No. 23-6139

IN THE

Supreme Court of the United States

MILTON DWAYNE GOBERT,
Petitioner,

v.

BOBBY LUMPKIN, Director, Texas Department of Criminal Justice,
Correctional Institutions Division,
Respondent.

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

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

JOSH RENO
Deputy Attorney General
For Criminal Justice

EDWARD L. MARSHALL
Chief, Criminal Appeals Division

STEPHEN M. HOFFMAN
Assistant Attorney General
Counsel of Record

MOLLY M. KNOWLES
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
Tel: (512) 936–1400
stephen.hoffman@oag.texas.gov

Counsel for Respondent

CAPITAL CASE
QUESTIONS PRESENTED

1. Should this Court grant certiorari to review the Fifth Circuit's denial of a certificate of appealability (COA) as to Gobert's claim that he received ineffective assistance of trial counsel when—upon Gobert's insistence and withholding of information—trial counsel called a particular witness during trial?

2. Should this Court grant certiorari to review the Fifth Circuit's decision affirming the district court's denial of Gobert's untimely motions for substitute counsel when the district court could understand Gobert's reasons for his requests based on his pro se pleadings, as well as a letter from his then-counsel, without conducting additional inquiry?

LIST OF ALL PROCEEDINGS

The State of Texas v. Gobert, No. D-1-DC-06-904006 (331st Judicial District Court, Travis County, Texas, March 10, 2010)

Gobert v. State, No. AP-76,345, 2011 WL 5881601 (Tex. Crim. App. Nov. 23, 2011) (not designated for publication)

Ex parte Gobert, No. WR-77,090-01, 2014 WL 12702626 (Tex. Crim. App. Jan. 14, 2014) (not designated for publication)

Gobert v. Lumpkin, No. 1:15-CV-42-RP, 2022 WL 980645 (W.D. Tex. Mar. 30, 2022)

Gobert v. Lumpkin, No. 22-70002, 2023 WL 4864781 (5th Cir. July 31, 2023) (unpublished)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

INTRODUCTION

Gobert contends that the Fifth Circuit has developed a "per se rule" that "a defendant cannot direct their legal counsel to pursue a specific strategy and subsequently accuse them of providing inadequate representation for adhering to those instructions." Pet. Cert. 8–9. According to Gobert, this principle deviates from this Court's Sixth Amendment jurisprudence. But this Court has instructed that a defendant's own statements or actions may be determinative of the reasonableness of counsel's actions. *Strickland v. Washington*, 466 U.S. 668, 691 (1984). This is particularly so when a defendant gives counsel reason to believe that further investigation would be fruitless or harmful. *Id*. Thus, applying a general principle that a defendant's actions—or withholding of information—can render counsels' actions reasonable in the *Strickland* context is not contrary to, but is rather aligned with, this Court's jurisprudence. Reasonable jurists would not debate that Gobert's counsel did not render ineffective assistance of counsel when they acceded to Gobert's insistence that they put a jail guard on the stand who, unbeknownst to counsel, had been fraternizing with Gobert and had knowledge of his escape plan.

Next, Gobert argues that there is a division among the circuits as to what triggers the duty of a district court to inquire into a motion for substitute counsel. In *Martel v. Clair*, this Court noted that one of the three general considerations when reviewing a district court's denial of a motion for

substitution is the adequacy of a district court's inquiry into the defendant's complaint against his counsel. 565 U.S. 648, 663 (2012). The Court did not specify what constitutes an adequate inquiry, nor did it specify that the adequacy of the district court's inquiry was dispositive when assessing whether it abused its discretion. Rather, the Court explained that a trial court's decision on substitution is "so fact-specific" that it deserves deference. *Id.* at 663–64. There is no division among the circuits as to what triggers a district court's duty to inquire; there is only a difference in outcomes due to the fact-intensive nature of requests for substitute counsel. And in Gobert's case, where the district court had adequate information and filings to probe before denying Gobert's untimely motions for substitute counsel, the Fifth Circuit properly found that it did not abuse its discretion.

Therefore, Gobert's petition does not demonstrate any special or important reason for this Court to review the lower court's decision. Accordingly, no writ of certiorari should issue.

STATEMENT OF THE CASE

I. Evidence at Guilt

The Texas Court of Criminal Appeals (CCA) summarized the evidence presented during trial in its opinion on direct appeal:

> In the early hours of October 6, 2003, five-year-old Dem[i]trius Cotton was awakened by the sound of his mother, Mel Cotton, screaming from her bedroom. He went into her room and saw a strange man there—"kind of tall, bald, and buff." He had a mustache and was wearing boots and boxers. He had gloves on his hands. Dem[i]trius saw his mom sitting on the edge of the bed with duct tape on her mouth; the man was standing in front of her, stabbing her in the arms with a sharp knife. She was trying to get away from him. She stood up, but then lost her balance and fell. The man kept stabbing, so Dem[i]trius "ran over and tried to pull him down by his leg." He said, "Stop," but the man pushed him off, turned on the bedside light and continued stabbing at his mom. The man told Dem[i]trius, "sit down and shut up," so Dem[i]trius sat down. He was scared.
>
> Then the man put duct tape on Dem[i]trius's ankles and mouth. He told Dem[i]trius to get out of the room, so the child hopped out into the hallway. The man locked the door when Dem[i]trius tried to get back inside the bedroom. He heard his mom scream, "Leave me alone," but the man said, "Give me the money" and "Where is it at in your purse?" Dem[i]trius hopped into his room and sat on a pallet of blankets beside his bed. He heard the man take his mom's phone and "stomp on it" in the bathroom. The man also cut the telephone cord.
>
> Dem[i]trius fell asleep, but he woke up when he heard the man come into his room. The man "choked" Dem[i]trius with both hands. Dem[i]trius tried to scream, but he couldn't. He blacked out. When he woke up later, he had a hole in his chest with blood coming out. He went to his mom's room. She was laying on the floor on her side. Dem[i]trius felt her neck. It was cold. "[S]he was gone." He touched her hand and talked to her for a while. Then he went to the bathroom for a washcloth to stop his chest from bleeding. He

looked to see if anyone else was there in the apartment. The man was gone. Dem[i]trius ate a popsicle, then went back to his room, got his stuffed caterpillar, and waited for a long time for someone to come. He fell asleep again, but woke up early that Monday morning when he heard knocking on the door. He took his stool to the door to see out of the peephole, and when he saw his "Aunt Tweety," he opened the door.

Monica Salinas, who lived in the same Austin apartment complex as Mel Cotton and Dem[i]trius, heard a hysterical woman crying, "My sister is dead, my sister is dead, please help me." She ran up the stairs, saw Dem[i]trius with duct tape still around his neck and Mel Cotton's body in the master bedroom, so she called 911. She saw "blood everywhere and handprints of blood all over the room."

Paramedics rushed Dem[i]trius to the hospital. He had four stab wounds in his chest. They were so deep that a paramedic saw Dem[i]trius's lung inflating and deflating. Dem[i]trius said that he could hear the air coming out of the hole in his chest; it sounded like "a farting noise." Dem[i]trius lost twenty to thirty percent of his blood volume and had a pneumothorax (collapsed lung) and a pulmonary contusion. Doctors also determined that Dem[i]trius had been strangled. Although his wounds were life-threatening, Dem[i]trius recovered.

The medical examiner testified that Mel Cotton had a total of 107 stab wounds that were inflicted during a drawn-out attack. Thirty-eight of the wounds were centered around Ms. Cotton's left breast, indicating "some degree of [the victim's] incapacitation or lack of movement." Another group of wounds were in her back. She had approximately thirteen defensive wounds to her hands and arms. Twenty of the wounds reached her internal organs. She, like Dem[i]trius, had been strangled. The medical examiner said that Ms. Cotton had probably been conscious for about ten to twenty minutes after her jugular vein had been cut.

Christina Pocharasang, [Gobert's] former girlfriend, learned of Ms. Cotton's murder later that day. She immediately suspected [Gobert]. She testified that Ms. Cotton had helped her move out of [Gobert's] apartment two weeks earlier by arranging for a man named Kenneth to haul her heavy furniture. [Gobert] had been

furious and accused Ms. Cotton and Kenneth of stealing his things, including his vacuum cleaner.[FN1] Christina called [Gobert] to ask him about the murder. When he answered the phone, [Gobert] was breathing heavily and said that he had been in a fight with Kenneth, who had stabbed him in the stomach, causing an injury that required sixteen stitches. Christina then called the Austin police to report her suspicions.

> [FN1] [Gobert] left numerous threatening voicemails for Christina, saying such things as "Yeah, ho, you go on and do what you like. I don't give a f—— no more. But I bet you this one thing. You still got my s[—], you keep that. That's yours. Since you distributed my s[—] to all this different mother f—— and s[—]. And gave my s[—] to these n[——]. You gave my shit to these n[——]. But b[—], one day you're going to look up, and you're going to see me. Bet that."

Austin police discovered that [Gobert] had an outstanding parole-violation warrant and went to his apartment to arrest him. After peeking through his blinds, [Gobert] refused to open the door, so the officers made a forced entry. [Gobert] did not have a stab wound in his stomach, but he did have cuts on his right hand that looked like those made when an attacker loses his grip on a knife shaft and cuts his own hand.

Officers obtained a search warrant for [Gobert's] apartment and car. They found stain remover, bleach, and vinegar containers; a glove on top of the washing machine; and a glove, tennis shoes, and a striped shirt inside the washing machine. DNA consistent with that of Ms. Cotton's DNA was found on the left tennis shoe, and DNA consistent with that of [Gobert], Ms. Cotton, and an unknown male[FN2] was found on the glove on top of the washing machine. A latent fingerprint, matching [Gobert's] fingerprint, was found on Ms. Cotton's bedroom window blind.

> [FN2] When the DNA analysis was made, the technician did not have Dem[i]trius's DNA.

While in jail, [Gobert] bragged to his cellmate about stabbing Ms. Cotton and Dem[i]trius. He recounted details of the crime,

including wrapping Ms. Cotton in an extension cord, washing his bloody clothes, and throwing the knife that he used in a lake.[FN3]

> [FN3]During his punishment-stage testimony, [Gobert] confirmed that he threw the knife into the lake.

[Gobert] called a jail guard, Deputy Tasha Lass, to testify that the inmates did not have much privacy in their jail cells, thus suggesting that perhaps the cellmate could have learned details about the murder from reading [Gobert's] case files in his jail cell.

[Gobert] also made numerous phone calls from the jail to family members, suggesting to one brother that he might remember that [Gobert] and Mel Cotton had a sexual relationship. [Gobert's] older brother told [Gobert] to stop asking him, his brother, and their mother to lie for him. These calls were recorded and played at trial.[FN4] In them, [Gobert] told various versions of the events.

> [FN4]In one of them, [Gobert] told his brother that a jury would surely sentence him to death if they heard that he had attacked and stabbed his mother when he was nineteen, so he wanted his mother to lie about that event. "I can't have her up there. That's, that's suicide. . . . What am I going to look like in these folks' eyes? . . . I mean it's not about telling the truth, get up there and tell the truth, that's suicide, man. . . . How can you say if you love somebody that you're gonna sit up there and, and, and get up there and, and help go to the death chamber? That's suicide for me, man."

One of [Gobert's] brothers testified at trial to the version of events that [Gobert] told him. According to [Gobert], he and Mel Cotton had had sex that night, and then he went to sleep in her bed. She later woke him up, and they began arguing. She came at him with a knife, saying that she was going to shoot him with a gun. They struggled over the knife. He got the knife, but when he tried to get dressed and leave, she attacked him again. Dem[i]trius came into the room and "fell" on the knife that his mother was holding. [Gobert] told his brother that he had stayed with the little boy, giving him pain pills, until Dem[i]trius's aunt arrived the next

morning. [Gobert] told his family members that "wasn't nothing wrong with [Dem[i]trius], he was—he's alive and he wasn't seriously hurt. . . . He wasn't hurt bad at all. He went to school the next day."

The jury found [Gobert] guilty of capital murder.

App. H at 97a–99a.[1]

II. Evidence at Punishment

During the punishment phase, the State introduced [Gobert's] prior convictions for burglary of a habitation, robbery, false imprisonment, assault, and dating-violence assault.

Christina Pocharasang testified again and recounted three different violent episodes. One time, several months before the murder, [Gobert] punched her in her face because she did not want to cut her hair the way [Gobert] wanted it cut. He chased her into the bathroom and kept hitting her for about thirty minutes. Then, about two weeks before the murder, [Gobert] got angry when Christina asked him to go to his brother's church. He closed the bedroom door so Christina's son couldn't see him, and he choked Christina with both hands around her neck. Christina decided to move out of town, and she contacted her friend, Mel Cotton, who found Kenneth to help her move. But, in late September, Christina forgave [Gobert] and came back to Austin. One night, [Gobert] attacked her as she was driving. He punched her in the face five or six times, choked her neck, bit her on the shoulder,[FN5] hit her in her lower back about fifteen times, and crushed her cell phone so she couldn't call for help. He told Christina he was going to kill her. Christina finally escaped, drove to a hospital, and called the police. Nine days later, [Gobert] killed Mel Cotton.

[FN5] Six years later, Christina still had a scar from that bite.

Another woman testified that she had dated [Gobert] in 2002, but he got jealous and began hitting her and grabbing her by

---

[1] When citing the Petitioner's Appendices, the Respondent uses the Petitioner's page numbers rather than the internal document pagination.

the neck when he was angry. She told him that she wanted nothing more to do with him. But one day he came over, and she got into his car to talk to him. [Gobert] became angry again and, after she jumped out of his moving car, he came after her and started hitting her in the face. Her father called the police and she filed assault charges against him.

A third woman testified that she had dated [Gobert] when they were both in high school. He was often verbally abusive to her, but one day he got jealous and hit her in the nose, then threatened to kill her as he forcibly took her back to his apartment. The next morning she escaped by grabbing her car keys. She drove off, speeding and running red lights when she saw [Gobert] driving behind her. She stopped, got out of her car and started calling for help, but no one paid attention to her, so she raced back to her car. [Gobert] was on the roof of her car. She nevertheless drove to a friend's house, got out, and [Gobert] drove off in her car. Several years later, [Gobert] found her in Round Rock, burglarized her friend's home, stole a TV and purse, and kidnapped her. The police eventually found her at [Gobert's] apartment, and he went to prison for burglary. She related another incident in which [Gobert] choked her when he found out she was dating someone else. Even though [Gobert] has been locked up in jail for years, she is still afraid that he will come back for her.

A former cellmate testified that [Gobert] assaulted him while he was lying in his bunk. [Gobert] said that he was a Muslim and didn't want to be in a cell with a Catholic. [Gobert] accused the cellmate of farting while [Gobert] was praying, and then he began hitting the man in the chest, saying that he would kill him. The cellmate, in fear of his life, asked to be moved. [Gobert] had numerous instances of disruptive conduct while in jail and, at one point, was assessed fifteen days of administrative segregation for his actions.

A former female jailer who had given [Gobert] special privileges resigned when her superiors discovered that she had been "fraternizing" with [Gobert]. Thereafter, she visited [Gobert] in jail seventeen times in six months.

Tasha Lass, the female jailer whom [Gobert] had called to testify during the guilt stage, was called by the prosecution during

the punishment stage. She admitted that she, too, had been fraternizing with [Gobert] for several weeks. She said that she had brought [Gobert] a cell phone so he could call her from the jail without their conversations being recorded. They talked on the phone every day, and [Gobert] repeatedly told Deputy Lass that he loved her. She testified that he was still talking to her every day on the smuggled cell phone.

Another jailer testified that, after Deputy Lass's testimony, he had searched [Gobert's] jail cell and found the cell phone stuffed into a bag of Cheetos inside [Gobert's] commissary bag. A cell phone charger was also found. Deputy Lass was then arrested and charged with the felony of bringing a prohibited item into a correctional facility.

Yet another officer testified that a piece of plastic had been wedged into [Gobert's] leg brace that he was required to wear as he was transported each day from the jail to the courtroom so that it would not lock. A different officer testified that [Gobert] had tampered with his leg brace on a second occasion as well. That time [Gobert] was walking around in the open courtroom with his leg brace unlocked.

After the defense offered several mitigation witnesses and rested, the State then recalled Tasha Lass to testify about "an escape plan." This time, Deputy Lass testified that she had originally been a missionary in Romania, and then had traveled to Sri Lanka, Australia, and England for eight years. She then became a police officer in Chattanooga, Tennessee, and was named Patrol Officer of the Year in 2008. She moved to Austin, became a deputy in June 2009, and first met [Gobert] around Christmas time. She listened to him talk about his case, his family, and his problems in jail. He made her feel "needed." He told her about his escape plan and wanted her to buy a storage shed so he could hide out "with food and stuff" until he escaped to Dubai. He chose Dubai because it is a Muslim country and he could not be extradited from there. He also wanted her a buy a .45 pistol with a silencer and four magazines and bring it into the jail "so he could shoot people and locks to get out."

[Gobert] told Deputy Lass that he planned to call Deputy Fernandes over to his cell at 2:30 a.m., shoot him, drag the deputy's

body into the cell, change into his clothes, grab his car keys,[FN6] shoot any other inmates who saw him, kill the control-room operator,[FN7] take the keys to the fire closet, grab the bag inside that closet that contained a rope, then go to the top floor fire closet for another rope, go out the roof door, tie the two ropes together and attach one end to the building, toss the rope over the edge and climb down, run over to the parking garage and drive off in Deputy Fernandes's car. [Gobert] would "knock out" Deputy Lass and put her in the fire closet, but she did not believe that he would leave her alive. She said that she did not want to aid in this escape plan, but [Gobert] kept asking her every day.

> [FN6] [Gobert] told Ms. Lass that he had seen Deputy Fernandes drive in and out of the parking garage, so he knew which car was his and where it was parked.
>
> [FN7] [Gobert] wanted Ms. Lass to be in the control room so she could give him the keys.

The State also called Dr. Richard Coons who testified that, in his opinion, a hypothetical person with [Gobert's] history, conduct, and character would likely pose a danger of violence in the future.

Finally, the defense called [Gobert] to the witness stand. He admitted that he had hurt a lot of women. He said that he had hit his brother over the head with a statue and beaten his mother and the women that he loved. It was because of "anger issues and situations. . . . Maybe sometimes I go overboard."

Based on the jury's answers to the special issues, the trial judge sentenced [Gobert] to death. After hearing a victim allocution statement by Mel Cotton's sister, [Gobert] shouted, "That b[—] wasn't no angel. That was a b[—], a motherf——— b[——]. F—— all y'all. That was a b[—] a ho b[—]." When the trial judge attempted to interrupt, [Gobert] said, "No, f—— you. F your allocution. F—— all you motherf———."

Thus ended the trial of Milton Dwayne Gobert.

App. H at 99a–100a.

III. Course of State and Federal Proceedings

In 2010, Gobert was convicted by a Texas jury of the capital murder of Mel Cotton and sentenced to death. ROA.2007.[2] The CCA affirmed Gobert's conviction and sentence on direct appeal. App. H at 97a–107a. He then petitioned this Court for a writ of certiorari, but that was denied. *Gobert v. Texas*, 568 U.S. 827 (2012). Gobert also applied for state habeas relief, but the CCA denied his state habeas application in 2014. App. D at 88a–89a.

Gobert then filed a habeas petition in federal district court under 28 U.S.C. § 2254. ROA.497–690. In March 2022, the district court denied and dismissed Gobert's federal petition and denied him a COA. App. B at 9a–72a. Gobert filed a motion for a COA in the Fifth Circuit, which the court denied on July 31, 2023. App. A at 1a–8a. Gobert now seeks certiorari review of the Fifth Circuit's decision.[3]

REASONS FOR DENYING THE WRIT

The questions that Gobert presents for review are unworthy of the Court's attention. Supreme Court Rule 10 provides that review on writ of

---

[2] "ROA" refers to the record on appeal filed in the court below.

[3] In Gobert's Certificate of Service, his counsel indicated that she served an Assistant Attorney General (AAG) with Gobert's petition on November 28, 2023. However, Gobert's counsel did not serve the AAG until his petition was hand-delivered to the AAG on November 29, 2023. The AAG also did not receive an electronic copy of the petition at the time of filing in accordance with Supreme Court Rule 29(3).

certiorari is not a matter of right, but of judicial discretion, and will be granted only for "compelling reasons." Where a petitioner asserts only factual errors or that a properly stated rule of law was misapplied, certiorari review is "rarely granted." *Id.* Furthermore, there is no automatic entitlement to appeal in federal habeas corpus. *Miller-El v. Cockrell*, 537 U.S. 322, 335 (2003). As a jurisdictional prerequisite to obtaining appellate review, a petitioner is required to first obtain a COA. 28 U.S.C. § 2253(c)(1)(A); *Miller-El*, 537 U.S. at 335–36; *Slack v. McDaniel*, 529 U.S. 473, 483 (2000). In determining whether to issue a COA, a court must consider whether the petitioner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983). The COA standard:

> . . . is not coextensive with a merits analysis. At the COA stage, the only question is whether the applicant has shown that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further."

Buck v. Davis, 137 S. Ct. 759, 773 (2017) (quoting *Miller-El*, 537 U.S. at 327); *see also Slack*, 529 U.S. at 484. Nevertheless, "the determination of whether a COA should issue must be made by viewing the petitioner's arguments through the lens of the deferential scheme laid out in 28 U.S.C. § 2254(d)." *Barrientes v. Johnson*, 221 F.3d 741, 772 (5th Cir. 2000); *see also Miller-El*, 537 U.S. at 336 ("We look to the District Court's application of AEDPA to petitioner's

constitutional claims and ask whether that resolution was debatable amongst jurists of reason."). Under § 2254(d), a federal court may not issue a writ of habeas corpus for a defendant convicted under a state judgment unless the adjudication of the relevant constitutional claim by the state court, (1) "'was contrary to' federal law then clearly established in the holdings of" the Supreme Court; or (2) "'involved an unreasonable application of'" clearly established Supreme Court precedent; or (3) "'was based on an unreasonable determination of the facts' in light of the record before the state court." *Harrington v. Richter*, 562 U.S. 86, 100–01 (2011) (quoting *Williams v. Taylor*, 529 U.S. 362 (2000)).

The Court has emphasized § 2254(d)'s demanding standard, stating:

> [u]nder § 2254(d), a habeas court must determine what arguments or theories supported, or . . . could have supported, the state court's decision; and then it must ask *whether it is possible fairminded jurists could disagree* that those arguments or theories are inconsistent with the holding in a prior decision of this Court. . . . It bears repeating that even a strong case for relief does not mean the state court's contrary conclusion was unreasonable.

Richter, 562 U.S. at 102 (emphasis added); *Brumfield v. Cain*, 576 U.S. 305, 314 (2015) (if "'[r]easonable minds reviewing the record might disagree' about the finding in question, 'on habeas review that does not suffice to supersede the trial court's . . . determination.'").

The Court has noted that "[i]f this standard is difficult to meet, that is because it was meant to be." *Richter*, 562 U.S. at 102. "Section 2254(d) reflects the view that habeas corpus is a 'guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction through appeal." *Id.* at 102–03 (quoting *Jackson v. Virginia*, 443 U.S. 307, 332 n.5 (1979) (Stevens, J., concurring in judgment)).

Here, Gobert's petition presents no compelling reasons, important questions of law, or genuine conflicts among the circuit courts to justify this Court's exercise of its certiorari jurisdiction and certiorari should be denied.

I. The Fifth Circuit Correctly Denied a COA for Gobert's Ineffective Assistance of Trial Counsel Claim.

In denying a COA on Gobert's first issue, the Fifth Circuit applied a principle it has applied in the past, which is that "a defendant cannot direct their legal counsel to pursue a specific strategy and subsequently accuse them of providing inadequate representation for adhering to those instructions." App. A at 3a–4a (citing *United States v. Masat*, 896 F.2d 88, 92 (5th Cir. 1990); *Autry v. McKaskle*, 727 F.2d 358, 361 (5th Cir. 1984); *Nixon v. Epps*, 405 F.3d 318, 325–26 (5th Cir. 2005)). Gobert now argues that this principle constitutes a "per se rule," which fundamentally departs from this Court's clearly established law. Pet. Cert. 8–17.

A. Factual background

Gobert fraternized and developed a relationship with a jail guard, Tasha Lass, who he insisted be called to the stand to dispute a State's witness's testimony. ROA.4143, 4275–76; App. F at 93a–94a; App. G at 95a–96a. The State's witness, one of Gobert's cellmates in jail, testified that Gobert had bragged about stabbing Cotton and her son. ROA.4083–84. When called by the defense during the guilt-innocence phase of trial, Lass testified to how little privacy inmates had in their jail cells, with the insinuation that the State's witness could have received facts of the murder from Gobert's legal papers. ROA.4143. Subsequently, the State called Lass during the punishment phase of trial and she testified that she and Gobert had a relationship, that she had smuggled a cell phone into the jail so they could have unrecorded phone calls, and that Gobert told her the details of a plan for his escape which he asked her to participate in. ROA.4275–78, 4434–43.

According to lead trial counsel, Gobert did not disclose his relationship with Lass to the defense team and no one on the defense team wanted to put Lass on the stand, but Gobert "very insistently ordered [them] to put her on the witness stand[.]" App. G at 95a–96a. Other members of Gobert's defense team attested to essentially the same thing: calling Lass as a witness was Gobert's idea and at his insistence. App. E at 91a; App. F at 93a–94a.

Gobert raised his instant claim on direct appeal and in his state habeas application. *See* App. H at 104a; *see also* App. C at 82a–84a. On direct appeal, the CCA rejected his claim on the merits. App. H at 104a. During Gobert's state habeas proceedings, the state court concluded that in addition to Gobert's claim being barred on habeas review for having already been raised and rejected, Gobert failed to meet his burden to establish he received ineffective assistance of trial counsel. App. C at 82a–84a. These conclusions were adopted by the CCA. ROA.5587–88.

B. The Fifth Circuit's determination that Gobert did not demonstrate *Strickland* deficiency complies with this Court's precedent.

In *Strickland*, this Court announced that when a convicted defendant makes a claim of ineffective assistance, a reviewing court "should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." 466 U.S. at 690. Even more relevant to Gobert's argument, this Court explained:

> The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information . . . And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may

> not later be challenged as unreasonable. In short, inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions.

Id. at 691 (citation omitted).

Gobert now devalues the role a client's actions and instructions should play when assessing a counsel's conduct for reasonableness. *See* Pet. Cert. 10–17. Gobert argues that, essentially, courts must assess *Strickland* deficiency with little to no regard for the defendant's own actions. *See id*. This Court has instructed otherwise, and the reasonableness of Gobert's trial counsel's actions *can* be determined by Gobert's own statements and actions. *Strickland*, 466 U.S. at 691. Thus, Gobert's own failure to disclose his relationship with Lass, paired with his insistence of calling her to the stand, were properly deemed determinative of the reasonableness of trial counsel's actions.

Gobert further contends that the general principle at-issue—that a defendant cannot direct their legal counsel to pursue a specific strategy and later accuse them of ineffectiveness for adhering to those instructions—creates an absurd result. Pet. Cert. 17–23. Gobert argues that it creates a "perverse incentive" for counsel to follow their client's instructions. *Id*. at 21. Gobert fails to acknowledge that "[a] lawyer may still be sanctioned for pursuing frivolous theories, even on the insistence of his client[.]" *Masat*, 896 F.2d at 92. In other words, lawyers are always incentivized to avoid frivolous trial strategies no

matter their client's wishes. Instead, it is actually Gobert that asks this Court to create an absurd result: allowing a defendant to insist on a certain trial tactic and then avoiding his conviction and sentence when his lawyer did what he was asked.

But putting aside Gobert's explicit instructions to call Lass as a witness, he also cannot demonstrate *Strickland* deficiency because he withheld information that would have given reason for the further investigation he now complains did not occur. Counsel's decisions must be directly assessed for reasonableness "on the facts of the particular case, viewed at the time of counsel's conduct" and "applying a heavy measure of deference." *Strickland*, 466 U.S. at 690–91. It bears repeating, "[t]he reasonableness of counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant." *Id*. at 691. And the information provided by the defendant is critical when assessing the reasonableness of counsels' investigation decisions. *Id*.

Gobert himself chose not to disclose his relationship with Lass to his trial counsel. Lass was called by the defense for a limited purpose: to testify that inmates have limited privacy in the jail. App. E at 91a; App. F at 93a. Given the limited purpose for which Lass was called, and the fact that Gobert did not give his own counsel information pertaining to their relationship, trial

counsel's investigation decisions related to Lass were reasonable. *Strickland*, 466 U.S. at 691.

Gobert argues to the contrary, claiming that based on his history of developing a relationship with a separate jail guard, his trial counsel should have directly asked Lass whether Gobert had developed a similarly inappropriate relationship with her. Pet. Cert. 27. In other words, Gobert contends that trial counsel should have anticipated that he had formed a relationship with a jailer, that she had smuggled a phone into the jail so they could have unrecorded phone calls, and that he had discussed a detailed escape plan with her. To find trial counsel ineffective under these circumstances would require faulting counsel for failing to prepare for remote possibilities, and also assessing counsel's conduct with the "distorting effects of hindsight," both of which this Court has explicitly warned against. *Richter*, 562 U.S. at 110; *Strickland*, 466 U.S. at 689. The CCA correctly applied the same precedent in denying Gobert's claim. App. H at 104a (citing *Richter*, 562 U.S. at 110–11).

In sum, the Fifth Circuit's determination that Gobert's trial counsel did not perform deficiently was proper and in accordance with this Court's clearly established law. Because it was Gobert himself who insisted on calling Lass as a witness and who failed to disclose his secret relationship with her, his ineffectiveness claim is meritless. App. A at 3a–4a.

Furthermore, where a *Strickland* claim was adjudicated on the merits by the state court, which is the case here, it must be reviewed under the "doubly deferential" standards of both *Strickland* and 28 U.S.C. § 2254(d). *Cullen v. Pinholster*, 563 U.S. 563, 190 (2011); *Richter*, 562 U.S. at 101. For the foregoing reasons, the state court's rejection of Gobert's claim was not unreasonable and Gobert's case does not warrant federal habeas relief. Thus, the Fifth Circuit correctly concluded that reasonable jurists could not disagree with the district court's resolution of the issue. App. A at 4a. Certiorari review should be denied.

C. The Fifth Circuit's determination that Gobert did not demonstrate *Strickland* prejudice complies with this Court's precedent.

Gobert argues that, with further investigation, trial counsel would have discovered Gobert and Lass's relationship, trial counsel would have never called Lass to the stand, and the State would not have presented her during the punishment phase of trial. Pet. Cert. 26–28.

To establish *Strickland* prejudice, Gobert must show, "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. As specifically relevant to Gobert's claim, "[a] defendant who alleges a failure to investigate on the part of his counsel must allege with specificity what the investigation would have revealed and how it would have altered the outcome of trial." *Nelson v. Hargett*, 989 F.2d 847, 850

(5th Cir. 2011) (quoting *United States v. Green*, 882 F.2d 999, 1003 (5th Cir. 1989)).

Given the secrecy of Gobert and Lass's relationship, ROA.4276, 4489, 4491, 4506, Gobert cannot show that any amount of further investigation would have led to trial counsel's discovery of their relationship. Notably, even after Lass testified to their relationship during punishment, trial counsel *did* investigate Lass's background and found nothing that would have incited any concerns about her as a witness for the limited purpose for which she was called by the defense. App. E at 91a; App. F at 94a. Gobert's assertion that Lass would have disclosed their secret relationship to trial counsel upon specific inquiry, *see* Pet. Cert. 27–28, is purely speculative.

Moreover, there is evidence that the State's interest in Lass was not triggered by the defense calling her to testify during the guilt-innocent phase of trial. Rather, a member of Gobert's defense team recalled that Lass had appeared in the courtroom several times during trial of her own volition. App. F at 93a–94a. The prosecutor on one occasion made a comment to the effect of, "there's something not right about her." *Id*. at 94a. The prosecution called Lass within the next few days. *Id*. Thus, Gobert has not demonstrated that, but for his trial counsel calling Lass to the witness stand, the State would have never developed an interest in Lass or called her as a witness. In which case, he

cannot show that there is a reasonable probability that the outcome of his trial would have been different. *Strickland*, 466 U.S. at 694.

Finally, where the evidence of a petitioner's future dangerousness is overwhelming, it is "virtually impossible to establish prejudice." *Ladd v. Cockrell*, 311 F.3d 349, 360 (5th Cir. 2002) (citing *Strickland*, 466 U.S. at 698; *Jones v. Johnson*, 171 F.3d 270, 277 (5th Cir. 1999); *Russell v. Lynaugh*, 892 F.2d 1205, 1213 (5th Cir. 1989)). Aside from Lass's punishment-phase testimony, there was substantial evidence presented concerning Gobert's future dangerousness. The crime for which Gobert was convicted was particularly heinous; Gobert stabbed Mel Cotton 107 times and then stabbed her five-year-old son, choked him, and left him to die. App. H at 97a–98a. Gobert also had an extensive and violent criminal history, including convictions for burglary, robbery, false imprisonment, assault, and family violence assault. *Id.* at 99a. He was abusive towards girlfriends, assaulted a cellmate, tampered with his security leg brace, developed a relationship with another female jailer in addition to Lass, and admitted to the jury that he beat the women he loved because of his "anger issues." *Id.* at 99a–100a. Therefore, because the evidence of Gobert's future dangerousness was overwhelming, he cannot establish *Strickland* prejudice. *Ladd*, 311 F.3d at 360.

In sum, Gobert does not establish that further investigation by his trial counsel would have led to the discovery of his and Lass's relationship and he

does not establish that the State's calling of Lass during punishment necessarily resulted from defense counsel's actions. Moreover, the alternative evidence of Gobert's future dangerousness was overwhelming.

Accordingly, the State court's rejection of Gobert's claim was not unreasonable and his claim does not warrant federal habeas relief under § 2254(d). The Fifth Circuit correctly concluded that Gobert failed to establish either prong of the *Strickland* inquiry and that reasonable jurists could not disagree with the district court's resolution of the issue. App. A at 4a. Certiorari review should be denied.

II. There Is No Genuine Circuit Split Related to the Triggering of the Inquiry Requirement for a Motion for Substitute Counsel and the District Court Did Not Abuse Its Discretion.

A. Factual background

Gobert's state habeas attorney moved for appointment as federal habeas counsel in January 2015. ROA.13. However, the district court appointed Seth Kretzer and Carlo D'Angelo instead. ROA.25–26. Counsel filed Gobert's initial petition on January 12, 2016, and an amended petition on March 8, 2016. ROA.294, 497. The Director responded to Gobert's amended petition on November 23, 2016. ROA.714.

Nearly two years after counsel were appointed, and almost a year after counsel filed his initial petition, Gobert moved for an "opportunity to be heard." ROA.807. In this pro se filing, Gobert identified several issues with how his

counsel had been handling his case and complained that they failed to raise certain claims. ROA.807–21. Gobert made clear that this pro se filing was not a substitute request because he said he would follow up with a motion to represent himself until he could "obtain a [different] law firm." ROA.818.

About a week later, Gobert sent the district court a letter that he had previously sent to his appointed counsel, in which he asked them to terminate their representation of him. ROA.821–22. Gobert did not address any alleged omitted claims in this letter, but rather asserted that his counsel had "not met the legal constrain[t]s and professional obligations." *Id*. He complained that his lawyers (1) had not responded to his letters in over a year, (2) incorrectly listed Jon Evans, the attorney for Tasha Lass, as Gobert's trial attorney, (3) incorrectly referred to Gobert's father as "Gobert" instead of his real name, Milton Epperson, (4) incorrectly mentioned the Travis County Downtown Jail when they meant to refer to the Del Valle Correctional Complex, and (5) accidentally referred to a different petitioner's name in Gobert's petition. *Id*.

On or about February 7, 2017, Gobert sent another letter to the district court, saying that he met with one of his federal habeas counsel and asked that he "terminate himself from my case." ROA.830. Gobert complained about "the mischaracterization of [his] brief as a whole," and for the first time, explicitly requested appointment of a new attorney. *Id*.

Gobert sent yet another letter to the district court on February 21, 2017. This time, he requested appointment of new counsel and identified an attorney that had agreed to take his case. ROA.834. Gobert's counsel filed a sealed ex parte response to Gobert's letters about a month later. ROA.838 (March 17, 2017 motion for extension filed by Gobert, which states, "Mr. Gobert has filed successive motions with the Court asking that new CJA counsel be appointed. Counsel has responded to these motions in a letter-brief filed under seal with this Court."); *see Gobert v. Lumpkin*, No. 1:15-cv-00042-RP (W.D. Tex.), ECF No. 38.[4] On April 20, 2017, the district court denied Gobert's pro se motion to be heard and his three letters, which the court liberally construed as motions for substitute counsel. ROA.842–44.

The following year, in another letter to the district court, Gobert asserted that he was disabled and had an IQ of 73. ROA.862. Gobert said that his counsel was not contacting him and requested the Federal Public Defender's Office for the Western District of Texas be permitted to represent him. *Id*. Gobert's counsel then filed a motion to substitute counsel on Gobert's behalf, which did not explain why substitution was warranted. ROA.864–66. The district court denied the motion on February 21, 2018. ROA.872. The Fifth

[4] Counsel's ex parte response remains under seal. The Director was permitted to access the document during Gobert's Fifth Circuit proceeding, but the content of the response is unnecessary to resolve Gobert's issue presented in his petition for certiorari.

Circuit affirmed the district court's denial of substitute counsel. App. A at 6a–8a.

B. There is no genuine circuit split warranting this Court's review.

In *Clair*, this Court held that in deciding whether to grant a request for substitute counsel under 18 U.S.C. § 3599, courts must use an "interests of justice" standard. 565 U.S. at 663. Generally, in reviewing substitution motions, courts of appeals point to several relevant considerations, including "(1) the timeliness of the motion; (2) the adequacy of the district court's inquiry into the defendant's complaint; and (3) the asserted cause for that complaint, including the extent of the conflict or breakdown in communication between lawyer and client (and the client's own responsibility, if any, for that conflict)." *Id.* at 663 (citations omitted) (enumeration added). This Court did not specify what level or form of inquiry a district court should make before deciding a request for substitute counsel; rather, this Court noted that "all Circuits agree, courts cannot properly resolve substitute motions without probing why a defendant wants a new lawyer." *Id.* at 665 (citation omitted).

In Gobert's case, although the district court did not hold a hearing on Gobert's motions for substitute counsel, it had multiple pro se filings from Gobert that spelled out his reasons for wanting a new lawyer. Specifically, Gobert had disagreements over the claims raised in his federal habeas petition,

he was concerned about non-substantive errors in his petition, and he was displeased about his lawyers not responding to some of his letters. ROA.807–22, 830, 862. The district court also had an opportunity to probe the issues between Gobert and his then-counsel by way of a sealed response Gobert's counsel filed in early 2017. *See* ROA.838.

Given this, the Fifth Circuit found that the district court had "sufficient information to make a well-informed decision" regarding Gobert's request for substitute counsel. App. A at 8a. Notably, the district court's inquiry is identical to the inquiry employed in *Clair*. *See* 565 U.S. at 654–55 (noting the district court inquired into Clair's motion to substitute counsel through review of a letter Clair's counsel sent to the Court addressing his motion), 664 (referring to the district court's inquiry into Clair's first motion for new counsel as a "proper inquiry"). Thus, the Fifth Circuit correctly affirmed the district court's denial of Gobert's substitution motions.

Nevertheless, Gobert now asserts that a circuit split presents a ground for certiorari review. According to Gobert, the Fifth, Eighth, and Eleventh circuits require that an initial request for substitute counsel satisfy a threshold burden to trigger the duty to inquire. Pet. Cert. 33. Whereas the Third, Fourth, Sixth, and Ninth Circuits do not place a threshold burden on indigent capital habeas petitioners seeking new counsel. *Id*. at 33, 35. Gobert's characterization of the issue is illusory. The issue is not whether one meets a threshold burden

to trigger the duty to inquire; rather, it is whether a district court's inquiry was so inadequate, in light of the facts of the case, that it constituted an abuse of discretion. As this Court acknowledged, a trial court's decision on substitution is "fact-specific." *Clair*, 565 U.S. at 663–64. Thus, logically, because every case is factually distinct, different cases in different circuits have had different outcomes. As shown below, there is no genuine circuit split requiring this Court's intervention.

Albeit in a context distinguishable from Gobert's,[5] the Fifth Circuit has reasoned that "'[t]he duty to inquire is not so formalistic as to require affirmative questioning when such is rendered unnecessary because the parties have volunteered all the relevant information for a court to determine that no substantial conflict exists.'" *United States v. Quinn*, 826 F. App'x 337 (5th Cir. 2020) (unpublished) (quoting *Fields v. Thaler*, 483 F.3d 313, 352 (5th Cir. 2007)). According to the Fifth Circuit, "the key is whether the court had enough information to 'adequately apprise' [the defendant]'s concerns without further inquiry." *Id.* (quoting *United States v. Stewart*, 671 F. App'x 325, 326 (5th Cir. 2016) (per curiam)). The Eighth Circuit has likewise found that "in

---

[5] In *Clair*, this Court aligned the 18 U.S.C. § 3599 analysis with that given to substitution requests made by indigent defendants under § 3006A, which applies in federal non-capital litigation. *Clair*, 565 F.3d at 658. For the purposes of argument, the Director cites cases involving such requests by indigent defendants in the federal non-capital context.

some instances, the court [has] the relevant facts without engaging in an intensive inquiry." *United States v. Jones*, 795 F.3d 791, 796 (8th Cir. 2015) (citing *United States v. Rodriguez*, 612 F.3d 1049, 1054 (8th Cir. 2010)). However, in other instances, where a defendant makes a "seemingly substantial complaint about counsel," the court has an obligation to inquire thoroughly. *Id.* (citing *Smith v. Lockhart*, 923 F.2d 1314, 1320 (8th Cir. 1991)). In other words, the Eighth Circuit has reasoned that the level of inquiry required by a court is dependent on the facts of the case. The Eleventh Circuit has opined that it is not an abuse of discretion where, without probing more deeply, the court "reasonably could have concluded that further inquiry was unnecessary" because the defendant's counsel had listed his reasons for withdrawal in the substitution motion itself and none of those reasons warranted substitution. *United States v. Davis*, 777 F. App'x 360, 364 (11th Cir. 2019) (unpublished), *vacated on other grounds, Davis v. United States*, 140 S. Ct. 952 (2020).

Gobert argues the Third, Fourth, Sixth, and Ninth Circuits[6] materially differ in how they treat the inquiry requirement when reviewing motions for substitution. But, as in the Fifth, Eighth, and Eleventh Circuits, the courts'

---

[6] Gobert lists the Third, Fourth, Sixth, and Eleventh Circuits in his petition, but cites to cases from the Third, Fourth, Sixth, and Ninth Circuits. Pet. Cert. 35. The Director presumes Gobert intended to list the Ninth Circuit, not the Eleventh in this portion of his petition.

weighing of the adequacy of the district court's inquiry is dependent on case-specific facts.

For instance, Gobert cites *United States v. Senke*, a Third Circuit case, to support his circuit-split argument. Pet. Cert. 35 (citing *United States v. Senke*, 986 F.3d 300 (3d Cir. 2021)). In *Senke*, the defendant filed a pro se motion asserting complaints about his counsel and the district court took no action on the motion. *Senke*, 986 F.3d at 307. Subsequently, at a pretrial conference without the defendant's presence, counsel informed the judge and the prosecutor that the defendant was not happy with him and said that he did not know of the defendant trying to fire him, but he was "just difficult." *Id.* Under those facts, the Third Circuit found that the defendant's motion, paired with counsel's statements during the pretrial conference, should have indicated to the district court that further inquiry was necessary. *Id.* at 311.

But in a factually distinguishable case, the Third Circuit did not find an abuse of discretion where the district court did not hold a hearing on a defendant's complaints about counsel. *United States v. Diaz*, 951 F.3d 148, 155 (3d Cir. 2020). In *Diaz*, the defendant submitted several motions or letters to the district court complaining about his counsel and/or requesting new counsel, to which counsel failed to respond. *Id.* at 152–53. The defendant's counsel subsequently filed a motion for a continuance, in which he represented: "After a meeting between counsel and the Defendant on March 23, 2017, all issues

between counsel and the Defendant have been resolved and the Defendant wishes to continue with counsel's representation." *Id*. at 153. Counsel and the defendant later appeared together at a pretrial conference and neither raised any issue related to the request or the representation. *Id*. After the conference, the defendant twice again wrote to the court complaining of counsel's failures. *Id*. The Third Circuit found there was no abuse of discretion because, although no hearing was held related to the defendant's complaints or requests for new counsel, the court had good reason to believe that counsel was communicating with the defendant and that the defendant no longer sought new counsel. *Id*. at 155.[7]

Fourth, Sixth, and Ninth Circuit opinions have similarly turned on specific facts of each case. For instance, in *United States v. Collado-Rivera*, the Sixth Circuit[8] found an abuse of discretion where a district court denied counsel's post-trial motion to withdraw (which was filed upon the defendant's request) because the court did not inquire into the request. 759 F. App'x 455, 466 (6th Cir. 2019) (unpublished). However, in that instance, the motion did not contain the defendant's complaints, nor did the court allow the defendant

---

[7] The Third Circuit did not endorse the district court's approach but did not find it to be an abuse of discretion. *Diaz*, 951 F.3d at 155, n.3.

[8] Gobert inexplicably refers to *Collado-Rivera* as a Third Circuit opinion. Pet. Cert. 35–36.

to discuss his complaints; instead, after the court overruled the motion to withdraw and the defendant objected, the court in-part stated, "the Court of Appeals can deal with the entire thing." *Id.* at 459, 466. Thus, in *Collado-Rivera*, it appears the district court considered *no* evidence or facts presented to it about the reasons the defendant sought substitute counsel—it did not represent that it had conducted an inquiry of documents already on the record, it did not allow the defendant to explain his reasons for seeking new counsel when the issue was raised in open court, and it refused to review a document the defendant presented in support of substitution. *Id.* at 459, 466.[9]

The Ninth Circuit has also acknowledged that "[f]ailure to conduct an inquiry is not necessarily an abuse of discretion if the trial court has sufficient information to resolve the motion." *United States v. Velazquez*, 855 F.3d 1021, 1034 (9th Cir. 2017) (citing *Clair*, 565 U.S. at 664–66).[10] Pre-*Clair* Ninth

---

[9] Gobert incorrectly states that "the Sixth Circuit requires a hearing when a defendant brings 'any serious dissatisfaction with counsel to the attention of the district court.'" Pet. Cert. 36 (citing *United States v. Higgins*, No. 22-3538, 2023 WL 6536752, at *8 (6th Cir. Oct. 6, 2023)). Although a hearing was held in *Higgins*, the Sixth Circuit did not say that a *hearing* was required; rather, the court plainly stated that "[o]nce a defendant brings any serious dissatisfaction with counsel to the attention of the district court, the court has a duty to inquire into the source and nature of that dissatisfaction." *Id.* (quotation omitted). The Sixth Circuit did not specify that a live hearing is required or that a record-based inquiry would be inadequate.

[10] The Ninth Circuit found that the district court abused its discretion in *Velazquez* because the motions to substitute were promptly filed, the court's inquiry was inadequate, and because the extent of the conflict warranted granting

Circuit opinions also illustrate the circuit's position on the requisite inquiry in the substitution motion context. *See, e.g., United States v. Smith*, 282 F.3d 758, 764 (9th Cir. 2002) ("Despite this general preference [to inquire when a party seeks substitute counsel], under certain circumstances, [ ] the failure to conduct a hearing is not *by itself* an abuse of discretion.") (citations omitted); *United States v. McClendon*, 782 F.2d 785, 789 (9th Cir. 1986) ("While the trial judge might have made a more thorough inquiry into the substance of [the defendant]'s alleged conflict with counsel, [defendant]'s description of the problem and the judge's own observations provided a sufficient basis for reaching an informed decision. Thus, the district court's failure to conduct a formal inquiry was not fatal error."). The Fourth Circuit has also acknowledged that a failure to inquire into reasons for requesting new counsel at a hearing "does not rise to an abuse of discretion if the district court sufficiently examines the factual record and alleged bases for requesting new counsel." *United States v. Hill*, 492 F. App'x 365, 371 (4th Cir. 2012) (unpublished) (citing *United States v. Perez*, 661 F.3d 189, 192 (4th Cir. 2011)).

---

substitution of counsel. *Velazquez*, 855 F.3d at 1035–37. However, notably, the defendant in *Velazquez* had repeatedly raised the issue before the court and ultimately, the court declined to review any exhibits or recordings the defendant had to support her request for substitute counsel. *Id.* at 1027, 1035. Moreover, the conflicts between the defendant and counsel were pervasive and widely undisputed. *Id.* at 1036.

As illustrated, decisions on motions to substitute are fact-specific. Accordingly, the review of such decisions—even when the courts are applying the same standard announced in *Clair*—turn on the facts of each case. Gobert's assertion that some circuits require the meeting of some threshold before the duty to inquire is triggered is inaccurate. The circuits' opinions demonstrate that the adequacy of a district court's inquiry—whether it be by reviewing pro se letters or motions, reviewing filings by counsel, or by a live hearing—is determined on a case-by-case basis and on individual facts.

Therefore, because Gobert fails to identify a genuine conflict between courts, certiorari review should be denied.

C. The district court did not abuse its discretion in denying Gobert's motions for substitute counsel.

As demonstrated above, the district court's inquiry into Gobert's complaints was sufficient given the specific facts of his case. *See* Section II(B), *supra*. However, the inquiry issue aside, the district court would not have abused its discretion if it had denied Gobert's motions based on the two remaining *Clair* factors.

First, the district court could have properly denied Gobert's motions based on untimeliness. Where the district court could have properly rejected a motion to amend the petition, a district court may act "within its discretion in denying [a] request to substitute counsel, even without the usually appropriate

inquiry." *Clair*, 565 U.S. at 666. In *Clair*, this court noted that Clair's second request for new counsel came "[a]fter many years of litigation, an evidentiary hearing, and substantial post-hearing briefing" and after "the court had instructed the parties that it would accept no further submissions[.]" 565 U.S. at 665. At that stage, "[t]he case was all over but the deciding; counsel whether old or new, could do nothing more in the trial court proceedings. At that point and in that forum, Clair's conflict with his lawyers no longer mattered." *Id*. For that reason, this Court concluded, "the timing of that motion precludes a holding that the District Court abused its discretion." *Id*.

Gobert's motions for substitute counsel were not filed until well after the Director had filed his response to the petition. ROA.807–22, 830, 862. Therefore, new counsel would not have been entitled to amend Gobert's petition without leave of court. Fed. R. Civ. P. 15(a)(2). Because the district court in Gobert's case would have been well within its discretion in denying a hypothetical motion for leave to amend that new counsel would have filed, it was also "within its discretion" to not further inquire into Gobert's desire for new counsel that "no longer mattered." *Clair*, 565 U.S. at 665.

Next, the asserted cause for Gobert's complaints was insufficient to warrant appointment of new counsel. As noted by the district court, Gobert did not establish an irreconcilable conflict or a breakdown in communications. ROA.843. Instead, he generally asserted that his counsel did not present

certain arguments, which, standing alone, did not implicate any federal constitutional right. *Id.* (citing *Jones v. Barnes*, 463 U.S. 745, 751 (1983) (a defendant does not have a constitutional right to have his appointed counsel raise every non-frivolous argument requested by the client)). Gobert's complaints relating to non-substantive errors in his petition, *see* ROA.821, also do not indicate an irreconcilable conflict or a breakdown in communications. And while Gobert claimed that his then-counsel was not responding to his letters, he informed the district court that he had met with his counsel in early 2017. *See* ROA.830. This also indicates that there was not a complete breakdown in communication warranting a substitution of counsel.

In sum, the district court could have denied Gobert's motions as untimely and, as it properly noted, Gobert did not establish an irreconcilable conflict or breakdown in communication between him and his counsel. Given these circumstances, the level of inquiry conducted by the district court was *not* outcome dispositive in Gobert's case.

Accordingly, regardless of the level of inquiry, the district court did not abuse its discretion in denying Gobert's substitution motions. Moreover, the Fifth Circuit could have properly affirmed those denials on alternative

grounds.[11] Thus, Gobert does not present a compelling reason to grant certiorari review and his petition should be denied.

CONCLUSION

For the foregoing reasons, the Fifth Circuit correctly denied COA and affirmed the district court's denial of Gobert's motions for substitute counsel. Gobert's petition for a writ of certiorari should be denied.

Respectfully submitted,

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

JOSH RENO
Deputy Attorney General

---

[11] The Fifth Circuit correctly noted that Gobert's appeal of the denial of substitute counsel could have been properly denied as moot under its reasoning in *Gamboa v. Lumpkin*, No. 16-70023, 2023 WL 2536345 (5th Cir. Mar. 16, 2023) (unpublished). App. A at 6a, n.1. In *Gamboa*, the Fifth Circuit reasoned that in appealing a denial of a motion to substitute counsel, the petitioner implicitly requested the court vacate or invalidate orders that were entered after the petitioner filed his motion to substitute, including the district court's denial of his habeas petition. *Gamboa*, 2023 WL 2536345, at *3. For the court of appeals to overturn the district court's disposition of the merits of the petitioner's habeas petition, however, the petitioner would have needed to first receive a COA by making a "substantial showing of the denial of a constitutional right." *Id.* (quoting *Buck*, 137 S. Ct. at 773). Because due process caselaw does not recognize a right to *court-appointed* counsel of choice, a petitioner could not make a substantial showing of the denial of a constitutional right based on a denial of his motion for substitute court-appointed counsel. *Id.* at *4. It follows that a petitioner's appeal of a denial of a motion for substitute court-appointed counsel—such as in Gobert's case—does not independently qualify for issuance of a COA. Because Gobert's remaining claims did not warrant a COA, his substitution appeal was moot.

For Criminal Justice

EDWARD L. MARSHALL
Chief, Criminal Appeals Division

STEPHEN M. HOFFMAN
Assistant Attorney General
Counsel of Record

MOLLY M. KNOWLES
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
Tel: (512) 936–1400
Fax: (512) 320–8132
stephen.hoffman@oag.texas.gov

Attorneys for Respondent