# SUPREME COURT OF THE UNITED STATES

No. 00–9285

WALTER MICKENS, JR., PETITIONER *v.*
JOHN TAYLOR, WARDEN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[March 27, 2002]

JUSTICE KENNEDY, with whom JUSTICE O'CONNOR joins, concurring.

In its comprehensive analysis the Court has said all that is necessary to address the issues raised by the question presented, and I join the opinion in full. The trial judge's failure to inquire into a suspected conflict is not the kind of error requiring a presumption of prejudice. We did not grant certiorari on a second question presented by petitioner: whether, if we rejected his proposed presumption, he had nonetheless established that a conflict of interest adversely affected his representation. I write separately to emphasize that the facts of this case well illustrate why a wooden rule requiring reversal is inappropriate for cases like this one.

At petitioner's request, the District Court conducted an evidentiary hearing on the conflict claim and issued a thorough opinion, which found that counsel's brief representation of the victim had no effect whatsoever on the course of petitioner's trial. See *Mickens* v. *Greene*, 74 F. Supp. 2d 586 (ED Va. 1999). The District Court's findings depend upon credibility judgments made after hearing the testimony of petitioner's counsel, Bryan Saunders, and other witnesses. As a reviewing court, our role is not to speculate about counsel's motives or about the plausibility of alternative litigation strategies. Our role is to

defer to the District Court's factual findings unless we can conclude they are clearly erroneous. See *Lackawanna County District Attorney* v. *Coss,* 532 U. S. 394, 406 (2001) (opinion of O'CONNOR, J.). The District Court found that Saunders did not believe he had any obligation to his former client, Timothy Hall, that would interfere with the litigation. See 74 F. Supp. 2d, at 606 ("[T]he Court concludes that, as a factual matter, Saunders did not believe that any continuing duties to a former client might interfere with his consideration of all facts and options for his current client") (internal quotation marks and alteration omitted). Although the District Court concluded that Saunders probably did learn some matters that were confidential, it found that nothing the attorney learned was relevant to the subsequent murder case. See *ibid.* ("[T]he record here confirms that Saunders did not learn any confidential information from Hall that was relevant to Mickens' defense either on the merits or at sentencing" (emphasis deleted)). Indeed, even if Saunders had learned relevant information, the District Court found that he labored under the impression he had no continuing duty at all to his deceased client. See *id.,* at 605 ("[T]he record here reflects that, as far as Saunders was concerned, his allegiance to Hall, '[e]nded when I walked into the courtroom and they told me he was dead and the case was gone'") (quoting Hearing Tr. 156–157, 218 (Jan. 13, 1999)). While Saunders' belief may have been mistaken, it establishes that the prior representation did not influence the choices he made during the course of the trial. This conclusion is a good example of why a case-by-case inquiry is required, rather than simply adopting an automatic rule of reversal.

Petitioner's description of roads not taken would entail two degrees of speculation. We would be required to assume that Saunders believed he had a continuing duty to the victim, and we then would be required to consider

whether in this hypothetical case, the counsel would have been blocked from pursuing an alternative defense strategy. The District Court concluded that the prosecution's case, coupled with the defendant's insistence on testifying, foreclosed the strategies suggested by petitioner after the fact. According to the District Court, there was no plausible argument that the victim consented to sexual relations with his murderer, given the bruises on the victim's neck, blood marks showing the victim was stabbed before or during sexual intercourse, and, most important, petitioner's insistence on testifying at trial that he had never met the victim. See 74 F. Supp. 2d, at 607 ("[T]he record shows that other facts foreclosed presentation of consent as a plausible alternative defense strategy"). The basic defense at the guilt phase was that petitioner was not at the scene; this is hardly consistent with the theory that there was a consensual encounter.

The District Court said the same for counsel's alleged dereliction at the sentencing phase. Saunders' failure to attack the character of the 17-year-old victim and his mother had nothing to do with the putative conflict of interest. This strategy was rejected as likely to backfire, not only by Saunders, but also by his co-counsel, who owed no duty to Hall. See *id.*, at 608 ("[T]he record here dispels the contention that the failure to use negative information about Hall is attributable to any conflict of interest on the part of Saunders"). These facts, and others relied upon by the District Court, provide compelling evidence that a theoretical conflict does not establish a constitutional violation, even when the conflict is one about which the trial judge should have known.

The constitutional question must turn on whether trial counsel had a conflict of interest that hampered the representation, not on whether the trial judge should have been more assiduous in taking prophylactic measures. If it were otherwise, the judge's duty would not be limited to

cases where the attorney is suspected of harboring a conflict of interest. The Sixth Amendment protects the defendant against an ineffective attorney, as well as a conflicted one. See *Strickland* v. *Washington*, 466 U. S. 668, 685–686 (1984). It would be a major departure to say that the trial judge must step in every time defense counsel appears to be providing ineffective assistance, and indeed, there is no precedent to support this proposition. As the Sixth Amendment guarantees the defendant the assistance of counsel, the infringement of that right must depend on a deficiency of the lawyer, not of the trial judge. There is no reason to presume this guarantee unfulfilled when the purported conflict has had no effect on the representation.

With these observations, I join the opinion of the Court.