warranting relief under the Sixth Amendment cannot be the result of a defendant’s unjustifiable reaction to the circumstances of his situation.”), cert. denied, 531 U.S. 982 (2000). Thus, the district court did not abuse its discretion in declining to appoint new counsel, and petitioner would accordingly not be entitled to relief even if he prevailed on the question presented.

b. In addition, the court of appeals’ analysis illustrates that any error was harmless under any standard, because petitioner would have received the same sentence even with new counsel. Petitioner argued on appeal that the court might have imposed a different sentence if his counsel had objected to the PSR’s recommendation for “a one-level sentence enhancement pursuant to U.S.S.G. § 2A4.1(b)(4)(B), because the victim was not released before more than seven days elapsed.” Pet. C.A. Br. 43. But as the court of appeals correctly observed, eliminating that enhancement “would have left [petitioner] with * * * an identical

guidelines range of 360 months' imprisonment to life imprisonment." Pet. App. A14.

Petitioner has not identified any other potential error in the district court's Guidelines' calculation. As the court of appeals observed, "the district court specifically addressed each of the enhancements in the [PSR] and found that 'substantial and overwhelming' evidence supported" each one. Pet. App. A13 (citing Sent. Tr. 24). J.C.M. testified at trial that petitioner repeatedly bound, gagged, and raped her, which supported petitioner's six-level enhancement under Sentencing Guidelines § 2A4.1(b)(5) for sexually exploiting J.C.M. See Pet. App. A3-A4; PSR 5-7. Petitioner also repeatedly beat and strangled J.C.M., Pet. App. A3-A4, burned her with cigarettes, punched her in the face, and "inflicted a severe bite wound to [her] buttocks," PSR 5-6, all of which supported petitioner's two-level enhancement under Guidelines Section 2A4.1(b)(2)(B) because the victim sustained serious bodily injury.²

Finally, petitioner suggested to the court of appeals that different counsel might have pursued a below-Guidelines sentence. See Pet. C.A. Br. 43. But the district court specifically stated that it had considered whether the factors in 18 U.S.C. 3553(a)

² Even without this two-level enhancement under Guidelines Section 2A4.1(b)(2)(B), petitioner's revised offense level of 38 and criminal history category of VI would have produced an identical recommended sentencing range of 360 months to life imprisonment.

would support "a sentence outside the otherwise applicable guideline range," Sent. Tr. 33, and concluded that they did not. Moreover, petitioner's appointed counsel requested a sentence at "the low end of the guidelines," id. at 23, and the court concluded that even that sentence would not be appropriate in light of the Section 3553(a) factors. See id. at 24. The district court had ample bases for reaching that conclusion, and different counsel could not have achieved a better result.

The district court "describ[ed] in detail [petitioner's] lengthy criminal history," which was also extremely violent. Pet. App. A14; Sent. Tr. 24-33. "[H]is life of crime started at age 18," including, inter alia, multiple narcotics charges; multiple burglary arrests and convictions; grand larceny, during which petitioner "possessed a stolen vehicle, damaged the vehicle and attempted to run over the victim during his escape"; obstruction of administration of law during which petitioner "took control of [a] patrol vehicle, backed up, attempted to run over the police officer and sped away"; driving towards an officer in a reckless manner, creating a substantial risk of serious bodily injury; causing a collision while fleeing; conspiracy to transport stolen vehicles; conspiracy to commit theft; and multiple assault and battery arrests and convictions, including for "str[iking] a police officer in the head with a tire iron while fleeing a burglary," "assault by automobile" in connection with a hit-and-

run, and "aggravated assault of a police officer" during which petitioner "sped away in his vehicle * * * struck a patrol unit and civilian vehicle." Sent. Tr. 24-33; see also PSR 12-29.

The PSR also showed petitioner's extensive history of domestic violence, which was confirmed in trial testimony. He had prior convictions for "chok[ing] and slap[ping] his girlfriend about the face" and multiple instances of "battery on his wife" leaving her "with injuries requiring medical attention." PSR 14. He had also committed "aggravated domestic battery and false imprisonment" during which he "forced his girlfriend into a vehicle and then drove, and when the victim attempted to exit * * * was forced back inside," with "[s]everal witnesses indicat[ing that petitioner] struck the victim several times about her body and drove off with her body partially out of the truck, causing the victim's feet to drag on the pavement." PSR 24. A former girlfriend testified at trial that petitioner beat her, threatened to kill her, and then violated a restraining order by pursuing her in a vehicle. PSR 7. Two witnesses to petitioner's violence admitted to the FBI that petitioner had threatened and coerced them into telling police that petitioner had not beaten his girlfriend. Ibid. Petitioner's former spouse testified that petitioner repeatedly beat and raped her, confined her to a closet in their home, suffocated her with a plastic bag, burned her, strangled her, and threatened to kill her and her daughter, all of

which led her to attempt to commit suicide. PSR 7-8. J.C.M. testified at trial that petitioner told her that he had thrown his ex-girlfriend out of a car, had beaten his ex-wife so hard that she became disabled, and had killed another ex-girlfriend. See Pet. App. A3. Petitioner's ex-girlfriend, D.B., was last seen the weekend of July 4, 2012 with petitioner; she has been missing ever since. PSR 9. A search warrant executed at the home D.B. shared with petitioner showed D.B.'s blood on the walls and behind the baseboard, and officers later recovered her phone and wallet from petitioner's car. Ibid. The district court thus observed that "[t]his defendant throughout his entire adult life has had no respect for the law" and that "[i]t is clear the only way to deter this defendant is to imprison him; otherwise he will commit further crimes." Sent. Tr. 33.

The district court also based its sentence on the fact that, in the course of petitioner's crime, he engaged in "cruel, brutal and degrading conduct towards the victim." Sent. Tr. 33; see Statement of Reasons 2 ("Based upon the circumstances of this offense, the defendant's cruel, brutal and degrading conduct towards the victim, a sentence at the high end of the guidelines range was imposed."). In light of this record before the court of appeals, any error by the district court in declining to appoint new counsel before sentencing was harmless beyond a reasonable doubt.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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