No. 18-6423

IN THE SUPREME COURT OF THE UNITED STATES

MARLAN MCRAE, PETITIONER

v.

UNITED STATES OF AMERICA

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

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

BRIAN A. BENCZKOWSKI
Assistant Attorney General

DEEPTHY KISHORE
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the court of appeals properly rejected petitioner's claim of ineffective assistance of counsel on the ground that petitioner was not prejudiced by his counsel's decision not to move for a mistrial.

2. Whether the judge presiding over petitioner's trial abused his discretion by not declaring a mistrial in any event when a witness improperly invoked the Fifth Amendment's right against compelled self-incrimination.

IN THE SUPREME COURT OF THE UNITED STATES

No. 18-6423

MARLAN MCRAE, PETITIONER

v.

UNITED STATES OF AMERICA

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

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A12)* is not published in the Federal Reporter but is reprinted at 734 Fed. Appx. 978. A prior opinion of the court of appeals is not published in the Federal Reporter but is reprinted at 542 Fed. Appx. 484.

JURISDICTION

The judgment of the court of appeals was entered on May 23, 2018. A petition for rehearing was denied on July 27, 2018 (Pet.

---

* The opinion of the court of appeals (Pet. App. A1-A12); order of the court of appeals (id. at G1-G5); and opinion of the district court (id. at B1-11) are cited using the pagination of those opinions.

App. C1). The petition for a writ of certiorari was filed on October 9, 2018. 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 conspiracy to possess at least five kilograms of cocaine with the intent to distribute, in violation of 21 U.S.C. 841(a) and 846. Judgment 1. He was sentenced to 235 months of imprisonment, followed by five years of supervised release. Judgement 2-3. The court of appeals affirmed. 542 Fed. Appx. at 502. Petitioner later moved to vacate his sentence under 28 U.S.C. 2255. D. Ct. Doc. 1, at 5-6 (Jan. 21, 2015). The district court denied petitioner's motion and his request for a certificate of appealability (COA). Pet. App. B1-B11. The court of appeals granted a COA and affirmed. Id. at A1-A12; see id. at G1-G5.

1. Between 1997 and 2007, petitioner participated in a conspiracy to transport cocaine from California to Detroit for distribution throughout Michigan. Pet. App. A1; Presentence Investigation Report ¶ 75. As relevant here, a federal grand jury charged petitioner and his accomplices with conspiracy to possess five kilograms or more of cocaine with the intent to distribute, in violation of 21 U.S.C. 841(a) and 846. Second Superseding Indictment 1-2.

Petitioner was tried with two of his co-defendants. Pet. App. A1. Several of petitioner's other co-conspirators pleaded guilty and testified against him. See id. at A1-A2; B1-B2. Two of those witnesses testified that they had supplied petitioner with cocaine for roughly a decade and that petitioner often received the drug deliveries at his house in Detroit. Ibid. The government introduced a handwritten ledger into evidence that corroborated their testimony. Id. at A2. In addition, a police officer testified that in July 2006, officers executed a search warrant at the Detroit house "and found a large amount of cash, cocaine, heroin, marijuana, several handguns, and multiple safes." Ibid. Petitioner stipulated that two of his fingerprints were found on a brown bag containing two bricks of cocaine found in one of the safes. Ibid.

Tommie Hodges, a federal inmate serving a sentence on different charges, also testified against petitioner. Pet. App. A2. Hodges testified that on numerous occasions he saw petitioner accept deliveries of cocaine from another co-defendant, possess large amounts of cocaine, cook cocaine into crack, and sell crack. Ibid. On cross-examination, Hodges was whether he received anything in exchange for his cooperation, and Hodges responded that he had received a sentence reduction for assisting the government in the investigation of an unrelated case. Id. at A2-A3. When the government asked Hodges to describe the nature of that assistance on redirect examination, Hodges invoked his Fifth

Amendment privilege against compelled self-incrimination. Id. at A3. The next day, after appointing counsel to advise Hodges, the district court ruled that Hodges had no Fifth Amendment privilege regarding any cooperation he provided to the government. Ibid.

Petitioner's co-defendants moved for a mistrial. Pet. App. A3. Marvin Barnett, petitioner's counsel, opposed the motion, and instead asked the district court to strike Hodge's entire testimony. Ibid. The court denied the motions for mistrial, explaining that mistrials are to be granted only in "striking and extraordinary circumstances," and that a curative instruction could serve as an adequate remedy. Ibid. Accordingly, the court instructed the jury to "disregard entirely the testimony of Tommie Hodges," and "consider th[e] case as if he had not testified." Ibid. (citation omitted).

Petitioner was ultimately convicted of conspiracy to possess five kilograms or more of cocaine with the intent to distribute, in violation of 21 U.S.C. 841(a) and 846. Judgment 1. The court of appeals affirmed. 542 Fed. Appx. at 502.

2. The district court judge who presided over petitioner's trial later filed a formal complaint against Barnett with the Michigan Attorney Grievance Board (Board). Pet. App A4. Among other things, the district judge had learned that, after Hodges invoked the Fifth Amendment right against self-incrimination during petitioner's trial, Barnett had attempted to intimidate and threaten Hodges through Hodges' appointed counsel. Ibid. After

investigating that complaint, as well as other complaints against Barnett in two unrelated matters, the Board suspended Barnett's license for three years and ordered him to pay petitioner $47,000 in restitution. Id. at A5.

3. Petitioner filed a motion to vacate his sentence under 28 U.S.C. 2255, arguing that he had received ineffective assistance of trial counsel. D. Ct. Doc. 1, at 1-14. According to petitioner, Barnett refused to file a motion for a mistrial after Hodges invoked the Fifth Amendment unless petitioner paid him $50,000 to retry the case. Pet. App. A4. Petitioner stated that when he told Barnett that he could not pay the additional amount, Barnett opposed the co-defendants' motion for a mistrial and instead moved for the district court to strike Hodges' testimony. Id. at A3-A4.

The district court denied the Section 2255 motion, finding that petitioner's claim failed to meet the ineffective-assistance standard set forth in Strickland v. Washington, 466 U.S. 668 (1984). Pet. App. B11. Strickland generally requires that, to succeed on an ineffective-assistance claim, a defendant must demonstrate (1) that counsel's performance was constitutionally deficient, and (2) "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694; see id. at 687. The court found as a factual matter that petitioner could not establish prejudice under the Strickland test. "Even if [petitioner] had been given a new trial," the court determined, "there is no reason

to believe that the outcome would have been different," because "[t]here was substantial evidence of [petitioner's] guilt aside from Hodges[']s testimony." Pet. App. B9. The court noted that petitioner's co-defendants "testified to supplying [petitioner] with cocaine, and officers found cash, guns, and drugs in [petitioner's] house, along with [petitioner's] fingerprints on a bag of cocaine." Ibid. The court rejected petitioner's argument that he was entitled to a presumption of prejudice under Cuyler v. Sullivan, 446 U.S. 335 (1980), noting that "[n]either the Supreme Court nor the Sixth Circuit has expanded the Sullivan presumption of prejudice rule," which involved attorney representation of multiple defendants, "to cases involving pecuniary conflicts between an attorney and his client." Pet. App. B8.

4. The court of appeals granted a COA on petitioner's ineffective-assistance claim, Pet. App. G5, but ultimately affirmed on the merits, id. at A12. First, it rejected petitioner's argument that he was entitled to a presumption of prejudice under Sullivan, explaining that, even assuming that Barnett could be viewed as having "actively represented conflicting interests" when he demanded $50,000 to retry the case, the specific harm alleged by petitioner -- Barnett's failure to move for a mistrial -- "is not the type of conflict that evades vindication under Strickland's prejudice requirement." Id. at A9. Observing that this Court has "directed courts to exercise restraint in extending Sullivan to conflicts that do not involve

multiple representation," the court of appeals determined that the district court correctly declined to apply Sullivan's presumption of prejudice to petitioner's claim. Ibid.; see id. at A7.

Second, the court of appeals found that petitioner could not demonstrate prejudice under Strickland on the facts of this case. Pet. App. A11-A12. The court agreed with the district court that "the substantial evidence of [petitioner's] guilt ma[de] it difficult for him to demonstrate prejudice," id. at A11, but emphasized that its decision did not "rest solely on the weight of the evidence against [petitioner]," id. at A12. Taking the view that "an analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective," id. at A11 (quoting Lockhart v. Fretwell, 506, U.S. 364, 369 (1993)), the court of appeals determined that although "Barnett's actions were clearly unethical," those actions "did not render the trial fundamentally unfair," id. at A12. The court observed that even after Barnett refused to move for a mistrial, "he continued to vigorously represent [petitioner] and, over government objection, successfully moved to strike Hodges' entire testimony, which would have been particularly damaging to [petitioner]." Ibid. The court additionally found that the district court gave an "adequate curative instruction," ibid., when it directed the jury to "disregard entirely the testimony of Tommie Hodges," and "consider

th[e] case as if he had not testified," id. at A3 (citation omitted).

ARGUMENT

Petitioner asks (Pet. 4-14, 18-21) this Court to review his fact-bound contention that the court of appeals erred in affirming the district court's denial of his ineffective-assistance claim. But those courts correctly applied well-settled law to the facts of petitioner's case and its decision does not conflict with any decision of this Court or any other court of appeals. Further review in this Court is unwarranted.

1. The court of appeals correctly applied Strickland v. Washington, 466 U.S. 668 (1984), in denying petitioner's ineffective-assistance claim. Under Strickland, a defendant seeking to establish ineffective assistance of counsel must prove both (1) deficient performance and (2) prejudice. Id. at 687. Defense counsel's performance is deficient if it fails to meet an "objective standard of reasonableness," but courts must also apply a "strong presumption" that counsel's strategy and tactics fell "within the wide range of reasonable professional assistance." Id. at 688-689. To demonstrate prejudice, a defendant must show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694.

This Court has identified a few exceptional circumstances in which prejudice is presumed and therefore need not be proved by

the defendant. A defendant is per se prejudiced when he is actually or constructively denied the assistance of counsel at a critical stage of the proceedings, United States v. Cronic, 466 U.S. 648, 659 (1984), or when the State interferes with counsel's assistance, Strickland, 466 U.S. at 692. A "similar, though more limited, presumption of prejudice" applies if a defendant demonstrates that his counsel "'actively represented conflicting interests'" and that the conflict "'adversely affected his lawyer's performance.'" Ibid. (quoting Cuyler v. Sullivan, 446 U.S. 335, 348, 350 (1980)).

The lower courts correctly determined that petitioner cannot demonstrate prejudice under Strickland. Pet. App. A10-A12, B8-B9. As those courts found, it is not apparent that the trial court, which denied petitioner's co-defendants' request for a mistrial, would have granted a mistrial had Barnett sought one; the evidence of petitioner's guilt was in any event overwhelming so a new trial would not likely have resulted in a different outcome; and to the extent that he could raise a claim that his proceedings were otherwise fundamentally unfair, the record does not support it. See id. at A11-A12. Any fact-bound challenge to those determinations does not warrant this Court's review. See Sup. Ct. R. 10.

Relying on Sullivan, supra, however, petitioner argues (Pet. 4-14) that he did not have to prove prejudice at all because his attorney had a conflict between his personal interest in retaining

a fee and his client's interest in moving for a mistrial. That argument lacks merit because the underlying alleged conflict of interest is not the type that triggers a presumption of prejudice under Sullivan.

In Sullivan, this Court held that prejudice is presumed when a defendant's attorney engages in simultaneous representation of multiple defendants that creates a conflict of interest that "actually affected the adequacy of [the] representation." 446 U.S. at 349. In Mickens v. Taylor, 535 U.S. 162 (2002), this Court cautioned that, although the lower courts had presumed prejudice under Sullivan in "all kinds of alleged attorney ethical conflicts," id. at 174 (citation omitted), "the language of Sullivan itself does not clearly establish, or indeed even support, such expansive application," id. at 175. Mickens thus indicated that aside from instances of "multiple concurrent representation" and "where assistance of counsel has been denied entirely or during a critical stage of the proceeding," Strickland requires an affirmative showing of prejudice -- i.e., a reasonable likelihood that any unprofessional error affected the outcome of the trial. Id. at 166, 175. Accordingly, "[i]n the sixteen years since Mickens was decided, circuit courts have been hesitant to apply Sullivan's presumption outside the multiple- or serial-representation context." Pet. App. A8.

Petitioner nonetheless asserts (Pet. 18-21) that this Court should grant review to "expand" Sullivan to situations in which a

conflict arises from an attorney's personal pecuniary interest. But this Court in Mickens warned that the purpose of presuming prejudice "is not to enforce the Canons of Legal Ethics, but to apply needed prophylaxis in situations where Strickland itself is evidently inadequate to assure vindication of the defendant's Sixth Amendment right to counsel." Mickens, 535 U.S. at 176. No such prophylaxis is warranted here. As the court of appeals explained, "[t]his is not the type of conflict that evades vindication under Strickland's prejudice requirement," because petitioner "can point to a measurable harm: Barnett's failure to move for a mistrial." Pet. App. A9; see also United States v. Walter-Eze, 869 F.3d 891, 906 (9th Cir. 2017) (explaining that when an alleged conflict "is relegated to a single moment of the representation and resulted in a single identifiable decision that adversely affected the defendant, the Supreme Court's reasoning regarding when prejudice should be presumed does not control" because courts would know the precise impact of any conflict on the trial), cert. denied, No. 18-7083 (Feb. 19, 2019). Therefore, even if the presumption of prejudice under Sullivan "can extend * * * beyond the case of multiple concurrent representations * * * this is not a case where the presumption applies." Walter-Eze, 869 F.3d at 906.

2. Petitioner also appears to raise (Pet. 15-17) an independent claim that the trial court should have declared a mistrial on its "own initiative" when Hodges improperly invoked

the Fifth Amendment during the government's redirect examination. However, petitioner never raised this argument on direct appeal. See 542 Fed. Appx. at 492-494, 500-502. Because petitioner "has procedurally defaulted [this] claim by failing to raise it on direct review," it "may be raised in habeas only if [petitioner] can first demonstrate either 'cause' and actual 'prejudice,' or that he is 'actually innocent.'" Bousley v. United States, 523 U.S. 614, 622 (1998) (citations omitted). Petitioner has not acknowledged a procedural default or identified any "cause" or "actual prejudice" excusing his default.

Even if the claim were properly presented, it lacks merit. As the trial court judge recognized, the remedy of a mistrial "should be reserved for extraordinary and striking circumstances." Pet. App. A12 (citation and internal quotation marks omitted). And petitioner cannot show that the judge erred in determining that Hodges' invocation of the Fifth Amendment did not warrant the sweeping remedy of a mistrial, which his co-defendants had requested. Cf. Illinois v. Somerville, 410 U.S. 458, 461-462 (1973) (emphasizing the "broad discretion" reserved to the trial court in determining whether to grant a mistrial). That is especially true in light of the court's curative instruction directing the jury "to disregard entirely the testimony of Tommie Hodges" and to "consider th[e] case as if he had not testified." Pet. App. A3 (citation omitted); cf. Penry v. Johnson, 532 U.S. 782, 799 (2001) ("We generally presume that jurors follow their

instructions."). In any event, the district court's fact-bound and discretionary decision not to grant a mistrial would not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

BRIAN A. BENCZKOWSKI
Assistant Attorney General

DEEPTHY KISHORE
Attorney

MARCH 2019