No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

MARVIN CHARLES GABRION II,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE QUESTION PRESENTED

Can an attorney who provides legal advice to counsel of record without filing a formal appearance in the case have a conflict of interest if the attorney simultaneously represents an adverse witness, or do conflict-of-interest rules apply only to attorneys who file formal appearances?

PARTIES TO THE PROCEEDINGS

Petitioner is Marvin Gabrion, movant and appellant below.

Respondent is the United States of America, appellee below.

RELATED PROCEEDINGS

United States v. Gabrion, No. 1:99-cr-76, U.S. District Court for the Western District of Michigan. Judgment entered on March 16, 2002.

United States v. Gabrion, Nos. 02-1386, 02-1461, 02-1570, 517 F.3d 839, U.S. Court of Appeals for the Sixth Circuit. Judgment entered on March 14, 2008.

United States v. Gabrion, Nos. 02-1386, 02-1461, 02-1570, 648 F.3d 307, U.S. Court of Appeals for the Sixth Circuit. Judgment entered on August 3, 2011.

United States v. Gabrion, Nos. 02–1386, 02–1461, 02–1570, 719 F.3d 511, U.S. Court of Appeals for the Sixth Circuit. Judgment entered on May 28, 2011.

Gabrion v. United States, No. 1:15-cv-447, 2018 WL 4786310, U.S. District Court for the Western District of Michigan. Judgment entered on October 4, 2018.

Gabrion v. United States, No. 18-2382, 43 F.4th 569, U.S. Court of Appeals for the Sixth Circuit. Judgment entered on August 4, 2022.

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OPINION BELOW

The Sixth Circuit's opinion is reported at 43 F.4th 569 and is reprinted in the Appendix at 218a.

JURISDICTION

The court of appeals entered its judgment on August 4, 2022, and denied a petition for rehearing en banc on November 23, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.

STATEMENT

In preparation for Marvin Gabrion's federal capital trial, Gabrion's trial attorneys received strategic advice and assistance from Federal Public Defender Christopher Yates. At the same time that Yates participated in Gabrion's representation, he represented a witness against Gabrion: Joseph Lunsford. The court of appeals held that, despite Yates' admitted involvement in Gabrion's defense, Yates did not represent Gabrion and consequently did not operate under a conflict of interest. This Court should grant Gabrion's petition for a writ of certiorari to clarify how attorneys should understand the definition of representation and the

application of conflict-of-interest rules to attorneys in cases where they do not file formal appearances.

A. Trial

In June 1999, Marvin Gabrion was indicted in the Western District of Michigan for the murder of Rachel Timmerman. On February 26, 2001, prosecutors noticed intent to seek the death penalty. The district court appointed Paul Mitchell, and David Stebbins to represent Gabrion.

The trial began on February 11, 2002. 02/11/2002 Tr. Vol. I. During trial proceedings, Gabrion's defense team was assisted by Yates. Yates previously had represented Gabrion on his appeal from his conviction for Social Security fraud. After the government indicted Gabrion, Yates became involved in Gabrion's capital case. The first thing Yates did when he entered the capital case was to meet with Gabrion as part of the trial court's plan to address Gabrion's complaints about his trial counsel. Yates then became involved in the issues most crucial to Gabrion's defense. Yates consulted with Gabrion's lawyers regarding motions strategy and was involved in the search for Gabrion's social security disability records. *See., e.g.*, R. 16-5, 4/6/2001 letter Stebbins to Yates, PageID 1518-19 (explaining the motions Stebbins would like Yates to assist with); R. 119-1, Yates Dec., PageID 5292-94 (expressing his opinion that he did not represent Gabrion, though he also explained the work he did on Gabrion's case, including visiting Gabrion).

Yates also represented Joseph Lunsford when the government interviewed Lunsford and when Lunsford testified against Gabrion to the grand jury. *See* R. 16-

1, 3/30/1998 VerHey letter to Yates, PageID 1491-92; R. 16-3, Lunsford GJ test., PageID 1503-05. Lunsford provided penalty phase evidence against Gabrion, which he recanted during § 2255 proceedings. 03/12/2002 Sent. Tr. Vol. II, 318; R. 100-4, Lunsford Dec. ¶ 6, PageID 4700.

Gabrion was convicted on March 5, 2002. 03/04-05/2002 Tr. Vol. VIII, 1775. Following penalty phase proceedings, Gabrion was sentenced to death on March 16, 2002.

B. Direct Appeal

Following Gabrion's conviction and death sentence, the case proceeded to direct appeal. Prior to argument, the Sixth Circuit ordered the parties to brief subject matter jurisdiction. At the parties' request, the Sixth Circuit remanded for an evidentiary hearing to develop the record. Federal jurisdiction was based upon assertions that Ms. Timmerman was killed on federal land. But Ms. Timmerman's body was recovered in a lake, part of which was on federal land and part of which was on state land. On March 14, 2008, a divided panel of the United States Court of Appeals for the Sixth Circuit determined that the federal courts had jurisdiction over the case. *United States v. Gabrion*, 517 F.3d 839 (6th Cir. 2008). On August 3, 2011, a divided panel affirmed Gabrion's conviction but vacated his death sentence. *See United States v. Gabrion*, 648 F.3d 307 (6th Cir. 2011). The Sixth Circuit, sitting en banc, reversed the panel, affirming the conviction and death sentence. *United States v. Gabrion*, 719 F.3d 511 (6th Cir. 2013) (en banc).

C. § 2255 Proceedings

Gabrion filed his § 2255 motion on April 27, 2015; filed a redacted version of the § 2255 motion on May 29, 2015; and filed an amended § 2255 motion on March 8, 2017. Gabrion also sought discovery and an evidentiary hearing where his claims could be adversarially tested. *See* R. 51-1, Br. In Support of Discovery, PageID 2530; R. 67, Am. Br. To Conduct Discovery, PageID 2604; R. 59, Br. In Support of Mot. To Conduct Deps., PageID 2572-77; R. 89-1, Mot. For Evidentiary Hr'g, PageID 3805-45.

The district court denied Gabrion's § 2255 motion without granting discovery or holding a hearing. Though the district court also denied a Certificate of Appealability, the Sixth Circuit granted a COA on September 9, 2020. One issue on which the Sixth Circuit granted a COA was Claim 7: whether trial counsel was ineffective because it deprived Gabrion of representation by conflict-free counsel where one of the attorneys who assisted with Gabrion's defense and met with him represented a key government witness who testified against Gabrion.

On August 4, 2022, a divided panel of the Sixth Circuit affirmed the district court. The court held that although "Yates assisted Gabrion and his counsel," Yates did not "represent" Gabrion and therefore there was no conflict of interest. *Gabrion v. United States*, 43 F.4th 569, 581 (6th Cir. 2022). The court also held that even if Yates represented Gabrion, "Gabrion cannot show that a conflict of interest *adversely affected* Yates' performance as counsel for Gabrion." *Id.* The dissent noted that "Gabrion has plausibly alleged that Yates represented him during his penalty-

phase proceeding"; that "the scope of Yates' participation is something that discovery and a hearing could elucidate"; and that "[a]lthough Gabrion has not, at this stage of litigation, proven an adverse effect, he has at least alleged sufficient facts to support his claims." *Id.* at 591, 594 (Moore, J., concurring in part and dissenting in part). Gabrion petitioned for rehearing en banc, which the Sixth Circuit denied on November 23, 2022.

REASONS FOR GRANTING THE PETITION

In § 2255 proceedings in this capital case, the Sixth Circuit held that an attorney providing strategic advice to a client's counsel of record without entering a formal appearance could not possibly represent the client and therefore could not operate under a conflict of interest. The Sixth Circuit's holding is premised on a narrow definition of representation that does not reflect how lawyers define representation for purposes of avoiding conflicts of interest. Indeed, the Fourth Circuit has previously held that attorneys working on a case without appearing in court or signing papers can operate under a conflict of interest. This Court should grant certiorari to clarify how attorneys should understand the definition of representation and the application of conflict-of-interest rules to attorneys in cases where they do not file formal appearances.

The Sixth Amendment right to effective counsel includes a "correlative right to representation that is free from conflicts of interest." *Wood v. Georgia*, 450 U.S. 261, 271 (1981). To prevail on a claim that he was denied his Sixth Amendment right to conflict-free counsel, a habeas petitioner must generally "establish that the

conflict of interest adversely affected his counsel's performance." *Mickens v. Taylor*, 535 U.S. 162, 174 (2002); *accord Strickland v. Washington*, 466 U.S. 668, 692 (1984).

Christopher Yates represented a key witness in Marvin Gabrion's capital case: Joseph Lunsford. Yates represented Lunsford when the government interviewed him about Gabrion. *See* R. 16-1, 3/30/1998 VerHey letter to Yates, PageID 1491-92. He also represented Lunsford when he testified against Gabrion to the grand jury. *See* Lunsford GJ test., PageID 1503-05. Lunsford, who had been incarcerated with Gabrion, provided perhaps the most graphic and disturbing penalty phase evidence against Gabrion, alleging that he saw Gabrion masturbate to a photo of Timmerman's toddler daughter, whom the government said Gabrion killed.[1] 03/12/2002 Sent. Tr. Vol. II, 318. During § 2255 proceedings, Lunsford recanted this testimony, and said Yates suggested this fact to him. R. 100-4, Lunsford Dec. ¶ 6, PageID 4700. Lunsford also stated that at the time of trial he wanted to recant and be kept off the witness stand, but Yates told him that if he did back out he would face a harsher sentence. *Id.* ¶ 7, PageID 4700.[2] (Yates, for his part, denied Lunsford's accusation. R. 119-1, Yates Dec. ¶ 9, PageID 5294.)

[1] Gabrion was not indicted or tried for causing Shannon's death. Indeed, her body has never been found. But the government did argue Gabrion caused her death as an aggravating circumstance supporting imposition of the death penalty.

[2] Gabrion's §2255 counsel filed a motion to have counsel appointed for Lunsford before Lunsford recanted his sworn testimony, but the district court denied this motion, stating, "The Court is aware of no authority under which it can appoint counsel to a third party, in these or any other circumstances, and Movant has offered none." R. 72, Order, PageID 2631. The court's statement is baffling. Lunsford, of course, had counsel—Yates—when he presented as a trial-level witness in this very case. The fact that he was now presenting as a §2255 witness is not a distinction that makes a difference. The district's CJA plan in effect when the request for counsel was made provided the court wide latitude for appointment of counsel. *See* Section IV.A.2.h of the W.D. Michigan CJA Plan

Meanwhile, Gabrion's trial attorneys received strategic advice and assistance from Yates. The full extent of Yates' involvement in Gabrion's case is not known. Gabrion sought discovery on this issue, pursuant to Rule 6 of the Rules Governing Section 2255 Proceedings for the United States District Courts, and an evidentiary hearing. *See* R. 51-1, Br. in Support of Discovery, PageID 2530; R. 67, Am. Br. to Conduct Discovery, PageID 2604; R. 59, Br. in Support of Mot. to Conduct Deps., PageID 2572-77; R. 89-1, Mot. for Evidentiary Hr'g, PageID 3805-45. However, the district court denied all discovery and a hearing. R. 156, Op., PageID 5833, 5991, 5996.[3]

Yet even without discovery or a hearing, the post-conviction record contains evidence of Yates' deep involvement in Gabrion's case. For one, Yates, through a declaration, acknowledged that he visited Gabrion to discuss the case and encourage him to cooperate with his attorneys, provided research assistance to Gabrion's attorneys, and consulted with them about the case. R. 119-1, Yates Dec. ¶¶ 7, 8, PageID 5293-94. (Yates denies that he "represented" Gabrion, despite this involvement. R. 119-1, Yates Dec. ¶ 5, PageID 5293.)

(approved December 5, 2006) authorizes appointment of counsel when the interests of justice require and the person "is involved in 'ancillary matters …' pursuant to subsection (c) of the CJA [18 USC §3006A(c)]". Determining whether representation in an ancillary matter is appropriate, the CJA Plan directs the court to consider whether appointment is necessary "to protect a constitutional right." Lunsford's constitutional rights were at stake since he was recanting testimony given under oath.

[3] Yates probably should not have represented Lunsford at all, because, before representing Lunsford when he provided evidence against Gabrion, Yates had already represented Gabrion in another federal criminal case. His continuing duty of loyalty to Gabrion should have precluded him from assisting Lunsford as he provided damaging evidence against Gabrion. Nevertheless, the conflict at the heart of this case is Yates' involvement in Gabrion's defense in the capital case while *simultaneously* assisting Lunsford in providing damaging penalty-phase evidence against Gabrion.

An April 6, 2001, letter from trial counsel Stebbins to Yates reveals the depth of Yates' involvement in Gabrion's defense and trial counsel's reliance on Yates' assistance and advice:

> At this stage, we would like assistance in the research and preparation of a Motion challenging the death penalty in general and *as applied in this case*, and challenging the *specific aggravating circumstances* (both statutory and non-statutory) that the government intends to rely on. In addition, *we need help drafting the Jurisdiction Motion*.

R. 16-5, 4/6/2011 letter Stebbins to Yates, PageID 1518 (emphasis added).

Further, Stebbins specifically asked Yates to review examples of motions and "come up with a comprehensive challenge to the death penalty and the aggravating circumstances in this case," saying that such efforts "would lift an enormous load from us [Stebbins and Mitchell]." *Id.*, PageID 1519. Stebbins indicated he would get in touch with Yates "in the next week or so" regarding possible suppression issues. *Id.* He also told Yates that he planned to "sit down with you [Yates] and Paul [Mitchell] and see exactly where we are and how we can force more discovery out of the government." *Id.*

The letter also discussed jurisdictional issues that were critical to the case. Specifically, the issue was whether the victim was killed on federal land. If she was not, there was no federal jurisdiction and, because Michigan does not have the death penalty, no capital charge. With regard to the jurisdiction issue, Stebbins' letter to Yates indicated that a defense expert had "some interesting ideas that are

contrary to the government's expert." *Id.* Stebbins asked Yates to "contact Paul," so Yates and Paul Mitchell could "discuss that Motion." *Id.* Stebbins closed his letter:

> I hope to be in Grand Rapids on the 19th and 20th. Hopefully we can all get together and discuss these matters in more detail. Do not hesitate to contact me next week or any other time if you have questions or need additional information. *We all appreciate your able and willing assistance*.

Id., PageID 1520 (emphasis added). Thus, at a minimum Yates was involved in legal issues involving a "comprehensive" death penalty challenge, suppression, discovery, and jurisdiction.

Additionally, Yates unsuccessfully assisted trial counsel in trying to recover Gabrion's social security records, which potentially were critical penalty-phase evidence regarding proof of Gabrion's mental illness.

Yates' involvement in the case was encouraged by the district court. On February 21, 2001, the trial judge praised Yates in a letter to Gabrion: "I have also spoken with the Federal Public Defender, Christopher Yates, and asked him to assist Mr. Mitchell. You will find Mr. Yates, in addition to being a fine lawyer, also an individual of unquestioned integrity." R. 16-6, 2/21/2001 letter Bell to Yates, PageID 1522. Further, at a May 23, 2001, hearing, Mitchell addressed the trial court, saying, "myself, Yates, and Stebbins have lobbied to get him [Gabrion] moved." *See* R. 100, Am. § 2255 Mot., PageID 3928. The district court encouraged Yates' involvement in the case even though it knew Yates had a conflict. *See* R. 2-6, 2/21/2001 letter Bell to Gabrion, PageID 1522. And Gabrion's counsel of record

sought Yates' advice even though they knew Yates had a conflict. *See* 1:99-CR-76, R. 599, 6/29/1999 Arraign. Tr., 5 (pointing to Yates' conflict during Gabrion's arraignment).

Despite this evidence of Yates' involvement in Gabrion's case—and despite not even knowing the full extent of Yates' involvement—the Sixth Circuit held that Yates did not represent Gabrion and thus could not have a conflict of interest. The Sixth Circuit held that a conflict of interest,

> presupposes that Yates represented Gabrion in this murder case. But Yates swears that he did not. To be sure, Yates never made a formal appearance or filed anything on Gabrion's behalf. Mitchell and Stebbins were Gabrion's counsel of record, and the district court told Gabrion expressly that Yates could not represent him.

Gabrion, 43 F.4th at 581. The Sixth Circuit acknowledged that, "Yates assisted Gabrion and his counsel" but based its ruling on the fact that Yates never made a formal appearance. *Id.*

The Sixth Circuit's theory of representation—under which an attorney who met with the client, drafted motions, strategized with and advised counsel of record, and conducted research, could simultaneously represent a witness against that defendant at trial simply because he did not file a formal appearance—bears almost no resemblance to how the legal profession actually defines representation for purposes of avoiding conflicts.

Attorneys sometimes consult with attorneys outside their offices. Even if the consulting attorneys do not appear in court or sign pleadings, at least in some

circumstances, they would be prohibited from representing a co-defendant or adverse witness.

There are myriad other examples of lawyers and other legal professionals doing work without filing a formal appearance that nevertheless constitutes representation and requires adherence to conflict-of-interest rules. The legions of junior associates at large law firms who work on cases without entering formal appearances or signing pleadings still represent the clients on whose cases they work. These lawyers are not permitted to work on cases that would create conflicts. Law students who work on cases even when they cannot sign pleadings or appear in court still must adhere to conflict-of-interest rules. A first-year law student working in a criminal defense clinic and separately in an internship at a public defender's office could not assist in the representation of both a defendant and an adverse witness, even if they may never appear in court or sign a motion on behalf of either. Paralegals must adhere to conflict-of-interest rules, again despite never appearing in court or signing pleadings. Consulting experts who do not submit reports or testify still cannot work on behalf of multiple adverse parties. Application of the conflict-of-interest rules does not depend on filing a formal appearance, because work that happens behind the scenes obviously matters. The rule the Sixth Circuit posits would allow the complete evisceration of conflict-of-interest jurisprudence by simply directing attorneys to refrain from entering appearances. The Sixth Circuit's theory of representation would also make conflicts impossible in situations where

two parties are negotiating a deal rather than litigating in court, but conflict-of-interest rules of course apply to transactional attorneys.

The above examples reveal that there are two possibilities for understanding conflicts of interest. The first possibility is that an attorney does not need to file a formal appearance in order to represent a client. Alternately, if an attorney does need to file a formal appearance in order to represent a client, then conflicts of interest are possible even when lawyers do not represent someone, but rather assist the lawyers who do represent them. The Sixth Circuit's theory, however, appears to be that only attorneys who file formal appearances are subject to conflict-of-interest rules. The Sixth Circuit's theory created a conflict with the Fourth Circuit, which has held that attorneys who work on a case without filing a formal appearance can operate under a conflict of interest. *See Rubin v. Gee*, 292 F.3d 396, 399-402 (4th Cir. 2002).

Proceeding under the assumption that Yates was not that involved in Gabrion's representation, the Sixth Circuit also held that Gabrion did not suffer an adverse effect. But understanding the extent of Yates' involvement in Gabrion's case is necessary to understanding Yates' effect on Gabrion's representation. Thus, clarification of when an attorney may operate under a conflict of interest in the first place is necessary to assessing a lawyer's possible adverse effect.

Certainly, there is reason to believe that Yates' conflict adversely effected Gabrion. If an unconflicted lawyer who had met with Gabrion and advised his defense team learned that a key penalty phase witness was considering recanting,

as Lunsford swears he was, the lawyer would tell Gabrion's counsel of record. This information could have kept Lunsford off the witness stand or at least would have allowed for a powerful cross-examination. It is difficult to imagine why any lawyer involved in Gabrion's defense would not share this information with the lawyers who would be questioning witnesses on Gabrion's behalf—unless that lawyer had divided loyalties. Discovery and an evidentiary hearing would have elucidated the situation. Indeed, failing to grant a hearing is directly contrary to well established Sixth Circuit precedent, *see, e.g.*, *Martin v. United States*, 889 F.3d 827, 832 (6th Cir. 2018), and this Court's precedent, *see, e.g., Machibroda v. United States*, 368 U.S. 487, 495 (1962).

Accordingly, this Court should grant Gabrion's petition for a writ of certiorari to clarify how attorneys should understand the definition of representation and the application of conflict-of-interest rules to attorneys in cases where they do not file formal appearances.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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