No. 02-274

In the Supreme Court of the United States

LAURIE A. WHITE, INDEPENDENT COUNSEL,
PETITIONER

v.

UNITED STATES, ET AL.

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court's appointment of an independent counsel to investigate and present mitigation evidence during a federal capital sentencing proceeding violated the defendant's Sixth Amendment right to self-representation.

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OPINIONS BELOW

The opinion and order of the court of appeals (Pet. App. 1-38) is reported at 285 F.3d 378. The opinion of the district court (Pet. App. 39-62) is reported at 180 F. Supp. 2d 797.

JURISDICTION

The opinion and order of the court of appeals granting the writ of mandamus was entered on March 11, 2002. A petition for rehearing was denied on April 25, 2002 (Pet. App. 64-65). The petition for a writ of certiorari was filed on July 24, 2002. 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 Eastern District of Louisiana, Len Davis was convicted of conspiracy against civil rights resulting in death, in violation of 18 U.S.C. 241, and deprivation of rights under color of law resulting in death, in violation of 18 U.S.C. 242. After a penalty phase hearing, Davis was sentenced to death. The court of appeals affirmed the conviction but remanded for resentencing. On remand, Davis informed the court that he desired to represent himself during the new penalty phase. After holding a hearing pursuant to *Faretta* v. *California*, 422 U.S. 806 (1975), the district court ordered standby counsel to assume full representation of Davis. On July 17, 2001, the court of appeals issued a writ of mandamus directing the district court to allow Davis to represent himself. On August 30, 2001, the district court entered an order appointing petitioner to serve as independent counsel during the penalty phase of Davis's trial for the purpose of investigating and presenting mitigation evidence. On March 11, 2002, the court of appeals issued a second writ of mandamus and remanded for a penalty phase without the assistance of independent counsel.

1. On October 13, 1994, Paul Hardy shot and killed Kim Groves at the behest of Davis, who was then an officer of the New Orleans Police Department, after Groves filed an internal affairs complaint alleging that Davis had engaged in police brutality. Damon Causey helped to plan the murder and the subsequent coverup. *United States* v. *Causey*, 185 F.3d 407, 411 (5th Cir. 1999), cert. denied, 530 U.S. 1277 (2000).

On August 10, 1995, a federal grand jury returned a superseding indictment charging Davis, Hardy, and

Causey with one count of conspiracy against civil rights resulting in death, in violation of 18 U.S.C. 241; one count of deprivation of rights under color of law resulting in death, in violation of 18 U.S.C. 242; and one count of tampering with a witness by killing her to prevent the communication of information to a federal law enforcement officer, in violation of 18 U.S.C. 1512(a)(1)(C) and (a)(2). The government filed a notice of intent to seek the death penalty against Davis and Hardy but did not seek the death penalty against Causey, 185 F.3d at 411.

A petit jury found all three defendants guilty of the charges under 18 U.S.C. 241 and 242, and found Davis and Hardy guilty of the witness-tampering charge. After further capital sentencing proceedings against Davis and Hardy, the jury recommended a death sentence for each. The district court sentenced Davis and Hardy to three concurrent death sentences, and Causey to two concurrent terms of life imprisonment. *Causey*, 185 F.3d at 411-412.

The court of appeals affirmed the defendants' convictions under 18 U.S.C. 241 and 242, *Causey*, 185 F.3d at 413-416, but reversed Davis's and Hardy's convictions for witness tampering, *id.* at 421-423. The court also remanded Davis's and Hardy's cases for resentencing because the jury did not make separate recommendations concerning the appropriate penalty for each count of conviction. *Id.* at 423. This Court denied all three defendants' petitions for writs of certiorari. 530 U.S. 1277 (2000).

2. On remand, Davis moved to represent himself during the new penalty phase. After holding a hearing pursuant to *Faretta*, *supra*, the district court found that Davis had knowingly and intelligently elected to exercise his right of self-representation. The court con-

cluded, however, that the right of self-representation does not extend to criminal sentencing, and even if it does, that Davis's interests were outweighed by the Eighth Amendment requirement that the death penalty not be imposed arbitrarily and capriciously. The court directed standby counsel to assume full representation of Davis and to prepare and present a full penalty phase defense. Pet. App. 2.

On July 17, 2001, a divided panel of the court of appeals granted Davis's petition for a writ of mandamus directing the district court to allow Davis to represent himself in the penalty phase. Pet. App. 2; 7/17/01 Order 1-8. The majority held that Davis has a right under 28 U.S.C. 1654 and the Sixth Amendment to represent himself in the penalty phase of his capital trial and that, under the circumstances of this case, that right is not outweighed by the public's interest in avoiding arbitrary and capricious imposition of the death penalty. 7/17/01 Order 3-7. The court noted that the district court still had the authority to appoint standby counsel to assist Davis "if such is appropriate." *Id.* at 7-8.

Judge Dennis dissented from the issuance of the writ of mandamus. 7/17/01 Order 1-11 (Dennis, J., dissenting). He concluded that Davis's Sixth Amendment right to represent himself "is clearly outweighed by the interest of the people of the United States in the fair and efficient administration of justice in the imposition of federal capital punishment." *Id.* at 3-4.

3. On August 30, 2001, the district court issued an order appointing petitioner to serve as independent counsel during Davis's new penalty phase and directing her to "investigate and present mitigation evidence." Pet. App. 39-40. The court concluded that the involvement of independent counsel was necessary "to

accommodate" the public's "substantial independent interest in being assured of a full and fair sentencing proceeding." *Id.* at 40. The court acknowledged that the independent counsel would present mitigation evidence against Davis's wishes, but the court stated that the independent counsel "will be clearly identified as *not* representing Davis, and Davis will be permitted to present whatever defense he deems appropriate." *Ibid.*

4. On March 11, 2002, the same divided panel of the court of appeals issued a second writ of mandamus directing the district court to allow the penalty phase to proceed without the involvement of independent counsel. Pet. App. 1-38. The majority concluded that any "alleged inherent authority [of the district court] to appoint independent counsel" conflicts with Davis's Sixth Amendment right of self-representation. *Id.* at 9-10. The majority stated that Davis's right of self-representation "cannot be impinged merely because society, or a judge, may have a difference of opinion with the accused as to what type of evidence, if any, should be presented in a penalty trial." *Id.* at 10-11. The court noted that Davis's trial strategy—that of "attack[ing] the strength of the government's case as to his guilt" "instead of presenting traditional mitigating evidence"—"is in direct conflict with the independent counsel's approach." *Id.* at 11, 12.[1] After observing

[1] The majority acknowledged that, although Davis's brief suggests that he intends to rely on that "residual doubt" theory during the penalty phase, he has also threatened "on various occasions" that he will not present any evidence at all. Pet. App. 11 n.6. The court further noted that "[t]here is also evidence in the record that Davis would prefer the death penalty to be imposed," not because he is on a "suicide mission," but because he believes that "his legal arguments concerning sufficiency of the evidence will be scrutinized more closely on appeal" if he is under sentence of

that "Davis' right to self-representation encompasses the right to direct trial strategy," the court of appeals held that "the district court's decision to impose an independent counsel into these proceedings [must be] overturned." *Ibid.*

Judge Dennis again dissented. Pet. App. 14-38. He contended that the majority committed "legal error in this case of first impression." *Id.* at 15. In his view, Davis was not deprived of a constitutional right of self-representation by the district court's appointment of an independent counsel "to represent [a] national interest" "in the fair and faithful administration of justice." *Id.* at 38.

ARGUMENT

1. Petitioner seeks (Pet. 10-30) this Court's review of the court of appeals' order reversing the district court's appointment of independent counsel for the purpose of presenting mitigation evidence during the penalty phase of Davis's trial. This case, however, would provide a poor vehicle for review of the question presented, because petitioner lacks standing to challenge the decision below, and, in any event, petitioner's claims are not ripe for review by this Court.

a. Petitioner argues that the decision below is contrary to "the Eighth Amendment right prohibiting the imposition of arbitrary and capricious sentences[] and the generalized societal concern against wrongfully sentencing someone to death." Pet. 24. Petitioner lacks

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death. *Ibid.* The court concluded that "[w]hatever the merits of Davis's legal strategy, * * * Davis has the right to conduct his penalty defense in the manner of his choosing"—even if it includes "arguing to the jury that he should receive the death penalty"—because, ultimately, "it is he who suffers the consequences if his defense fails." *Id.* at 12 n.6 (quoting *Faretta*, 422 U.S. at 820).

standing to raise either of those claims. Petitioner cannot assert the Eighth Amendment rights of Davis, the real party in interest, because there is no indication in the record that Davis is "unable to litigate his own cause due to mental incapacity, lack of access to court, or other similar disability." *Whitmore* v. *Arkansas*, 495 U.S. 149, 162-166 (1990); see *Gilmore* v. *Utah*, 429 U.S. 1012 (1976). Further, the "generalized" interest of the public in reliable sentencing proceedings is insufficient to give her standing to challenge the court of appeals' decision. *Whitmore*, 495 U.S. at 160 ("public interest [in] protections of the Eighth Amendment" did not give inmate "a right to invoke this Court's jurisdiction to insure that an execution [of another prisoner] [wa]s not carried out * * * without appellate review"); see also *Allen* v. *Wright*, 468 U.S. 737, 754 (1984) ("This Court has repeatedly held that an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court.").

b. This Court's review of the question presented would also be premature. The court of appeals vacated the judgment against Davis in part and remanded the case to the district court for a new sentencing proceeding. Davis has not yet been resentenced and it is far from certain that he will be sentenced to death. *Whitmore*, 495 U.S. at 159-160 ("It is just not possible for a litigant to prove in advance that the judicial system will lead to any particular result in his case."). This Court generally does not review judgments in the courts of appeals when further proceedings are taking place in the same case in the lower courts, and the issue raised in the petition can be raised after conclusion of those proceedings. Robert Stern et al., *Supreme Court Practice* § 4.18, at 196 & n.60 (7th ed. 1993); *Hamilton-*

Brown Shoe Co. v. *Wolf Bros. & Co.*, 240 U.S. 251, 257-259 (1916). That general practice enables the Court to examine cases on a full record, prevents unnecessary delays in the trial and appeals process, and allows the Court to consider all of the issues raised by a single case or controversy at one time.

The prudential reasons for following that course are particularly compelling in this case. If Davis is sentenced to life imprisonment, petitioner's concerns about the imposition of the death penalty will be moot. *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting denial of certiorari). If Davis is sentenced to death, the court of appeals and this Court can, as appropriate, consider the questions presented in the instant petition as well as other potential issues, following final judgment. *Ibid.*; see *Hughes Tool Co.* v. *Trans World Airlines*, 409 U.S. 363, 365 n.1 (1973) (previous denial of certiorari does not bar later review). Indeed, although petitioner asserts that this case presents the question whether a defendant may "actively seek a death sentence" or "demand a sentence of death," Pet. 10, 25, petitioner has not yet presented a defense, and there is some evidence in the record to suggest that petitioner may rely on a "residual doubt" theory in his defense during the penalty phase. See note 1, *supra*.

2. In any event, the court of appeals correctly concluded that "[a]n individual's constitutional right to represent himself * * * outweighs an individual judge's limited discretion to appoint amicus counsel when that appointment will yield a presentation to the jury that directly contradicts the approach undertaken by the defendant." Pet. App. 4-5. In *Faretta* v. *California*, 422 U.S. 806, 832-834 (1975), the Court held that the Sixth Amendment guarantees a defendant the

right to forgo counsel and conduct his own defense. Because a defendant who represents himself "relinquishes * * * many of the traditional benefits associated with the right to counsel," a defendant seeking to proceed pro se "must 'knowingly and intelligently'" waive that right. *Id.* at 835 (quoting *Johnson* v. *Zerbst*, 304 U.S. 458, 464-465 (1938)). Furthermore, a defendant's "technical legal knowledge" is "not relevant" to the determination whether a defendant is competent to waive his right to counsel, *id.* at 836, and, although a defendant "may conduct his own defense ultimately to his own detriment, his choice must be honored," *id.* at 834; see *McKaskle* v. *Wiggins*, 465 U.S. 168, 177 n.8 (1984) (observing that "the right of self-representation is a right that when exercised usually increases the likelihood of a trial outcome unfavorable to the defendant").

There is no basis for declining to apply the right recognized in *Faretta* in the sentencing phase of a capital case. "The penalty phase of a capital trial is undertaken to assess the gravity of a particular offense and to determine whether it warrants the ultimate punishment; it is in many respects a continuation of the trial on guilt or innocence of capital murder." *Monge* v. *California*, 524 U.S. 721, 732 (1998). Although this Court has never squarely addressed the question whether *Faretta* applies in the sentencing phase of a capital case, it has denied a request for a stay of execution in at least one case in which the defendant represented himself during the penalty phase. *Lenhard* v. *Wolff*, 444 U.S. 807 (1979). Several other courts have expressly held that *Faretta* applies in capital sentencing proceedings. See, *e.g.*, *Silagy* v. *Peters*, 905 F.2d 986, 1006-1008 (7th Cir. 1990), cert. denied, 498 U.S. 1110 (1991); *Illinois* v. *Coleman*, 660 N.E.2d 919, 937-

938 (Ill. 1995), cert. denied, 519 U.S. 827 (1996); *Sherwood* v. *Indiana*, 717 N.E.2d 131, 135 (Ind. 1999); *South Carolina* v. *Brewer*, 492 S.E.2d 97, 99 (S.C. 1997); *Bishop* v. *Nevada*, 597 P.2d 273, 276 (Nev. 1979).

Under those principles, the court of appeals correctly held that the district court's appointment of an independent counsel violated Davis's Sixth Amendment right to self-representation during the penalty phase of his trial. "[T]he core of the *Faretta* right" is the right "to preserve actual control over the case he chooses to present to the jury." *McKaskle* v. *Wiggins*, 465 U.S. at 178. Thus, that right is violated by the appointment of counsel whose "participation over the defendant's objection effectively allows counsel to make or substantially interfere with any significant tactical decisions * * * or to speak *instead* of the defendant on any matter of importance." *Ibid.* Davis's right of self-representation thus encompasses the right to make the "specific tactical decision" whether to introduce mitigating evidence. Pet. App. 11; accord *Silagy*, 905 F.2d at 1007-1008 (holding *Faretta* right applies to decision not to present mitigating evidence); *Bishop* v. *Nevada*, 597 P.2d at 276 (same). Accordingly, the Sixth Amendment barred the district court's appointment of counsel to present mitigation evidence "in direct conflict" with "Davis's strategy" not to do so. *Id.* at 12.

Petitioner errs in asserting (Pet. 22-25) that the court of appeals' decision conflicts with the interests protected by the Eighth Amendment in fair and reliable capital sentencing proceedings. The Eighth Amendment guarantees the defendant the *opportunity* to present mitigation evidence for the jury's consideration. *E.g.*, *Saffle* v. *Parks*, 494 U.S. 484, 490 (1990); *Lockett* v. *Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion); *Woodson* v. *North Carolina*, 428 U.S. 280, 303-

305 (1976) (plurality opinion). The court of appeals' decision in this case neither deprives Davis of the opportunity to present mitigation evidence nor prevents the jury from considering any relevant mitigating factors based on the evidence presented by the parties during the guilt phase or in the forthcoming sentencing proceeding.

3. Petitioner argues that review of the decision below is warranted because it "is irreconcilably in conflict with this Court's decisions, with federal statutes, and with decisions of the United States Court of Appeals for the Seventh Circuit." Pet. 10. None of those contentions has merit.

a. Contrary to petitioner's assertion (Pet. 10-13), the court of appeals' decision does not conflict with *United States* v. *Nixon*, 418 U.S. 683, 709 (1974); *Herring* v. *New York*, 422 U.S. 853, 862 (1975); *Gardner* v. *Florida*, 430 U.S. 349, 360 (1977) (plurality opinion); *Lankford* v. *Idaho*, 500 U.S. 110, 127 (1991); *Quercia* v. *United States*, 289 U.S. 466, 469 (1933); and *United States* v. *Hasting*, 461 U.S. 499, 505-506 (1983). Although *Herring*, *Gardner*, and *Lankford* stress the importance of the adversarial process, and *Hasting* and *Quercia* recognize the federal courts' limited supervisory powers, none of those decisions involves the question whether or under what circumstances a district court has authority to appoint independent counsel during the penalty phase of a capital case. Accordingly, none warrants this Court's review of the court of appeals' decision on that issue.

b. Petitioner is also wrong is asserting (Pet. 13-17) that the court of appeals' decision conflicts with the Federal Death Penalty Act of 1994 (FDPA), which provides that upon a finding of guilt in a capital case the district court must "conduct a separate sentencing

hearing to determine the punishment to be imposed," 18 U.S.C. 3593(b), and further provides that during such hearing the defendant "*may* present any information relevant to a mitigating factor" and the prosecution "*may* present any information relevant to an aggravating factor." 18 U.S.C. 3593(c) (emphases added). Nothing in those provisions requires the parties to present evidence relevant to aggravating and mitigating factors in every case. A fortiori, the FDPA cannot fairly be read to authorize or mandate the appointment of independent counsel for the purpose of presenting mitigating evidence when the defense elects not to do so.

Petitioner similarly errs in relying (Pet. 14-15) on decisions recognizing the authority of the federal courts to appoint counsel to defend a legal position that none of the parties to a case will urge. In this case, the district court did not appoint independent counsel to adopt and present a legal position that neither party intends to defend. Rather, the court adopted counsel for the express purpose of adopting a trial strategy that directly conflicts with Davis's strategy. Pet. App. 12. None of the cases identified by petitioner involves the appointment of counsel for the purpose of altering or supplementing the presentation of evidence to the jury by a party who has asserted his constitutional right to self-representation, and none supports further review.[2]

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[2] Nor do the presentence report requirement applicable in non-capital cases or Rule 706 of the Federal Rules of Evidence warrant further review, as petitioner contends. Pet. 15-16. The FDPA specifically provides that "no presentence report shall be prepared" in conjunction with a federal capital sentencing proceeding. 18 U.S.C. 3593(c). Rule 706 authorizes a district court to appoint expert witnesses, not attorneys or advocates.

c. Petitioner also argues (Pet. 17-19) that the court of appeals' decision conflicts with *United States* v. *Taylor*, 569 F.2d 448 (7th Cir. 1978). That contention is incorrect. In *Taylor*, the Seventh Circuit held that the district court did not violate the defendant's right of self-representation by allowing standby counsel, over the defendant's objection, to cross-examine witnesses, make objections, and deliver a closing argument. 569 F.2d at 452-454. The *Taylor* court stressed, however, that its holding was limited to the "peculiar circumstances of th[at] case," which involved a defendant who "openly acknowledged his inability defend himself" and refused "to take [any] part in the proceedings." *Id.* at 453. The court also observed that "appointed counsel's participation in the trial did not in any manner impinge upon or undercut the defense." *Ibid.* By contrast, the court of appeals found that "Davis's strategy is in direct conflict with the independent counsel's approach." Pet. App. 12.

In any event, *Taylor* was decided before this Court's decision in *McKaskle*, *supra*, which holds that a district court may not allow standby counsel to override a *pro se* defendant's strategic choices. 465 U.S. at 178. *Taylor* also was not a capital case, and it did not involve the appointment of independent counsel. The court of appeals in the instant case has already authorized the district court to appoint standby counsel in the penalty phase. Pet. App. 3. Accordingly, *Taylor* provides no basis for further review of whether or when the appointment of independent counsel in a federal capital sentencing hearing is appropriate.

d. The state court cases relied on by petitioner (Pet. 26, 29) likewise do not conflict with the decision below. In *Washington* v. *Dodd*, 838 P.2d 86 (Wash. 1992) (en banc), the court addressed a defendant's right to waive

appellate review of a death sentence. The court did not address the question presented.

In *New Jersey* v. *Koedatich*, 548 A.2d 939, 993-995 (N.J. 1988), cert denied, 488 U.S. 1017 (1989), the court held that, even when a represented defendant directs his counsel not to introduce mitigating evidence in a capital sentencing hearing, the court should ensure that mitigating evidence is presented. While the court quoted proposed ways to address this problem, including having the trial court itself call witnesses with mitigating evidence or appointing counsel to call them, the court did not "adopt or reject any of them," or "foreclose the possibility that * * * the trial court may have to compel defense counsel to present the mitigating evidence despite a client's instructions to the contrary." *Id.* at 997. The court did not specifically address any issue of a defendant's rights under *Faretta.*

In *Muhammad* v. *Florida*, 782 So. 2d 343, 363-364 (Fla.), cert. denied, 122 S. Ct. 323 (2001), the court held, as a matter of state law, that the sentencing judge had erred in placing great weight on the verdict of the advisory jury, because the defendant (who was representing himself) had refused to put on mitigating evidence. The court then discussed "prospective procedures" that should apply on re-sentencing, including possible appointment of counsel to present mitigating evidence, if the defendant again refused to put on mitigating evidence. *Id.* at 364. The defendant did not raise any claim that such an appointment of counsel would conflict with his assertion of his right to self-representation, and the court did not address any such claim. The same is true in *Klokoc* v. *State*, 589 So. 2d 219 (Fla. 1991), where special counsel was appointed to present mitigating evidence after the defendant instructed his counsel not to do so. Although *Klokoc* also

sought to waive his appeal, the court reduced the death sentence to life imprisonment because of the mitigating circumstances; it did not address any claim under *Faretta*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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