No. 22-6852

IN THE SUPREME COURT OF THE UNITED STATES

MARVIN CHARLES GABRION, II, PETITIONER

v.

UNITED STATES OF AMERICA

(CAPITAL CASE)

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED

Whether the lower courts correctly rejected petitioner's claim that his conviction and sentence should be overturned on the theory that he received ineffective assistance from an attorney who did not represent petitioner at trial but provided pretrial assistance to petitioner's appointed counsel.

ADDITIONAL RELATED PROCEEEDINGS

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

United States v. Gabrion, No. 99-cr-76 (Aug. 25, 2006)

United States Court of Appeals (6th Cir.):

United States v. Gabrion, No. 18-2382 (Sept. 10, 2020)

Supreme Court of the United States:

Gabrion v. United States, No. 08-7512 (Apr. 6, 2009)

Gabrion v. United States, No. 13-7132 (Apr. 28, 2014)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 220a-248a) is reported at 43 F.4th 569. Three prior opinions of the court of appeals are reported at 719 F.3d 511, 648 F.3d 307, and 517 F.3d 839. The opinion of the district court (Pet. App. 1a-216a) is unreported but is available at 2018 WL 4786310. A prior opinion of the district court is not published in the Federal Supplement but is available at 2006 WL 2473978.

JURISDICTION

The judgment of the court of appeals was entered on August 4, 2022. A petition for rehearing was denied on November 23, 2022 (Pet. App. 250a). The petition for a writ of certiorari was filed on February 21, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Michigan, petitioner was convicted of first-degree capital murder occurring within the special maritime and territorial jurisdiction of the United States, in violation of 18 U.S.C. 7 and 1111. Pet. App. 1a. After a capital sentencing hearing pursuant to the Federal Death Penalty Act of 1994, Pub. L. No. 103-222, Tit. IV, 108 Stat. 1959 (18 U.S.C. 3591 et seq.), the jury unanimously recommended that petitioner be sentenced to death. See Pet. App. 222a; id. at 15a. The district court imposed that sentence, the court of appeals affirmed, and this Court denied a petition for a writ of certiorari. Id. at 222a; 572 U.S. 1089.

In 2015, petitioner filed a motion to vacate his sentence under 28 U.S.C. 2255. Pet. App. 222a. The district court denied the motion. Id. at 1a-216a. The court of appeals granted a certificate of appealability on four issues, 820 Fed. Appx. 442, and subsequently affirmed, Pet. App. 220a-248a.

1. In January 1997, police officers in Michigan arrested petitioner on charges of rape. 719 F.3d 511, 515. The arrest came after 19-year-old Rachel Timmerman reported to police that petitioner had raped her. Ibid. According to the evidence at petitioner's federal murder trial, Timmerman reported the crime even though petitioner had told her that if she did so, he would kill both Timmerman and her newborn baby. Ibid. When police arrested petitioner for the rape, they gave him an arrest warrant that identified Timmerman as one of the witnesses, along with Wayne Davis (an associate of petitioner's) and petitioner's teenage nephew. Ibid.

Petitioner was released on bail pending trial for the rape. 719 F.3d at 515. Timmerman twice encountered petitioner while he was free awaiting trial and made panicked calls to the sheriff's office both times. Id. at 516. Then, with his trial date approaching, petitioner turned to an associate to lure Timmerman and her baby to their deaths. Ibid. Petitioner directed John Weeks, a younger friend of his, to call Timmerman and ask her on a date. Ibid. Two days before petitioner's trial was scheduled to begin, Timmerman agreed, telling her father that a boy had asked her to dinner and that she would be home in several hours. Ibid. She told her father that she was bringing her baby on the date at the boy's request. Ibid.

Neither Timmerman nor the baby returned home. 719 F.3d at 516. Instead, witness accounts and forensic evidence at petitioner's trial established that Timmerman was abducted by petitioner and taken to a remote location in the Manistee National Forest. Id. at 515. He "bound and gagged her," put her in a boat, and then "threw her overboard, alive, into a shallow, weedy" portion of Oxford Lake, where she drowned. Ibid. Her bloated body surfaced a month later. Id. at 517.

The body of Timmerman's 11-month-old daughter was never found, but it was essentially undisputed that petitioner killed the baby. 719 F.3d at 517. While awaiting trial for Timmerman's murder, petitioner gave another prisoner a map of Oxford Lake, on which he had written "body of 3, 1 found." Ibid. Petitioner also told two other inmates that he "killed the baby because there was nowhere else to put it." Ibid.

Petitioner was implicated in three other murders. According to the evidence at petitioner's sentencing, Wayne Davis -- who had been identified as a witness to petitioner's rape of Timmerman -- disappeared shortly after petitioner was released on bail for the crime. 719 F.3d at 515-516, 518. Davis was last seen with petitioner. Id. at 518. When he disappeared, he left behind his personal effects other than his stereo, which petitioner was later caught trying to sell -- with

the serial numbers ground off -- to a consignment shop. Id. at 515-516. Other evidence implicated petitioner in the murder of John Weeks, who was likely the only witness to Timmerman's murder. Id. at 518. Weeks disappeared after telling his girlfriend that he was going on a "dope run" with petitioner. Ibid. Finally, a separate investigation by the Federal Bureau of Investigation (FBI) implicated petitioner in the murder of a mentally disabled man, Robert Allen, whose disability checks petitioner began to cash shortly after Allen's disappearance. Ibid.

2. On February 14, 2002, a federal grand jury in the Western District of Michigan charged petitioner in a superseding indictment with murdering Timmerman in the Manistee National Forest, in violation of 18 U.S.C. 7 and 1111, which prohibit murder within the special maritime and territorial jurisdiction of the United States. 517 F.3d 839, 842 n.2. The case proceeded to trial, after which a jury found petitioner guilty. Id. at 842. Following a federal death sentencing hearing, the jury unanimously recommended a sentence of death. 719 F.3d at 520. The district court imposed a capital sentence. Ibid.

The court of appeals ultimately affirmed petitioner's conviction and sentence. In an initial decision, the court ruled that the federal government had jurisdiction over

petitioner's crimes. 517 F.3d at 857. A Sixth Circuit panel subsequently reversed petitioner's death sentence, 648 F.3d at 353, but the full Sixth Circuit granted rehearing en banc, vacated the panel's decision, and affirmed the judgment. 719 F.3d at 535. This Court denied review. 572 U.S. 1089.

3. In April 2015, petitioner filed a motion under 28 U.S.C. 2255 asking the district court to vacate his sentence. Pet. App. 222a. Among other claims, petitioner asserted that an attorney conflict of interest had caused him to receive ineffective assistance of counsel. See id. at 56a. Petitioner did not contend that either Paul Mitchell or David Stebbins, the two private attorneys who were appointed to represent petitioner in connection with Timmerman's murder, were subject to the conflict of interest. Id. at 57a; see id. at 225a. Instead, the pertinent claim asserted that petitioner had received ineffective assistance of counsel based on the activity of a third attorney, Christopher Yates, who was serving as the Federal Public Defender for the Western District of Michigan at the time petitioner was indicted and later tried. Id. at 57a. Specifically, petitioner sought relief for ineffective assistance of counsel on the theory that Yates had assisted Mitchell and Stebbins notwithstanding a conflict of interest

that precluded him from representing petitioner in the murder case. Id. at 56a.

The conflict arose from Yates's representation of Joseph Lunsford, who shared a jail space with petitioner from December 1997 through January 1998. Pet. App. 56a; id. at 224a. In March 1998, Lunsford agreed to speak with the FBI about petitioner. Id. at 224a-225a. During an interview at which Yates represented Lunsford, Lunsford told FBI agents that while they were housed together, petitioner had admitted to raping Timmerman; said that he "'got rid of her to close her mouth'"; acknowledged "killing at least two people, one by drowning"; expressed concern when he learned that police were conducting another search of the lake in which Timmerman's body had been found; and "masturbated to a photo" of Timmerman's baby daughter. Id. at 225a. Lunsford subsequently testified to the grand jury on petitioner's murder charge, with Yates available outside in case Lunsford needed to consult with him. Ibid. And Lunsford, represented by Yates, later appeared as a witness during the penalty phase of petitioner's trial, in which he testified about, inter alia, petitioner's masturbation to a photo of Timmerman's baby. Ibid.

It is undisputed that Yates never formally represented petitioner in connection with this case. Indeed, although

petitioner asked the district court to appoint Yates to represent him when he was indicted in June 1999, the court declined on the ground that Yates had a conflict of interest. Pet. App. 225a; see id. at 57a. But after petitioner expressed dissatisfaction with Mitchell and Stebbins and asked the court to replace them with Yates or allow him to proceed pro se with Yates as backup counsel, the court told petitioner that "I have * * * spoken with the Federal Public Defender, Christopher Yates, and asked him to assist Mr. Mitchell." Id. at 226a (citation and emphasis omitted).

Yates later explained that petitioner, the district court, and petitioner's attorneys were all aware of Yates's representation of Lunsford, and that Yates never represented petitioner or appeared on his behalf in the murder case. Pet. App. 227a. Yates did, however, assist Mitchell and Stebbins in his role as the Federal Public Defender. Ibid. In that capacity, Yates provided research on federal jurisdiction and the location of the crime. Ibid. In addition, Stebbins asked Yates for assistance in the research and preparation of a motion challenging the death penalty in general and as applied to petitioner's case, including the aggravating factors that the government intended to rely on, and suggested that they meet to discuss how to "force more discovery out of the government."

Id. at 226a (quoting Letter from Stebbins to Yates (Apr. 6, 2001)). Yates also reviewed fee and expense applications, served as a conduit between petitioner and his attorneys, and visited petitioner to help him on practical issues, such as urging the Bureau of Prisons to move petitioner to the federal prison in Milan, Michigan. Id. at 227a.

In 2016, Lunsford recanted his testimony about petitioner's masturbating, accused Yates of concocting that story, and claimed that Yates threatened that if he did not testify against petitioner, Lunsford would serve a 30-year state prison term and his federal sentence consecutively. Pet. App. 226a-227a. Yates denied those allegations, submitting a declaration stating that he had not told Lunsford to lie or instructed him about what to testify. Id. at 227a.

4. The district court denied petitioner's Section 2255 motion. Pet. App. 1a-216a.

With respect to petitioner's claim about Yates, the district court determined that Yates's conflict did not result in petitioner's receiving ineffective assistance of counsel, in violation of his constitutional rights. Pet. App. 56a-64a.

The district court found "no evidence that Yates actually represented" petitioner, observing that "Yates did not appear in court, participate in any proceedings, or sign any motions

submitted on [petitioner's] behalf." Pet. App. 60a. The court acknowledged that an attorney could represent a client without appearing in court, but observed that Yates had submitted a declaration stating that he did not provide legal representation to petitioner, and found that petitioner did not rebut that assertion or "present[] any evidence indicating that he and Yates established an attorney-client relationship." Id. at 61a.

Instead, the district court found that Yates "provided some supplemental assistance to [petitioner] or his attorneys." Pet. App. 60a. And the court reasoned that such assistance would not trigger the Sixth Amendment right to effective assistance of counsel, because that right "only applies to the 'lawyer who is representing the criminal defendant or otherwise appearing on the defendant's behalf in the case,'" not "'every lawyer a criminal defendant consults about his case.'" Ibid. (citations omitted).

The district court additionally found that even if Yates "did represent [petitioner] in some informal way," petitioner failed to show that Yates's conflict resulted in deficient performance or in any prejudice to petitioner. Pet. App. 61a; see id. at 61a-64a. The court explained that when a defendant's attorney has also represented a government witness, the primary concern is that the attorney will not be able to cross-examine

that witness effectively. Id. at 62a. The court observed that here, Lunsford was not cross-examined by Yates, but instead by Mitchell, who "was not hindered by any loyalty to Lunsford." Ibid. And the court found that petitioner had not identified any other "adverse effects" that "have any connection to Yates' representation of Lunsford." Id. at 63a.

While petitioner had asserted that "counsel without a conflict of interest would have discovered Lunsford's alleged perjury," the district court rejected that speculation as implausible. Pet. App. 63a. Even "[a]ssuming for the sake of argument the unlikely possibility that Yates prompted and encouraged Lunsford to give false testimony," the court found "no reason to think that conflict-free counsel would have discovered the content of conversations between Lunsford and his attorney." Ibid. Accordingly, the court found that Yates's representation of Lunsford could not have prejudiced petitioner, because petitioner would not have been any better off if Yates were not involved in that representation. Ibid.

5. The court of appeals affirmed, rejecting petitioner's claim (inter alia) that Yates's actions had denied him the effective assistance of counsel. Pet. App. 221a-248a. The court determined that petitioner "has not alleged facts, much less pointed to evidence, that would support a finding that he

suffered a constitutionally impermissible conflict of interest by his counsel." Id. at 228a.

The court of appeals explained that Yates did not represent petitioner in connection with petitioner's murder trial, observing that Mitchell and Stebbins were petitioner's counsel of record and that the district court expressly told petitioner that Yates could not represent him. Pet. App. 227a. The court of appeals agreed with the district court that although Yates "assisted" petitioner and his counsel, that "did not form an attorney-client relationship between Yates and [petitioner], nor does [petitioner] claim that it did." Ibid.

The court of appeals further determined that "[e]ven if Yates represented" petitioner, he "cannot show that a conflict of interest adversely affected Yates's performance." Pet. App. 227a (emphasis omitted). The court observed that petitioner had not identified any instance in which Yates chose a course of action that benefited Lunsford but harmed petitioner. Ibid. The court emphasized that Yates obtained no benefit for Lunsford in exchange for his testimony against petitioner, nor did he cross-examine Lunsford during the penalty phase of petitioner's trial (which might have enabled him to protect Lunsford at petitioner's expense). Ibid. And while the court acknowledged "Lunsford's claim that Yates coerced him with threats to lie at

[petitioner']s sentencing," the court found that "even if that were true, that false testimony would have harmed both [petitioner] and Lunsford, not benefited Lunsford at [petitioner's] expense." Id. at 228a.

Judge Moore concurred in part and dissented in part. Pet. App. 242a-248a. In her view, petitioner's allegations regarding Yates's conflict of interest were sufficient to warrant a remand for discovery and an evidentiary hearing. Id. at 247a-248a.

ARGUMENT

Petitioner contends (Pet. 5-13) that the lower courts erred in denying his claim that he received ineffective assistance of counsel based on Yates's actions. The court of appeals' decision is correct and does not conflict with any decision of this Court or another court of appeals. No further review is warranted.

1. a. The Sixth Amendment affords a criminal defendant the right to have the assistance of counsel for his defense. Strickland v. Washington, 466 U.S. 668, 685-686 (1984). "[A]ssistance which is ineffective in preserving fairness does not meet the constitutional mandate." Mickens v. Taylor, 535 U.S. 162, 166 (2002). But a lawyer who is not actually representing the defendant is not his "counsel" under the Sixth Amendment, and such a lawyer's actions cannot deprive the

defendant of effective assistance of counsel unless they render his actual counsel ineffective.

Thus, as courts of appeals have recognized, "[i]f a criminal defendant in fact receives effective assistance of counsel from the lawyer he has retained to meet the prosecution's case, he cannot later claim that he received ineffective assistance of counsel from another lawyer he chose to consult." United States v. Martini, 31 F.3d 781, 782 (9th Cir. 1994) (per curiam); see, e.g., Ochoa v. United States, 45 F.4th 1293, 1299 (11th Cir. 2022) ("[T]he Sixth Amendment confers 'an affirmative right (the right to effective assistance of counsel at critical proceedings), not a negative right (the right to be completely free from ineffective assistance).'") (citation omitted), cert. denied, 143 S. Ct. 1024 (2023). Accordingly, "a defendant's constitutional right to effective assistance of counsel does not extend to those cases where a non-appearing attorney[] * * * gives a defendant legal advice even though he has not been retained by the defendant to help prepare his defense." Stoia v. United States, 22 F.3d 766, 769 (7th Cir. 1994).

b. The lower courts correctly applied those principles to recognize that because Yates was not retained or functionally acting as petitioner's constitutionally guaranteed counsel and did not render petitioner's constitutionally guaranteed counsel

ineffective, Yates's conflict could not have violated petitioner's constitutional right to the assistance of counsel. Pet. App. 227a; see id. at 59a-61a. Instead, "the district court told [petitioner] expressly that Yates could not represent him," and "Mitchell and Stebbins were [petitioner's] counsel of record." Id. at 227a.

Although "Yates provided some supplemental assistance to [petitioner] or his attorneys," there is no "evidence indicating that he and Yates established an attorney-client relationship." Pet. App. 60a-61a; see id. at 227a ("Yates assisted [petitioner] and his counsel, but that did not form an attorney-client relationship between Yates and [petitioner], nor does [petitioner] claim that it did."). Instead, there is evidence to the contrary: "Yates has provided an affidavit asserting that he did not represent [petitioner] and did not provide legal advice to him." Id. at 61a. And while petitioner may be "in a position to know whether that is true, * * * he does not offer any facts or evidence to rebut Yates' assertions." Ibid.

In those circumstances, "Mitchell and Stebbins were responsible for [petitioner's] representation, not Yates." Pet. App. 60a-61a. And as the court of appeals determined in an aspect of its decision that petitioner does not ask this Court to review, Mitchell and Stebbins provided petitioner with constitutionally adequate counsel. See id. at 230a-240a.

Petitioner "has raised no claim that Yates did anything that adversely affected Mitchell's or Stebbins's representation of him." Id. at 228a.

c. Petitioner identifies no basis for concluding that a defendant who receives constitutionally adequate assistance from his appointed counsel may nevertheless have his conviction or sentence set aside because he also received supplemental assistance from another, unretained attorney who had a conflict of interest. See Pet. 10-13. Instead, petitioner contends (Pet. 10) that under the ethical rules by which "the legal profession actually defines representation for purposes of avoiding conflicts," it was improper for Yates to represent Lunsford while simultaneously providing supplemental assistance to petitioner. Petitioner supports that contention (Pet. 11) with examples of other situations in which he asserts that "doing work without filing a formal appearance" would "nevertheless constitute[] representation and require[] adherence to conflict-of-interest rules."

But even assuming that Yates's conduct was inconsistent with applicable rules of legal ethics, it does not follow that Yates's conduct resulted in a violation of petitioner's Sixth Amendment rights. Petitioner received constitutionally adequate assistance from Mitchell and Stebbins, the attorneys "responsible for [petitioner's] representation," Pet. App. 60a,

and petitioner "has raised no claim that Yates did anything that adversely affected Mitchell's or Stebbins's representation of him," id. at 228a. Whether or not Yates's conduct was appropriate as a matter of legal ethics, therefore, petitioner received the effective assistance of counsel to which he was entitled under the Sixth Amendment.

2. In any event, the lower courts also correctly determined that petitioner is not entitled to relief because he cannot show that Yates's conflict "adversely affected Yates's performance as counsel for [petitioner]." Pet. App. 227a (emphasis omitted); see Mickens, 535 U.S. at 168 (holding that where counsel does not object to the representation of co-defendants at trial, "a defendant must demonstrate that 'a conflict of interest actually affected the adequacy of his representation'" in order to obtain relief) (quoting Cuyler v. Sullivan, 446 U.S. 335, 349 (1980)); Burger v. Kemp, 483 U.S. 776, 785 (1987) (finding that conflict of interest did not harm a lawyer's performance).

Petitioner identifies nothing that Yates did in his asserted role as petitioner's counsel that he would have done differently but for his representation of Lunsford. See Pet. 12-13. The "primary concern that arises when the defendant's attorney has represented a government witness is that the attorney will not be able to effectively cross-examine that

witness." Pet. App. 62a; see Moss v. United States, 323 F.3d 445, 460 (6th Cir.) ("The fear in successive representation cases is that the lawyer will fail to cross-examine the former client rigorously for fear of revealing or misusing privileged information."), cert. denied, 540 U.S. 879 (2003). But that concern is wholly absent here because Yates did not cross-examine Lunsford at trial and therefore had no opportunity to "protect Lunsford or harm" petitioner. Pet. App. 227a.

In nevertheless contending that "Yates' conflict adversely affected" him, petitioner asserts that "[i]f an unconflicted lawyer who had met with [petitioner] and advised his defense team learned that a key penalty phase witness was considering recanting, * * * the lawyer would tell [petitioner's] counsel of record." Pet. 12-13. But the only way that Yates might have known about the alleged desire to recant would be because of his representation of Lunsford during his consultation with the defense team. And as the district court observed, petitioner offers "no reason to think that conflict-free counsel would have discovered the content of conversations between Lunsford and his attorney." Pet. App. 63a. Accordingly, there is no basis for petitioner's assertion (Pet. 13) that Yates would have been able to "tell [petitioner's] counsel of record" about Lunsford's supposed interest in recanting if Yates had not been serving as Lunsford's attorney.

Petitioner also contends (Pet. 13) that "[d]iscovery and an evidentiary hearing would have elucidated the situation." But the district court did not abuse its discretion in declining to hold a hearing because petitioner had alleged no facts that could plausibly establish that Yates provided him with deficient performance attributable to Yates's representation of Lunsford. Pet. App. 64a; see Schriro v. Landrigan, 550 U.S. 465, 468-469 (2007) (evaluating district court's denial of evidentiary hearing in the context of an application for a writ of habeas context under 28 U.S.C. 2254 for abuse of discretion). An evidentiary hearing is not required if the defendant's claims do not raise a bona fide factual dispute, the trial record refutes his claim, or his arguments are clearly without merit. See, e.g., Fontaine v. United States, 411 U.S. 213, 215 (1973) (per curiam); Machibroda v. United States, 368 U.S. 487, 494 (1962); Walker v. Johnston, 312 U.S. 275, 284 (1941); cf. Schriro, 550 U.S. at 474 (observing that "[i]n deciding whether to grant an evidentiary hearing, a federal court must consider whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief").

3. Petitioner's passing assertion (Pet. 12) that the court of appeals' decision conflicts with the Fourth Circuit's

decision in Rubin v. Gee, 292 F.3d 396, cert. denied, 537 U.S. 1048 (2002), is incorrect.

In Rubin, the Fourth Circuit found that two attorneys who had been retained by the defendant suffered from a conflict of interest that resulted in a violation of the defendant's right to the effective assistance of counsel. 292 F.3d at 398. After their client killed her husband in what she would later claim was self-defense, the two attorneys concealed evidence of the crime and arranged to have the client admitted to a hospital under a fictitious name in an apparent effort to avoid detection. Id. at 399. They then "direct[ed] her actions in order to ensure themselves ample compensation," including by directing her to withdraw $105,000 from the bank -- to pay their fee -- while continuing to evade the police. Ibid.

After the client was arrested, they "remained part of the defense team" along with three other attorneys also retained by their client; although they did not formally represent her at the trial or sit at counsel table with the three other attorneys, they continued to collect their fee and "spent 'by far' the most time with [the client] in the events leading up to her trial." Rubin, 292 F.3d at 399, 404. And even after the prosecution used their client's evasion of the police and concealment of evidence to rebut her claim of self-defense, the two attorneys used the attorney-client privilege to avoid being

called as witnesses at trial about their roles in concealing evidence and hiding her from police. Id. at 404-405. As the Fourth Circuit explained, that choice "adversely affected [the client's] representation by her three [non-conflicted] trial attorneys" because it made important fact witnesses "effectively unavailable" to them. Id. at 405.

The court of appeals' determination that petitioner failed to establish a violation of his right to effective assistance of counsel in this case is fully consistent with the Fourth Circuit's finding of a violation under the materially different circumstances in Rubin. Unlike in Rubin, Yates was never at any point retained to represent petitioner and "did not form an attorney-client relationship" with him. Pet. App. 227a. And petitioner "has raised no claim that Yates did anything that adversely affected Mitchell's or Stebbins's representation of him." Id. at 228a. This Court's review is accordingly unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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