No. 18-_____

IN THE

Supreme Court of the United States

NICHOLAS BERNARD ACKLIN,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

On Petition for Writ of Certiorari to the Alabama Court of Criminal Appeals

Petition for Writ of Certiorari

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CAPITAL CASE

QUESTION PRESENTED

Shortly before the trial in this capital case, the defense attorney learned that his client, Petitioner Nicholas Acklin, had been abused and threatened at gunpoint by his father when he was a child. The attorney knew that this information could be important as mitigation. But Acklin's father was paying the attorney's fee, and he told the attorney that if evidence of the abuse was presented, he would no longer pay for the representation.

The attorney did not inform Acklin or the trial court that he had a conflict of interest. Instead, without mentioning the conflict, the attorney privately obtained a typewritten waiver of the abuse evidence from Acklin. The attorney then called Acklin's father to testify at the penalty phase that Acklin had been raised in a loving and supportive home. The trial court expressly relied on that testimony as a reason to impose a death sentence.

In the post-conviction proceedings below, the Alabama Court of Criminal Appeals held that Acklin's attorney did not have an "actual conflict of interest" under the Sixth and Fourteenth Amendments, based on the typewritten waiver, which the conflicted attorney had Acklin sign without disclosing his conflict.

The question presented is:

Whether a criminal defendant is deprived of his Sixth and Fourteenth Amendment rights to conflict-

free counsel when his lawyer is paid by a third party; the third party threatens to withhold payment unless the lawyer conducts the defense in a manner that serves the third party's interests; the lawyer does not inform his client or the court of the conflict; and the lawyer in fact conducts the defense in a manner that serves the third party payer's interests and sacrifices the client's interests.

PARTIES TO THE PROCEEDING BELOW

Petitioner is Nicholas Bernard Acklin. Respondent is the State of Alabama. Because no petitioner is a corporation, a corporate disclosure statement is not required under Supreme Court Rule 29.6.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Nicholas Acklin respectfully petitions this Court for a writ of certiorari to review the judgment of the Alabama Court of Criminal Appeals.

OPINIONS BELOW

The opinion of the Alabama Court of Criminal Appeals is unpublished, and is in the Appendix at 1a–65a. The order of the Madison County Circuit Court denying Acklin post-conviction relief is unpublished, and is in the Appendix at 66a–112a. The order of the Alabama Court of Criminal Appeals denying Acklin's application for rehearing is unpublished, and is in the Appendix at 113a–114a. The order of the Supreme Court of Alabama denying Acklin's petition for writ of certiorari is unpublished, and is in the Appendix at 115a–116a.

JURISDICTION

The Alabama Court of Criminal Appeals affirmed the denial of Acklin's post-conviction petition on December 15, 2017. *Acklin v. Alabama*, No. CR-14-1011, 2017 WL 6398544 (Ala. Crim. App. Dec. 15, 2017). The court denied Acklin's timely application for rehearing on all claims on April 20, 2018, and the Alabama Supreme Court denied certiorari as to all claims on June 15, 2018. This Court granted Acklin an extension of time within which to file a petition for writ of certiorari, up to and including November 12, 2018. *See Acklin v. Alabama*, No. 18A190 (Aug. 21, 2018). This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . and to have the Assistance of Counsel for his defence."

The Fourteenth Amendment to the United States Constitution provides, in relevant part: "No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This is an Alabama death penalty case in which: (1) the defense attorney was being paid by the defendant's father; (2) the attorney learned before trial that the defendant had been abused by his father when he was a child; (3) the defendant's father threatened to withdraw his support from the case if the attorney presented evidence of the abuse at the sentencing phase of the defendant's trial; (4) the attorney never informed either the defendant or the court about any conflict of interest; (5) within thirty-six hours of the father's threat, the attorney privately obtained a waiver from the defendant in which the defendant agreed to forego any use of the abuse evidence; (6) the attorney called the father to testify at the sentencing phase that the defendant was raised in a loving and supportive home; and (7) the trial court expressly relied on the father's testimony that the defendant had experienced a positive upbringing when imposing the death penalty. Remarkably, the

Alabama courts nevertheless held that the attorney did not have an actual conflict of interest that adversely affected his representation of Acklin. *Acklin v. Alabama*, No. CR-14-1011, 2017 WL 6398544, at *14–18 (Ala. Crim. App. Dec. 15, 2017), 35a–49a (appendix citation).

A. Pretrial Stage

Petitioner Nicholas Acklin[1] and two co-defendants were charged with capital murder for causing the deaths of Charles Hemphill, Michael Beaudette, Johnny Couch, and Brian Carter pursuant to a single scheme or course of conduct. *See* Ala. Code § 13A-5-40(a)(10). The four victims were killed by gunfire in a small apartment in Huntsville, Alabama, on the night of September 25, 1996.

Five days after the offense, attorney Behrouz Rahmati met with Acklin's mother, Velma Acklin Evans, and agreed to represent Acklin. R. 13–15, 190–91.[2] Rahmati and Velma signed an agreement providing for a $25,000 retainer and a fee of $150 per hour. C. 4235–36. It soon became clear that Velma was unable to pay for Rahmati's services. A year af-

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[1] This Petition generally refers to Nicholas Acklin as "Acklin," but at times as "Nicholas" in order to distinguish him from his father.

[2] "R. __" refers to the reporter's transcript from Acklin's state post-conviction case. "C. __" refers to the clerk's record from Acklin's state post-conviction case. "T.R. __" refers to the reporter's transcript from Acklin's 1998 trial.

ter the agreement was signed, she had paid only $1,200 of the $25,000 retainer. C. 4240; R. 32–40.[3]

Recognizing that Velma would be unable to pay him in full, Rahmati contacted Theodis Acklin, Nicholas's father, for help with his fees. R. 55–57; C. 4260. In March 1998, Theodis paid Rahmati $700. C. 4260. Two months later, Rahmati sought a court appointment to represent Acklin "so [he] could receive funds" because he had concerns that the family could not "afford paying [his] fee." R. 68; *see also* C. 4264. Rahmati later informed the court that he had changed his mind and "wish[ed] to continue to represent Mr. Acklin on a retained basis rather than being appointed," C. 4266, presumably because the cap for an appointed attorney's fee was $2,000, R. 161. He then continued to seek payment from both Velma and Theodis. C. 4267–70.

As the October 1998 trial date approached, Theodis increased his contributions significantly and became Rahmati's primary source of funds. He paid more to Rahmati in the month before the trial than Velma had paid in the previous two years.[4]

On October 17, 1998—two days before the trial was set to begin—Rahmati met with Velma alone. R.

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[3] Velma continued to make regular payments, sending checks for $100 in December 1997, $125 in January 1998, and $125 in March 1998. C. 4256–59. These payments barely made a dent in the initial retainer.

[4] Theodis paid Rahmati $2,000 on September 28, 1998, and $200 more on October 5, 1998. C. 4270. In total, Theodis had paid $2,900 in three payments. C. 4260, 4270. Velma had paid $1,900 over the course of eleven payments. R. 38–81; C. 4256, 4258, 4259, 4263, 4268, 4269.

182; C. 4253. Velma told Rahmati that Theodis had severely abused her and their children, including Nicholas. R. 113–16. As Rahmati recounted, Velma informed him that "if [Theodis] was mad at the kids, he would hold them down, put a gun to them, threaten to shoot them, threaten to kill them." R. 116.

Rahmati believed Velma's account of the abuse, R. 119–20, and he also recognized that it could serve as valuable mitigation evidence. As he explained later, "I think any human being that listens to kids growing up in that environment could feel like maybe they turned out the way they did because of that, and so they could possibly find some sympathy." R. 117.

Shortly after learning of the abuse, Rahmati met with Theodis, informed him of Velma's allegations, and asked him if he would testify about them. R. 109–12, 117–18. Theodis was enraged. R. 112, 118. He said to Rahmati, "You tell Nick if he wants to go down this road, I'm done with him," and "done with helping with this case." R. 112, 118.

In response to Theodis's threat, Rahmati did not investigate the abuse further, seek a continuance, or alert the trial court of the situation. Instead, he disposed of the issue immediately—without telling the court. Within thirty-six hours of discovering the abuse, he met privately with Nicholas at the jail and had him sign a typewritten document stating that he did not want evidence of the abuse presented at trial. R. 182–84.[5] Although Rahmati discussed the evi-

[5] Rahmati testified later that he tried to convince Acklin that the abuse evidence should be presented. R. 164–65. That testimony is impossible to reconcile with his behavior at the time. If Rahmati had intended to preserve the option of presenting

dence of abuse with Acklin, R. 164, he did not disclose that he had a conflict of interest or that Acklin had a right to receive guidance from conflict-free counsel.

B. Trial Proceedings

The guilt phase of Acklin's trial lasted five days. The jury found Acklin guilty of capital murder, T.R. 937–38, as Rahmati had anticipated, R. 89–90.

At the penalty phase, Rahmati presented testimony from several witnesses that Acklin had a peaceful disposition and was remorseful for his role in the offense. T.R. 953–75.[6] Rahmati also presented testimony from Theodis about Acklin's upbringing. T.R. 964–70. Theodis testified:

> I had to look back over my life and ask, where did I go wrong? Nicholas was raised in a God-fearing home. His mother, Velma, and I took him to church, he sang in the youth choir, he ushered. He was a good kid and I guess with me being a father who really, I guess overly protective, really a father who loves his children. Nick and I had a relationship, parent-teacher conferences,

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this evidence, he would have had no reason to prepare a type-written waiver and have Acklin sign it so quickly given that the penalty phase was still four days away.

[6] Rahmati served as lead counsel for the defense, and Kevin Gray served as second-chair counsel. R. 107, 280. Rahmati made the decisions about which witnesses to call, R. 293, and conducted all direct examinations, T.R. 951–75.

> I took him to the dentist, I took him because that is the relationship I wanted with my son because I was denied that relationship with my father.

T.R. 967. Rahmati asked Theodis whether he ever had to discipline Nicholas, T.R. 968–69; Theodis replied, "We didn't have that problem," T.R. 969. He described Nicholas as "easily disciplined." T.R. 965. Following closing arguments, the jury voted ten to two in favor of a death sentence. T.R. 1018, 1023.

Two weeks later, the trial court held a judicial sentencing proceeding. Rahmati called Theodis again to address the court. T.R. 1025–28. Theodis reiterated that his son Nicholas "was raised in a Christian home, Protestant ethics, hard work, good values, to love and respect others," but "[s]omehow he slipped." T.R. 1026. The trial court imposed a death sentence, stating in its order:

> This Court was impressed with the sincerity of the testimony by the defendant's mother and father. They are clearly good people and tried to do the right thing in raising him. However, the Court does not find this to be a mitigating circumstance. Most killers are typically the products of poverty, a dysfunctional family, physical or sexual abuse and/or social deprivation. Acklin was the product of a loving middle-class family. Acklin was exposed to all of the values that are central to an ordered society; however, he chose to reject them.

T.C. 294; *see also* T.R. 1044 (similar statement in court). Following the sentencing proceeding, Rahmati continued to seek payment from Theodis. C. 4280–86.

The Alabama Court of Criminal Appeals affirmed Acklin's conviction and death sentence on direct appeal. *Acklin v. Alabama*, 790 So. 2d 975 (Ala. Crim. App. 2000). The Alabama Supreme Court denied certiorari review, *Ex parte Acklin*, 790 So. 2d 1012 (Ala. 2001) (Mem.), as did this Court, *Acklin v. Alabama*, 533 U.S. 936 (2001) (Mem.).

C. Post-Conviction Proceedings

In his post-conviction ("Rule 32") petition, Acklin, who was then represented by new counsel, alleged that Rahmati had a conflict of interest resulting from Theodis's threat to stop paying Rahmati's legal fees if evidence of the abuse was presented. In addition to establishing the facts set forth above regarding the payments, Velma's revelation of the abuse, and Rahmati's response, Acklin presented testimony and records confirming the abuse.

Velma testified that Theodis routinely beat her and threatened her at gunpoint in front of the children. She explained: "He would have a gun in his hand, and he would be shaking it, and he would just shove it down my mouth." R. 219. Her son Nicholas and his brothers "would be screaming, telling their dad not to hurt their mom." R. 220. Velma also explained that she once fell out of a second-floor window during a fight with Theodis over a rifle. R. 225–29. That incident was corroborated by records from Huntsville Hospital, which show that Velma

had fallen from a second-floor window and was unconscious at the scene. C. 4303–05. Velma feared for her sons because as they got older, Theodis threatened them at gunpoint as well. R. 270–74.

Steve Acklin, Nicholas Acklin's brother, testified in detail about Theodis's threats and beatings. Steve explained: "[Theodis] would come into the room – and most of the time me and my brother were together, and he would come in, right before he disciplines with the belt, and have the gun in hand and tell us he will kill all of us and kill himself." R. 512. The abuse Steve described was confirmed by records from the Alabama Department of Human Resources, which had investigated an incident in which Theodis admitted to pulling a gun on his sons and stating, "I brought you into the world and I can take you out." C. 4694–95.

Following the hearing, the Rule 32 circuit court denied relief. C. 3995–4039. The Alabama Court of Criminal Appeals affirmed, holding that Acklin's attorney did not have an "actual conflict of interest." *Acklin v. Alabama*, No. CR-14-1011, 2017 WL 6398544, at *7–18 (Ala. Crim. App. Dec. 15, 2017), 18a–48a. The Alabama Supreme Court denied certiorari, and this petition follows. 115a.

REASONS FOR GRANTING THE WRIT

A criminal defendant has a Sixth and Fourteenth Amendment right to the assistance of counsel who does not have an "actual conflict of interest." *Mickens v. Taylor*, 535 U.S. 162, 171 (2002); *see also Wood v. Georgia*, 450 U.S. 261, 268–69 (1981) (recognizing the right to conflict-free representation). An "actual

conflict of interest" is a conflict that adversely affects the attorney's representation. *Mickens*, 535 U.S. at 171. It should go without saying that the right to be represented by conflict-free counsel could not be more important when a defendant faces the death penalty. The defendant must be able to have confidence that the advice he receives from his lawyer reflects the lawyer's reasonable, objective professional judgment, based on a thorough investigation of the facts and the law, of how best to protect the client's interest in avoiding a death sentence. *See generally Wiggins* v. *Smith*, 539 U.S. 510 (2003) (describing standards for effective assistance of counsel at capital sentencing proceedings). A lawyer's ability to fulfill that constitutional duty may be fatally compromised if that lawyer is serving two masters. And that is particularly true where the lawyer is paid by a third party and the interests of that third party are at odds with the interests of the person the lawyer is representing – something this Court has described as a "disturbing circumstance[]" that undermines confidence in the lawyer's representation. *Mickens*, 535 U.S. at 169 (2002) (describing *Wood v. Georgia*, 450 U.S. 261). Conflicts of this sort cast a shadow over the very legitimacy of the criminal proceedings that produce a death sentence.

Here, Acklin's father made it clear that he would cease paying Acklin's legal fees if Acklin's lawyer put on evidence of the father's abuse of Acklin as a child – evidence that the attorney himself acknowledged would be potentially powerful mitigation at sentencing (and that was far stronger than the evidence the attorney ultimately introduced). From the moment of the father's threat, Acklin's attorney labored under an obvious and extreme conflict of

interest: to ensure that he was paid for his work he would have to forego putting on the most compelling mitigation evidence available. Faced with that conflict, the attorney did not disclose it to his client or to the court. Instead he hid it, choosing to protect his own interest in remuneration and to sacrifice the interest of his client in avoiding a death sentence. And to cover his tracks, he secured Acklin's agreement to forego use of this mitigation evidence without disclosing his conflict. As a result, Acklin was deprived of the very thing that matters most to a defendant facing a death sentence: the ability to make an informed choice about how best to defend himself based on objective professional advice that is in the client's best interest, untainted by the skew of a lawyer's conflicting interests. Indeed, Acklin was denied even the knowledge that the lawyer on whom he was relying had conflicting loyalties that could affect his judgment and advice. He was, in other words, denied any opportunity to seek counsel from a lawyer who would put Acklin's interests ahead of his own.

The Alabama Court of Criminal Appeals nevertheless refused to so much as acknowledge the existence of this conflict. Instead, it held that the pressure on Acklin's lawyer to forego the only real mitigation case available did not amount to a conflict of interest and did not adversely affect the lawyer's representation of Acklin. To justify that counterintuitive result, the court pointed to Acklin's signature on a typewritten waiver form prepared by the lawyer that released him from any obligation to introduce the abuse evidence at sentencing. But the lawyer obtained Acklin's signature on the waiver form after Acklin's father had threatened to cut off

payment, and without informing either Acklin or the court that this conflict had arisen and compromised the lawyer's ability to provide objective advice in the client's interests. The waiver was thus the *product* of the conflict of interest, not its cure. It could not possibly justify the conclusion that no conflict existed in the first place. Because Acklin was never apprised of his lawyer's divided loyalties, he never had the opportunity to seek other counsel or decide whether to waive the conflict. Any judgment he might have made under those circumstances based on advice from his lawyer was therefore indelibly tainted by the undisclosed conflict. Put simply, Acklin had a Sixth Amendment right to representation from a lawyer whose judgment could be trusted to be objective and in his interest. The Alabama Court of Criminal Appeals denied him that right. The denial of this basic right would be troubling in any case. That it occurred in a capital case should be deeply disturbing.

The decision of the Alabama Court of Criminal Appeals cries out for plenary review (or summary reversal) by this Court. That decision conflicts at the most basic level of principle with decisions of this Court, of federal courts of appeals, and of state courts. And it raises fundamental questions about what the Sixth Amendment should be understood to require of lawyers representing defendants facing the death penalty – questions that deserve an answer from this Court.

I. Acklin's Trial Attorney Had an Actual Conflict of Interest That Affected His Performance.

A. The Attorney Had Divided Loyalties.

This Court has recognized that "inherent dangers . . . arise when a criminal defendant is represented by a lawyer hired and paid by a third party." *Wood*, 450 U.S. at 268–69. The primary danger is that the third-party payer will exercise leverage to pressure the lawyer to follow a course of action that helps the third party but harms the lawyer's client. *Id.* at 268–69, 270 n.17. That is precisely what happened here.

Acklin's attorney, Behrouz Rahmati, learned prior to trial that Acklin, as a child, had been abused and threatened at gunpoint by his father. Rahmati recognized that detailing this abuse would serve as a potentially powerful case in mitigation at the sentencing phase of Acklin's trial. R. 117.[7] But Acklin's father, Theodis, was paying Rahmati, and he threatened to withdraw his support for the case if Rahmati presented evidence of the abuse. Specifically, Theodis told the attorney, "You tell Nick if he wants to go down this road, I'm done with him," and "done with helping with this case." R. 112, 118.

From the instant it was uttered, that threat created a severe and undeniable conflict of interest. It was not possible for Rahmati to mount the

[7] This type of mitigating evidence has been recognized as critical at the penalty phase of a capital trial. *See, e.g., Wiggins v. Smith*, 539 U.S. 510, 535 (2003).

strongest possible mitigation case for Acklin while simultaneously doing what he needed to do to ensure that he was paid for his work. *See Wood*, 450 U.S. at 269 (explaining the risks of third-party arrangements); *Glasser v. United States*, 315 U.S. 60, 75 (1942) (describing an attorney's impossible struggle "to serve two masters").

The American Bar Association's Model Rules of Professional Conduct confirm that Rahmati had a conflict. The rules prohibit arrangements in which a third-party payer "interfere[s] with the lawyer's independence of professional judgment or with the client-lawyer relationship." Model Rules of Prof'l Conduct r. 1.8(f) (Am. Bar Ass'n); Ala. Rules of Prof'l Conduct r. 1.8(f). The threat made by Theodis, which required Rahmati to forego any use of this powerful mitigation evidence if he wanted to get paid, is exactly the type of situation the rules are designed to prevent.

B. The Attorney's Divided Loyalties Adversely Affected the Representation.

In a third-party payer situation, a conflict of interest adversely affects the representation where the attorney is "influenced in his basic strategic decisions by the interests of the [person] who hired him." *Wood*, 450 U.S. at 272. When evaluating this issue, courts typically consider the attorney's decisions between alternative courses of action to

assess whether the conflict has adversely affected the representation.[8]

Here, Rahmati could have taken at least four courses of action to protect Acklin and advance his interests in light of the abuse evidence. Yet each time, Rahmati chose a path that helped Theodis (and thereby ensured that Rahmati would be paid) and harmed Acklin.

First, Rahmati could have informed Acklin and the trial court of the conflict that arose when Theodis said that he was "done with helping with this case" if evidence of the abuse was presented. As this Court has explained, "defense attorneys have the obligation, upon discovering a conflict of interests, to advise the court at once of the problem." *Holloway v. Arkansas*, 435 U.S. 475, 485–86 (1978); *see also Cuyler v. Sullivan*, 446 U.S. 335, 346 (1980) (same principle). Had Rahmati done so, the court could have ensured that Acklin was fully aware of the conflict, its potential impact on the representation, and his right to conflict-free counsel. But Rahmati prevented that by remaining silent. Acklin thus remained in the dark about the conflict as he signed the mitigation waiver, and he was never given the chance to secure objective professional advice from non-conflicted counsel, or to make a knowing and informed

[8] *See United States v. Williams*, 902 F.3d 1328, 1333 (11th Cir. 2018) (explaining that a conflict adversely affects the representation where the attorney did not pursue an alternative course of action that "was inherently in conflict with . . . [the attorney's] other loyalties or interests"); *United States v. Flood*, 713 F.3d 1281, 1286 (10th Cir. 2013) (holding that a conflict adversely affects the representation where the attorney makes "choices advancing interests to the detriment of his client").

judgment to waive the conflict and continue to work with Rahmati.

Second, Rahmati could have requested a continuance to investigate the abuse and to provide Acklin with a meaningful opportunity to consider his options. Instead, Rahmati presented Acklin with a typewritten waiver of mitigation within thirty-six hours of learning of the abuse. C. 4978. The short timeframe is particularly suspicious given that the trial had not yet begun and the penalty phase was still four days away. There was simply no reason for Rahmati to prepare and secure a waiver so quickly.

Third, at a minimum, Rahmati could have refrained from calling Theodis as a witness at the penalty phase or could have chosen not to elicit testimony from Theodis about disciplining his sons when he knew that Theodis would conceal the fact that his "discipline" involved gun violence. Rahmati also could have refrained from calling Theodis to speak *again* about Acklin's upbringing at the judicial sentencing hearing (because he knew at that point exactly how unhelpful the testimony would be). Rahmati's repeated, deliberate presentation of misleading evidence from Theodis was entirely improper. *See Nix v. Whiteside*, 475 U.S. 157, 170–71 (1986) (explaining that a lawyer must not present false testimony).

Fourth, Rahmati could have objected when the trial judge stated that most killers are the product of abuse and dysfunction, but Nicholas was not. *See* T.C. 294; T.R. 1044. Instead, Rahmati said nothing. As this Court has explained: "The mere physical presence of an attorney does not fulfill the Sixth

Amendment guarantee when the advocate's conflicting obligations have effectively sealed his lips on crucial matters." *Holloway*, 435 U.S. at 490. Here, Rahmati's lips were sealed on a critical issue in this death penalty case.

As a direct result of Rahmati's conflicted actions, the jury and the judge based their sentencing decisions on a fundamental misunderstanding of the facts. The contrast between the testimony Rahmati elicited from Theodis and the facts Rahmati knew to be true is striking:

EVIDENCE PRESENTED IN THE TRIAL COURT	EVIDENCE OMITTED FROM THE TRIAL COURT
"[Nicholas] was raised in a Christian home, Protestant ethics, hard work, good values, to love and respect others. Somehow he slipped . . . ." *- Theodis Acklin*	"[Theodis] would have a gun in his hand, and he would be shaking it, and he would just shove it down my mouth. . . . [Nicholas and his brothers] would be screaming, telling their dad not to hurt their mom." *- Velma Evans*
"[Nicholas was] easily disciplined." "I guess with me being a father who really, I guess overly protective, really a father who loves his children. Nick and I had a relationship, parent-teacher conferences, I took him to the dentist, I took him because that is the relationship I wanted with my son . . . ." *- Theodis Acklin*	"[Theodis] would come into the room - and most of the time me and [Nicholas] were together, and he would come in, right before he disciplines with the belt, and have the gun in hand and tell us he will kill all of us and kill himself." *- Steve Acklin*[9]

[9] Clockwise from the top left, the quotations in the chart above appear at T.R. 1026, R. 219–20, R. 512, T.R. 965, and T.R. 967.

The contrast demonstrates that as a result of Rahmati's conflict, neither the judge nor the jury heard key mitigation evidence that Rahmati knew could have made a difference at sentencing. Particularly given the court's explicit reliance on Theodis's misleading testimony in sentencing Acklin to death, it is clear that Rahmati's conflict adversely affected the representation and harmed Acklin.

In short, Rahmati followed every wish of his third-party payer and did nothing to protect his client. The result was not only the omission of critical mitigating evidence, but also the presentation of misleading evidence that the court explicitly relied upon to justify the imposition of a death sentence.

II. The Decision of the Alabama Court of Criminal Appeals Conflicts with the Way in Which This Court and Other State and Federal Courts Analyze Conflicts of Interest.

The Alabama Court of Criminal Appeals based its conclusion that Rahmati did not have an actual conflict of interest on the fact that Acklin signed a mitigation waiver stating that he did not want Rahmati to present the abuse evidence. *Acklin*, 2017 WL 6398544, at *13–16, 32a–44a.[10] But Rahmati

[10] The Court of Criminal Appeals returned to this rationale many times throughout its opinion. *See*, *e.g.*, *Acklin*, 2017 WL 6398544, at *14, 37a ("The evidence supports the circuit court's finding that the sole reason for trial counsel's failure to introduce evidence of the alleged abuse was that Acklin expressly forbade them from doing so."); *15, 39a ("Rahmati's failure to introduce evidence of the abuse was at Acklin's express direction."); *16, 42a ("[T]he responsibility for Rahmati's failure to

obtained the mitigation waiver *after* the conflict arose and *without* informing Acklin or the trial court of the conflict. That course of action is the very definition of a conflict of interest that adversely affects counsel's representation of a client. By concluding that no conflict existed based on an action Acklin took after the conflict arose and without any knowledge that the conflict existed, the Court of Criminal Appeals resolved this case in a manner that conflicts with (and indeed disregards) the established jurisprudence of this Court, as well as other state and federal courts throughout the country.

Courts have consistently emphasized both an attorney's duty to inform the court of any conflict of interest and the high standard required for waiver of the right to conflict-free counsel. Those principles ensure that defendants' decisions are based on the objective professional advice of counsel after reasonable investigation of the facts and the law, or that defendants are fully aware of the risks and dangers they undertake when their counsel has divided loyalties. This Court, for example, has held that "defense attorneys have the obligation, upon discovering a conflict of interests, to advise the court at once of the problem." *Holloway*, 435 U.S. at 485–86. Courts have also held that, to establish that a defendant waived his right to conflict-free counsel, the State must show "that the defendant (1) was aware that a conflict of interest existed; (2) realized the consequences to his defense that continuing with counsel under the onus of a conflict could have; and

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tell the sentencing court about the abuse is because Acklin had expressly prohibited Rahmati from doing so.").

(3) was aware of his right to obtain other counsel." *Zuck v. Alabama*, 588 F.2d 436, 440 (5th Cir. 1979) (citing *United States v. Garcia*, 517 F.2d 272, 278 (5th Cir. 1975)); *see also United States v. Petz*, 764 F.2d 1390, 1392–93 (11th Cir. 1985); *United States v. Levine*, 794 F.2d 1203, 1206 (7th Cir. 1986); *Louisiana v. Cisco*, 861 So. 2d 118, 133 (La. 2003). Here, the Alabama courts relied on Acklin's waiver of mitigation evidence to find that his counsel did not have a conflict of interest. *See Acklin*, 2017 WL 6398544, at *13–16, 32a–44a. That decision flies in the face of established legal principles. Counsel's failure to disclose his conflict, and Acklin's resultant inability to waive that conflict, meant that the waiver was a product of the conflict, not the solution to it.

Where, as here, the client has *not* made a knowing waiver of a conflict of interest, this Court and others have consistently recognized that the conflict taints the client's choices and thus the proceeding itself. In *Wood*, for example, an attorney was representing probationers who would face prison time if they failed to pay certain fines. *Wood*, 450 U.S. at 266. However, the attorney was being paid by the probationers' employer, who had an independent interest in challenging the constitutionality of the fines. *Id.* at 267. Despite facing imprisonment, the probationers neither objected to the size of the fines nor paid "even small amounts . . . to indicate their good faith." *Id.* at 267–68 (noting that probationers did not move to modify the amount until after the probation revocation hearing). This Court did not infer from the probationers' willingness to forego these actions that there was no conflict. To the contrary, the Court relied on the actions as evidence of a conflict that adversely affected their

representation, and remanded the case. *Id.* at 272–74. Likewise, here, Acklin's signature on the typewritten mitigation waiver his lawyer provided does not erase the conflict or support the conclusion that he received conflict-free representation; it is evidence of the ways in which the conflict affected the representation.

Myriad courts have recognized the consequences that counsel's undisclosed conflict can have on the proceedings and on the client's own decision-making. In *United States v. Levy*, 577 F.2d 200 (3d Cir. 1978), an attorney represented both Donald Verna and Verna's co-defendant. *Id.* at 202. In the course of the attorney's dual representation, the co-defendant acted as a government informant and told the government that Verna had not participated in the drug transaction at issue. *Id.* at 205. Verna and his attorney discussed whether to call the co-defendant at trial, and Verna ultimately informed the court that he did not wish to call any witnesses. *Id.* at 206. Notwithstanding Verna's decision, the Third Circuit reversed the ensuing conviction because Verna had not been advised of his attorney's conflict before making his decision:

> [The] critical point is that Verna waived his right to present a witness in [sic] his behalf on the basis of advice from an attorney who owed an obligation to that witness, an obligation which may well have conflicted with the attorney's legal duty of undivided loyalty to Verna.

Id. at 211. The Third Circuit recognized the "critical point" that the defendant's decision to waive his right

to present certain evidence arose from the conflict. The waiver was thus *evidence* that there was a conflict which had tainted the proceedings. *See also Rubin v. Gee*, 292 F.3d 396, 402, 405–06 (4th Cir. 2002) (granting habeas relief when two attorneys' conflicts of interest "taint[ed]" trial counsel's performance, and noting that "nothing in the record suggests that [the defendant] waived or even understood the conflict of interest"); *United States v. Tatum*, 943 F.2d 370, 375–80 (4th Cir. 1991) (applying the same principle on direct review). In direct conflict with these decisions, the Alabama Court of Criminal Appeals relied on the mitigation waiver in this case as evidence that there was no conflict, even though Acklin was never apprised of his attorney's divided loyalties.

Similarly, in *Mannhalt v. Reed*, 847 F.2d 576 (9th Cir. 1988), an attorney was accused of buying stolen property from his client. *Id.* at 578. The attorney "discussed the accusation with [the client] but never told him that it created a potential conflict of interest and never warned [the client] of the dangers of continued representation." *Id.* at 580–81. The court reversed the conviction because the attorney had a conflict and the client "was [not] informed and aware of the risks associated with [the attorney's] representation." *Id.* at 581, 583; *see also United States v. Thompson*, 944 F.2d 1331, 1345 (7th Cir. 1991) ("[T]he potential conflict renders suspect the advice as to the waiver received by the defendant from counsel.").

The same principle is reflected in *Cisco*. There, a defendant's attorney also represented the state's primary prosecution witness. 861 So. 2d at 120. The

attorney had the defendant sign a written waiver she had prepared about the "potential conflict," the court briefly discussed the document with the defendant, and the defendant stated that he was fine with the attorney representing him. *Id.* at 125–29. Nevertheless, the Louisiana Supreme Court found that there was no waiver of the right to conflict-free counsel and remanded for a new trial. *Id.* at 134. As that court explained, the defendant "was clearly left on his own in determining whether an actual conflict of interest existed" and was not informed as to the "true nature of his counsel's conflict" or his right to obtain conflict-free counsel. *Id.* at 133–34; *see also Barclay v. Wainwright*, 444 So. 2d 956, 959 (Fla. 1984) (declining to find a waiver of the right to conflict-free counsel and granting habeas relief because there was "no evidence that Barclay was aware of a possible conflict, knew the possible effect of a conflict, or could make an effective waiver of conflict"); *Massachusetts v. Michel*, 409 N.E.2d 1293, 1300 (Mass. 1980) (declining to find that a defendant waived the right to conflict-free counsel by signing a joint representation statement when there was no "full disclosure of the actual and potential conflicts inherent in this situation"). The Alabama courts' reliance on the mitigation waiver, which Acklin's conflicted attorney prepared for him and had him sign, stands in direct conflict with this consistent line of authority.

Put simply, the analysis of the Alabama Court of Criminal Appeals is incompatible with the way in which this Court and other courts understand and analyze attorney conflicts of interest. The proper analysis, as reflected in the decisions explained above, considers the mitigation waiver in light of the

conflict that arose before it. The Alabama Court of Criminal Appeals conducted its analysis in reverse. It considered the mitigation waiver first—and independent of the facts that preceded it. The court then determined, on the basis of the mitigation waiver, that Acklin's attorney did not labor under a conflict of interest. *Acklin*, 2017 WL 6398544, at *13–16, 32a–44a. That gets it exactly backwards.

The Court of Criminal Appeals also suggested that Rahmati did not have a conflict of interest because he *believed* that his loyalty to Acklin was not affected by his financial interest. *Id.* at *14, 36a–37a. However, this Court has made clear that an attorney's subjective claims do not control a conflict inquiry. *See Wood*, 450 U.S. 261 (remanding due to concerns about a conflict that the attorney had not recognized).[11]

Because the decision below conflicts with established law and sanctions a death sentence in violation of the Constitution, this Court's intervention is fully warranted.

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[11] The Court of Criminal Appeals further suggested that the statements made by Acklin's father were not significant because Rahmati "did not expect to be paid the full retainer." *Acklin*, 2017 WL 6398544, at *14, 36a. But regardless of whether Rahmati expected to be paid in full, he certainly hoped and expected to receive additional payments from Theodis. That expectation is confirmed by the fact that even long after the trial, Rahmati continued to send letters to Theodis requesting payment. C. 4280–86.

CONCLUSION

The petition for certiorari should be granted. Alternatively, this court should summarily reverse the decision of the Alabama Court of Criminal Appeals.

Respectfully submitted,

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November 9, 2018

APPENDIX

APPENDIX A

REL: December 15, 2017

Notice: This opinion is subject to formal revision before publication in the advance sheets of *Southern Reporter*. Readers are requested to notify the Reporter of Decisions, Alabama Appellate Courts, 300 Dexter Avenue, Montgomery, Alabama 36104-3741 ((334) 229-0649), of any typographical or other errors, in order that corrections may be made before the opinion is printed in *Southern Reporter*.

ALABAMA COURT OF CRIMINAL APPEALS

———

CR-14-1011

———

Nicholas Bernard Acklin

v.

State of Alabama

———

OCTOBER TERM, 2017-2018

———

Appeal from Madison Circuit Court
(CC-97-162.60)

———

JOINER, Judge.

Nicholas Bernard Acklin, an inmate on death row at Holman Correctional Facility, appeals the Madison Circuit Court's denial of his petition for postconviction relief filed pursuant to Rule 32, Ala. R. Crim. P. We affirm.

On October 23, 1998, Acklin was convicted of one count of capital murder for killing Charles Lamar Hemphill, Michael A. Beaudette, Johnny Couch, and Brian Carter pursuant to one scheme or course of conduct, *see* § 13A-5-40(a)(10), Ala. Code 1975, and two counts of attempted murder as to Ashley Rutherford and Michelle Hayden, *see* § 13A-6-2 and § 13A-4-2, Ala. Code 1975. The trial court sentenced Acklin to consecutive sentences of 20 years' imprisonment for his convictions for attempted murder. As to his conviction for capital murder, the jury recommended, by a vote of 10-2, that Acklin be sentenced to death; the trial court accepted that recommendation and sentenced Acklin to death.

In Acklin's direct appeal, we quoted the following relevant facts of the underlying crimes from the trial court's sentencing order:

> "'Late on the night of September 25, 1996, Nicholas Bernard Acklin and two companions, all heavily armed, entered the home of Ashley Rutherford on University Drive in Huntsville, Madison County, Alabama. Acklin, Joseph Wilson, and Corey Johnson held seven people at gunpoint in a 13' x 18' room and, for nearly two hours, assaulted, tortured, and humiliated them. Then, shortly before midnight, Acklin and Wilson fired 19 rounds of 9mm ammunition, shooting 6 of the 7 victims in or about the head. Four of the six victims died, two survived the shooting, and one victim escaped.
>
> "'The events giving rise to these slayings occurred approximately one week before the murders took place. At this time, Joseph ("Joey") Wilson and Corey Johnson, while

visiting the home of Ashley Rutherford, stole a cellular telephone and a small bag of marijuana. The theft of the cellular telephone prompted Rutherford and the owner of the phone, Lamar Hemphill, to file a police report with the Huntsville Police Department. As a result of the police report being filed, Wilson was questioned by the police regarding the theft of the phone. Once Wilson learned that a police report had been filed, he became angry. On the night of September 25, 1996, Wilson, Acklin, and Johnson went to Ashley Rutherford's home seeking revenge against those persons they deemed responsible for filing the report.

"'Early in the evening of September 25, 1996, Ashley Rutherford's fiancee (Michelle Hayden) and two of his friends (Brian Carter and Lamar Hemphill) sat in Rutherford's garage apartment watching television and awaiting Rutherford's return from work. Later, Michael Beaudette, another friend of Ashley Rutherford, arrived and joined Hayden, Carter, and Hemphill in watching television and socializing. At approximately 10:00 p.m., Mike Skirchak and Johnny Couch, while driving past Rutherford's home on University Drive, noticed Michael Beaudette's car and decided to stop and talk for awhile with Beaudette and the others. At approximately 10:05 p.m., Skirchak and Couch decided to leave. As the two young men exited Rutherford's home, they were met by Nicholas Acklin, Joey Wilson, and Corey Johnson, who forced them back inside the garage apartment.

"'Once inside the apartment, Acklin, Wilson, and Johnson began asking repeatedly, "Who filled out the warrant?" When no one would give them a satisfactory answer, they brandished handguns and began physically assaulting Skirchak, Couch, Beaudette, Carter, and Hemphill. Specifically, these five young men were kicked, slapped, punched, spat on, and beaten with a whiskey bottle by Wilson and Johnson. A few times during these assaults, Acklin took Michelle Hayden outside and made sexual advances towards her. Acklin fondled Hayden's breasts and repeatedly asked her to pull down her pants. After approximately an hour of the aforementioned behavior, Ashley Rutherford arrived home from work and he was immediately confronted by Johnson, who forced him into the apartment. Once inside, Rutherford was also interrogated about the police report. He, too, was beaten and threatened. In fact, as the night progressed, two of the three assailants, Nicholas Acklin and Joey Wilson, grew increasingly violent and more demeaning. For example, Acklin placed a .357 magnum revolver in Rutherford's mouth and shoved it into his throat until Rutherford gagged. Acklin also placed Michael Beaudette in a headlock and placed the same .357 magnum revolver under his chin. Wilson kicked and stomped Johnny Couch until he was almost unconscious and then cut his ponytail off with a pair of scissors. A short while after this incident, Acklin made Michelle Hayden accompany him outside while he stole Brian Carter's car stereo from Carter's car. When Acklin

returned to the overcrowded apartment, he threw a pocket-knife at Brian Carter's feet. Then, Acklin turned to Wilson, who was holding a Ruger 9mm semi-automatic handgun and proclaimed, "Look, he has a knife!" Both Acklin and Wilson continued humiliating the victims by making them do self-degrading things, such as take off their pants and sit exposed in their underwear. At one point in the evening, Wilson placed his handgun on a dresser and dared anyone to try and grab it. Furthermore, following one of the several occasions that Acklin took Michelle Hayden outside, Acklin went back inside the apartment and told her fiance, Ashley Rutherford, that his girlfriend had just performed oral sex on him.

"'As the night progressed, all seven victims asserted that they did not know anything about a warrant being filed against Wilson. However, Rutherford and Hemphill did admit to their attackers that a police report had been filed for the stolen cellular phone, but no one had sworn out a warrant. Despite the assertions by Rutherford and Hemphill, as well as from the others, the anger of both Acklin and Wilson rose to a dangerous crescendo. Just before midnight, Acklin and Wilson made all seven victims give them their driver's licenses and identification cards. At this point, Corey Johnson tried to calm Acklin and Wilson down by telling them that the victims were not going to talk and that they didn't have to shoot anyone. Unfortunately, Acklin and Wilson ignored Johnson and began shouting for someone to go and start

the car. After yelling back and forth to each other to go start the car, Acklin finally left Wilson inside and went to start Wilson's car. At this point, Wilson was holding the seven victims at gunpoint and demanding that someone tell him who filed what he claimed was a warrant against him. When Acklin returned from outside, he was holding one of the two Lorcin 9mm handguns that had been tucked in his waistband earlier that night. As Wilson continued to demand answers to his questions, Acklin proclaimed, "Fuck it," and placed the Lorcin 9mm against the back of Ashley Rutherford's head and fired. Then, in a methodical manner, as each of the other victims sat and watched, Acklin shot Lamar Hemphill once in the head, shot Johnny Couch twice in the head, shot Michael Beaudette once in the head and once in the upper leg, and shot Michelle Hayden in the side of her face, in her arm, and in her abdomen. ... Joey Wilson shot Brian Carter six times in the neck and chest. ... Mike Skirchak ran out of the back door of the apartment without any gunshot wounds.

"'After having fired 19 rounds of ammunition inside the apartment, Acklin, Wilson, and Johnson fled. Ashley Rutherford, the first person shot by Acklin, laid in a pool of his own blood and pretended to be dead until he was sure that his attackers had left the apartment. Once he knew that they were gone, Rutherford left the garage apartment and went into the main part of the house to get help from his grandmother. After he told his grandmother to call an ambulance,

> Rutherford went back to assist his fiancee Hayden, who was lying in the doorway leading to the main part of the house. At approximately 12:30 a.m., Madison County emergency medical technicians arrived on the scene and determined that Michael Beaudette, Brian Carter, and Johnny Couch were already dead. Michelle Hayden was alive, but critically wounded, and Lamar Hemphill died minutes after medical technicians arrived.'"

Acklin v. State, 790 So. 2d 975, 982-84 (Ala. Crim. App. 2000) (quoting Trial C. 280-84[1]).

In relevant part, the trial court found that two aggravating circumstances existed: (1) the defendant knowingly created a great risk of death to many persons and (2) the capital offense was especially heinous, atrocious, or cruel compared to other capital offenses. *See* § 13A-5-49, Ala. Code 1975. With regard to the second aggravating circumstance, the sentencing order states, in relevant part:

> "Prior to the discharge of the two weapons, the victims were subjected to threats and intimidation. The victims were restrained at gunpoint and required to remove various portions of their clothing (primarily their pants). Joey Wilson kicked and stomped Johnny Couch until he was almost unconscious, and to further degrade and disfigure him, he cut off his pony tail with a pair of

[1] "Trial C." refers to the clerk's record in Acklin's direct appeal; "Trial R." refers to the reporter's transcript in the direct appeal. *See* Rule 28(g), Ala. R. App. P. *See also Hull v. State*, 607 So. 2d 369, 371 n.1 (Ala. Crim. App. 1992) (the Court of Criminal Appeals may take judicial notice of its own records).

scissors.[4] Throughout the evening Skirchak (the victim who escaped), Couch, Beaudette, Carter and Hemphill were repeatedly kicked, slapped, punched, spat on, and beaten with a whiskey bottle by Wilson and Johnson. After his arrival, Ashley Rutherford was also beaten and threatened.

"Several times during the night, Acklin took Michelle Hayden outside and made sexual advances toward her. Acklin fondled Hayden's breasts and repeatedly asked her to pull down her pants. After Acklin brought Michelle back inside, he told Ashley Rutherford that his girlfriend had performed oral sex on him. (She did not.)

"Acklin later placed a .357 magnum revolver in Rutherford's mouth and shoved it into his throat until Rutherford gagged. Acklin also placed Michael Beaudette in a headlock and placed the same .357 magnum revolver under his chin.

"The perpetrators also stole various items from the victims. They took the victims' driver's licenses (Beaudette's driver's license was recovered in the pair of pants that Acklin was wearing when they were seized by law enforcement). On one occasion Acklin made Michelle Hayden accompany him outside, while he stole Brian Carter's car stereo from Carter's car.

"This was an execution-style slaying. Acklin and Wilson killed or attempted to kill all of the victims in order to avoid later identification. In *Bush v. State*, 431 So. 2d

555, 560-561 (Ala. Cr. App. 1982), *aff'd* 431 So. 2d 563 [(Ala. 1983)], *cert. denied*, 464 U.S. 865 (1983), the Court of Criminal Appeals stated: 'Execution-type slayings evincing a cold, calculated design to kill, fall into the category of heinous, atrocious or cruel'

"In *Lawhorn v. State*, 581 So. 2d 1159, 1175 n.7 (Ala. Crim. App. 1990), *aff'd*, 581 So. 2d 1179 (Ala. 1991), the Court ruled that 'Evidence as to the fear experienced by the victim before death is a significant factor in determining the existence of [the] aggravating circumstance[] that the murder was heinous, atrocious, and cruel.' It is almost impossible to contemplate the fear and indeed the stark terror experienced by all of these victims on the night of September 25, 1996. After being repeatedly threatened, taunted, beaten and (in Hayden's case) sexually assaulted, Acklin and Wilson began shouting for someone to go and start the car. It was at this point that the four deceased victims certainly realized what was about to happen. Certainly, everyone there knew that they were about to die. Finally, each of the victims watched their friends being methodically shot before it was their time to die.

"The actions of the defendant were conscienceless and pitiless. This was not just a murder, *it was a massacre in which the defendant engaged in a bloody orgy of death and destruction*. By any standard acceptable to civilized society, this crime was extremely wicked and shockingly evil. While the Court

> recognizes that all capital offenses are heinous, atrocious and cruel to some extent, the degree of heinousness, atrociousness and cruelty which characterizes this offense exceeds that which is common to all capital offenses.
>
> "[4]While some of the actions cited herein were performed by Joey Wilson[2] and Corey Johnson, the defendant is equally liable for the conduct of Johnson and Wilson due to complicity. Alabama Code [1975,] § 13A-2-23. Within that statute, the terms 'aid and abet comprehend all assistance rendered by acts or words of encouragement or support or presence, actual or constructive, to render assistance should it become necessary.' *Turner v. State*, 674 So. 2d 1371, 1376 (Ala. Cr. App. 1995). The Court therefore finds that the defendant was equally responsible for the beatings, tauntings and other abuse heaped upon the victims by Wilson and Johnson."

(Trial C. 288-90.)

The trial court found that one statutory mitigating circumstance existed: Acklin had no significant history of prior criminal activity. *See* § 13A-5-51, Ala. Code 1975. As to nonstatutory mitigating circumstances, the trial court stated, in relevant part:

> "The defendant proffered a number of witnesses during the second and third stage sentencing hearings. Among those to testify

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[2] Joseph Wilson, Acklin's codefendant, was tried in August 1998. Following a guilty verdict and a unanimous jury recommendation of death, Wilson was sentenced to death. *See Wilson v. State*, 777 So. 2d 856 (Ala. Crim. App. 1999).

were his mother, father, grandmother, and several other individuals who had known Acklin during his youth.

"The following nonstatutory mitigating circumstances were either asserted by the defense or were gleaned by the Court from the testimony proffered by the defendant and the pre-sentence report.

"*Prior to September 25, 1996, the defendant was a quiet and polite individual who had no history of assaultive behavior.*

"All the evidence indicates that, during his formative years, Acklin was a quiet, polite and non-violent young man. The Court finds this mitigating circumstance has been proven and will be given appropriate weight.

"*The defendant has a common-law wife and two children.*

"While never formally married, the defendant has fathered two children .... [One of those children and her mother, Candice Wilson,] were living with the defendant at the time of his arrest. Counsel for the defendant contends that Nicholas Acklin and Candice Wilson are married at 'common-law.' This Court finds that this mitigating circumstance has been proven and will give it appropriate weight.

"*The defendant attended church and participated in church activities when he was younger.*

"Several witnesses testified that Acklin had participated in church activities when he was

younger. The Court finds that this mitigating circumstance has been proven and will give it appropriate weight.

"*The defendant was raised in a good home by loving parents*.

"The Court was impressed with the sincerity of the testimony by the defendant's mother and father. They are clearly good people and tried to do the right thing in raising him. However, the Court does not find this to be a mitigating circumstance. Most killers are typically the products of poverty, a dysfunctional family, physical or sexual abuse and/or social deprivation. Acklin was the product of a loving middle-class family. Acklin was exposed to all of the values that are central to an ordered society; however, he chose to reject them. Acklin made a conscious choice to become a killer; he was not born to it.

"*The defendant's father says that he is remorseful.*

"The defendant's father testified that Acklin was remorseful. While the Court finds that the testimony on this point by the defendant's father is not contradicted, the Court is not convinced that the defendant is remorseful. The defendant did not apologize to the victims' families, either in the second stage or third stage sentencing hearing. He never uttered a word of remorse. Acklin even had a half-smile or smirk on his face when the Court was sentencing him to death. The defendant glared at each of the witnesses

> with a gaze that was devoid of emotion. The defendant is clearly not remorseful. The Court finds that this statutory mitigating circumstance is not applicable."

(Trial C. 292-94.)

In weighing the aggravating and mitigating circumstances, the trial court stated:

> "In summary, this Court has found that two aggravating circumstances were established by the evidence beyond a reasonable doubt. The Court has also considered the advisory verdict of the jury recommending death. Those have been compared to and weighed against one statutory mitigating circumstance and several nonstatutory mitigating circumstances. After careful and deliberate consideration, this Court is convinced beyond a reasonable doubt that the two aggravating circumstances substantially outweigh the one statutory and several nonstatutory mitigating circumstances. While the Court is not required by law to make this second analysis, the Court nevertheless finds that *each* of the two aggravating circumstances, *even standing alone*, outweigh all the mitigating circumstances.
>
> "The savage brutality of these murders is shocking. As was stated *supra*, the defendant's actions led to a massacre. The United States Supreme Court has recognized that 'certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death.' *Gregg*

v. Georgia, 428 U.S. 153, 184 (1976). This is such a crime.

"Robert Oppenheimer is considered by most historians and scientists to be the 'father' of the atomic bomb. When the atomic bomb was first tested in New Mexico in 1945, Oppenheimer was awestruck at the bomb's destructive power. In considering the destruction that the atomic bomb would soon bring to Japan, Oppenheimer paraphrased an ancient Hindu religious scholar and said, 'I fear I am become death, the destroyer of worlds.'

"In this case, Nicholas Acklin chose to 'become death, the destroyer of worlds.' He destroyed the world of three young men and their families by his own hand and destroyed the world of one other young man through the hands of his accomplice. He also tried mightily to destroy the world of another young man and a young lady. Because he has chosen to 'become death' and destroy so many worlds, it is to death he shall return."

(Trial C. 294-96.)

On appeal, this Court affirmed Acklin's convictions and sentences, including his death sentence. *Acklin v. State*, 790 So. 2d 975 (Ala. Crim. App. 2000). The Alabama Supreme Court denied Acklin's petition for a writ of certiorari, *Ex parte Acklin* 790 So. 2d 1012 (Ala. 2001), as did the United States Supreme Court, 533 U.S. 936 (2001). The certificate of judgment, making Acklin's direct appeal final, was issued on January 12, 2001.

On June 18, 2002, Acklin filed the underlying Rule 32 petition. Over the next 11 years, Acklin filed three

amended petitions and, among other things, numerous requests for discovery. The matter was assigned to several circuit judges over the years.[3] Several of the Rule 32 claims were summarily dismissed. The circuit court held an evidentiary hearing on the remaining claims in December 2013.

On April 8, 2015, in a detailed 45-page order, the circuit court denied the Rule 32 petition. Acklin appealed to this Court. *See* Rule 32.10, Ala. R. Crim. P.

Standard of Review

"'[Acklin] has the burden of pleading and proving his claims. As Rule 32.3, Ala. R. Crim. P., provides:

> """The petitioner shall have the burden of pleading and proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief. The state shall have the burden of pleading any ground of preclusion, but once a ground of preclusion has been pleaded, the petitioner shall have the burden of disproving its existence by a preponderance of the evidence."
>
> """The standard of review this Court uses in evaluating the rulings made

[3] Circuit Judge James P. Smith, who had presided over Acklin's trial, was originally assigned the petition. Judge Smith recused himself on November 4, 2002, and the matter was reassigned to Circuit Judge Loyd H. Little. Judge Little recused himself on October 21, 2008. After a number of additional reassignments and recusals, the matter was ultimately assigned to Circuit Judge Chris Comer on May 15, 2013. On December 9-12, 2013, Judge Comer held an evidentiary hearing on the remaining claims.

> by the trial court [in a postconviction proceeding] is whether the trial court abused its discretion." *Hunt v. State*, 940 So. 2d 1041, 1049 (Ala. Crim. App. 2005). However, "when the facts are undisputed and an appellate court is presented with pure questions of law, [our] review in a Rule 32 proceeding is de novo." *Ex parte White*, 792 So. 2d 1097, 1098 (Ala. 2001). "[W]e may affirm a circuit court's ruling on a postconviction petition if it is correct for any reason." *Smith v. State*, [122] So. 3d [224], [227] (Ala. Crim. App. 2011).
>
> "'....As stated above, [some] of the claims raised by [Acklin] were summarily dismissed ....
>
> "'....'

"*Washington v. State*, 95 So. 3d 26, 38-39 (Ala. Crim. App. 2012).

"[Acklin's] remaining claims were denied by the circuit court after [Acklin] was afforded the opportunity to prove those claims at an evidentiary hearing. *See* Rule 32.9(a), Ala. R. Crim. P.

"When the circuit court conducts an evidentiary hearing, '[t]he burden of proof in a Rule 32 proceeding rests solely with the petitioner, not the State.' *Davis v. State*, 9 So. 3d 514, 519 (Ala. Crim. App. 2006), *rev'd on other grounds*, 9 So. 3d 537 (Ala. 2007). '[I]n a Rule 32, Ala. R. Crim. P., proceeding, the burden of proof is upon the petitioner seeking postconviction relief to establish his grounds for relief by a preponderance of the evidence.'

> *Wilson v. State*, 644 So. 2d 1326, 1328 (Ala. Crim. App. 1994). Rule 32.3, Ala. R. Crim. P., specifically provides that '[t]he petitioner shall have the burden of ... proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief.' '[W]hen the facts are undisputed and an appellate court is presented with pure questions of law, that court's review in a Rule 32 proceeding is de novo.' *Ex parte White*, 792 So. 2d 1097, 1098 (Ala. 2001). 'However, where there are disputed facts in a postconviction proceeding and the circuit court resolves those disputed facts, "[t]he standard of review on appeal ... is whether the trial judge abused his discretion when he denied the petition."' *Boyd v. State*, 913 So. 2d 1113, 1122 (Ala. Crim. App. 2003) (quoting *Elliott v. State*, 601 So. 2d 1118, 1119 (Ala. Crim. App. 1992)).
>
> "Finally, '[a]lthough on direct appeal we reviewed [Acklin's] capital-murder conviction for plain error, the plain-error standard of review does not apply when an appellate court is reviewing the denial of a postconviction petition attacking a death sentence.' *James v. State*, 61 So. 3d 357, 362 (Ala. Crim. App. 2010) (citing *Ex parte Dobyne*, 805 So. 2d 763 (Ala. 2001)). With these principles in mind, we review the claims raised by [Acklin] on appeal."

Marshall v. State, 182 So. 3d 573, 580-82 (Ala. Crim. App. 2014) (some citations omitted).

Discussion

On appeal, Acklin raises four issues—each of which relates solely to claims presented at the December 2013 evidentiary hearing. Acklin does not address any claims that were summarily dismissed, nor does he raise all the claims that were designated for the evidentiary hearing. Accordingly, we address only those issues Acklin raises on appeal.[4]

I.

Acklin's primary claim is that his trial counsel were ineffective due to an alleged financial conflict of interest. (Acklin's brief, p. 13.) To examine this claim, a brief background is necessary.

Acklin was represented at his trial by Behrouz Rahmati and Kevin Gray.[5] The evidence at the Rule 32 hearing indicated that Rahmati agreed to represent Acklin after he met with Acklin's mother, Velma Acklin Evans ("Velma"), and Acklin's father, Theodis Acklin ("Theodis"), in September 1996, a few days after the offenses occurred. Velma signed an agreement with Rahmati providing for a $25,000 retainer and an hourly rate of $150 per hour. At that time, Rahmati and Gray were not partners, but Gray eventually began assisting Rahmati on the case.

At the time Rahmati was retained, he knew that Velma and Theodis were divorced. Regarding his

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[4] Acklin's petition presented claims related to both the guilt phase and penalty phase of his trial. At oral argument in this matter, however, counsel for Acklin stated that Acklin is not seeking a new guilt-phase proceeding; rather, Acklin is seeking a new penalty-phase proceeding only.

[5] Rahmati and Gray testified at the Rule 32 evidentiary hearing.

$25,000 retainer and Velma's ability to pay him, Rahmati testified that it was "obvious from Day 1" that Velma was in "financial distress" and Rahmati "suspected strongly [that he and Gray] were never going to get paid." (R. 56.)

During Rahmati's testimony, Acklin introduced billing statements and "monthly billing" letters from Rahmati's law firm.[6] That evidence, along with Rahmati's testimony, indicated that Velma paid several monthly payments of around $100 toward the retainer, for a total of about $1,900. Regarding these monthly payments, Rahmati testified that in his experience, when a parent of a client makes monthly payments of $100 to $200, "that's a very strong signal they can't afford paying." (R. 56.)

The evidence also indicated that by the time of Acklin's October 1998 trial, Theodis had made three sporadic payments totaling $2,900. (R. 80.) Those three payments of $700, $2,000, and $200 occurred in March 1998, September 1998, and October 1998, respectively. Rahmati testified that he did not know what convinced Theodis to pay toward the retainer, but he said that based on his interactions with Theodis, Velma, and Acklin, he did not think Theodis was "really trying as hard" as Velma to help with Acklin's case.

The record indicates that, based on billing statements, trial counsel spent more than 400 hours preparing for Acklin's trial. On June 1, 1998, Rahmati submitted a letter to the trial judge, along with an affidavit indicating that Acklin was indigent, in which

[6] Rahmati testified that his law firm routinely sent out billing statements or letters in the middle of each month. Acklin introduced several of those letters into evidence.

Rahmati sought to be appointed as counsel. A few days later, Rahmati withdrew the request, in part because Gray, who had not been practicing law for five years, could not have been appointed to assist with Acklin's defense. Rahmati testified that, at the time, Alabama law imposed a statutory cap on the amount of money an appointed attorney could be paid in a capital case. Rahmati also testified:

> "A. I consciously decided to withdraw my request for appointment for various reasons.
>
> "Q. But on that June 1st, 1998 request to be appointed, you weren't seeking to have all counsel removed entirely, new counsel to be appointed to Mr. Acklin, right?
>
> "A. No. It would have been a situation of me staying in as counsel and asking the Court to appoint a co-counsel of my choosing. Thank God, Judge Smith was kind enough, if I recall—if I recall, I think he would have appointed whoever I asked to be appointed. But then I withdrew my request to be appointed because, truly, I would have rather have Kevin Gray to stay as my co-counsel because of—I just knew how much he was putting into the case.
>
> "And furthermore, [Acklin] himself specifically requested that Kevin and I stay in the case, and I want to say perhaps his mom did as well, but I can't remember. I can't remember about his father. You have to understand, sir, at that point it wasn't necessarily about the money anymore."

(R. 72.)

In preparing for Acklin's trial, both Rahmati and Gray testified that they felt relatively certain they would need to be prepared for a penalty phase, and they began preparing for that phase in advance of the trial. Trial counsel were in consistent contact with Acklin and his family, and they interviewed several potential character witnesses, many of whom testified during the penalty phase.

The record indicates that trial counsel knew Acklin allegedly had used alcohol and marijuana at the time of the crimes. Counsel consulted experts about the possible effects those substances could have had on Acklin, particularly because he was a diabetic. Counsel also examined a report of a forensic psychological evaluation performed on Acklin. Ultimately, however, counsel determined that, in their opinion, none of the information from the experts or the evaluation would have been beneficial to Acklin in either the guilt phase or the penalty phase.

Counsel also testified that they asked Acklin and his parents about Acklin's childhood but that they were not told anything remarkable or out of the ordinary. On October 17, 1998—two days before Acklin's trial was to begin—Velma met alone with Rahmati, however, and told Rahmati that Theodis had perpetrated severe abuse against her and their children, including Acklin. This abuse, according to Velma's testimony at the evidentiary hearing, became very intense when Velma told Theodis she had had an affair. In 1982, within a year of the disclosure of the affair, Velma and Theodis were divorced, and Theodis was given full custody of the couple's three sons.[7]

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[7] When questioned about this, Velma testified that "when the divorce papers come to the home, I remember I signed them, and

At the evidentiary hearing, Velma and her son Steve Acklin testified about the abuse. The abuse included multiple allegations of Theodis threatening Velma and the children with a gun. Velma testified that Theodis "would have a gun in his hand, and he would be shaking it, and he would just shove it down [her] mouth." (R. 219.) Acklin and his brothers "would be screaming, telling their dad not to hurt their mom." (R. 220.) Velma also testified that she once fell from a second-floor window during a fight with Theodis over a rifle, which resulted in her being hospitalized. (R. 225-29.)

Rahmati testified that, when he first learned of the abuse two days before Acklin's trial, he "was very surprised that they never disclosed those details to us, even though we had discussed, with the whole family that we could talk to, with the exception of the brothers [who, Rahmati thought, were incarcerated]." Once he learned of the abuse, Rahmati talked to Theodis. Rahmati testified:

> "Q. What did you say to [Theodis] after Velma told you about the abuse?
>
> "A. I told [Theodis] that I had learned about the—or that [Velma] had told us about the physical and the mental abuse, more or less

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that's all I know. I didn't read them at the time." (R. 268.) When asked about whether she was ever "concerned for [her sons'] safety," Velma testified:

> "I didn't feel that [Theodis] would hurt them, you know; I didn't feel like he would really actually hurt them. But I knew that his discipline, or how he would handle it, affected them. But I never thought that he would actually hurt them."

(R. 268-69.)

at his hands to paraphrase, that he had put [Acklin] through and [Velma] through and the brothers through. And obviously, at that point, you know, I had a different opinion and vision of [Theodis].

"....

"... [And] I asked him if he would consider testifying regarding that so we could at least—you know, first I wanted to see if he was willing to talk to me about it to see if, in fact, it was true, (one); (two), if it was true, what his reasons were as to why he may have been like this towards his kids or towards his wife.

"Q. Right. Then if he had told you that information, would you have then talked to him about possibly getting on the stand at the trial and relating this?

"A. Sure. Yes, that's what I did, and he wasn't happy about that idea.

"Q. What do you mean, 'He wasn't happy'?

"A. He wasn't happy. He didn't appreciate the idea that his ex-spouse, [Velma], had disclosed these facts to me. I can't remember what he specifically said. It was as if, 'It's all not true.' I told him, 'Look, this is critical. You can help your son possibly, possibly. We've got a stacked deck against us as it is.'

"In my opinion, if the father truly—even if the father was abusive, if he truly loved his son, he would appear in court, if needed, to help. He took a very aggressive posture with me.

"Q. What does that mean?

"A. He wasn't happy. As I recall, we were in [the] office, and I can't remember if [Velma] was there or not. He literally got up as he started hearing what I was saying about what [Velma] had said. He literally stood up, and he was like, 'I can't believe they are doing this,' or 'They are going there,' something to that effect. Visibly, he was angry, and he said, 'You tell [Acklin] if he wants to go down this road, I'm done with him,' to that extent.

"Q. 'I'm done with him'?

"A. More or less. If I recall, that was the verbiage he used. He got up and walked out of my office. And if I recall, as he was walking out, I told him, '[Theodis], I will do whatever I need to, to get you to this sentencing phase; I just want you to know that,' and I don't think he even said anything. I was talking to the back of his head as he was walking out. He left, and that was it."

(R. 110-12.)

As to whether Rahmati considered putting this evidence on during the penalty phase, Rahmati said that he did.[8] Rahmati testified that he believed that the allegations were true and that, when he went to talk to Acklin the next day, Acklin confirmed that they

[8] Rahmati described the potential benefit of the evidence in the following manner: "I think any human being that listens to kids growing up in that environment could feel like maybe they turned out the way they did because of that, and so they could possibly find some sympathy." (R. 117.)

were true. Rahmati's testimony on his interaction with Acklin was as follows:

> "Q. You said ... that you got confirmation from Nick Acklin about what Velma said, right?
>
> "A. Yes, sir.
>
> "Q. You honestly told Nick everything that happened with Velma, right?
>
> "A. Yes, sir.
>
> "Q. You were open with him?
>
> "A. Sure.
>
> "Q. Told him everything—
>
> "A. Yes.
>
> "Q. —as to Velma?
>
> "A. As to what his mother told me, yes, and about discussions with his father as well.
>
> "Q. So discussions with the father; you told him everything that the father said? ... The father getting up and leaving your office? ... And what the father told you?
>
> "A. Yes, sir."

(R. 131-32.) According to Rahmati's records, he consulted with Acklin for two hours at this time. Counsel Gray also met with Acklin the same day.

Rahmati explained to Acklin that Velma, Theodis, and Acklin's brothers could be called to testify about the abuse and that the jury could consider that testimony as mitigating. Acklin, however, steadfastly refused to permit Rahmati to introduce the evidence. Rahmati testified:

"A. ... [Acklin] admitted that the physical and mental abuse took place, but he specifically stated he did not want me to introduce that evidence into the case because he didn't want to put his father in that position, or to really put his family in that position. I urged him that this was important. How much impact would it have, if any, I wasn't sure, but I felt certainly that we would need to try to introduce it. He didn't want to—if I recall, he said they didn't—if I recall, [Acklin] said something to the effect of, 'That didn't cause me to be here. I don't want to ruin their lives or have anything like this to come out on them.' So he specifically required us not to—instructed us not to subpoena his father or introduce this evidence.

"Q. As a result of what your client told you, did you ask him to memorialize his instructions in any specific way?

"A. Yes, sir. Because we felt so strong about the need to try to introduce this evidence and the fact that he had instructed us not to, I felt the need to memorialize it in the form of a writing that we asked [Acklin] to sign, which he signed, just for me to have in my file.

"....

"Q. Did you threaten [Acklin] in any way in order to get him to sign this particular document?

"A. Absolutely not.

"Q. Now, if you could, please read the last sentence beginning, 'I have expressly.'

"A. 'I have expressly forbidden them to mention or present such evidence or argue such evidence during any part of the trial proceeding, including either the guilt or the penalty phase.'

"Q. When he refers to 'such evidence,' what is the particular evidence you understood he was forbidding you and Mr. Gray from presenting either at the guilt phase or the penalty phase?

"A. It was primarily the physical and the verbal abuse that [Velma] told us that [Theodis] carried out on the family, including, I think, the reference to the gun, pointing the gun at the kids, telling them he was going to kill them, things like that."

(R. 164-66.)

The statement signed by Acklin provided in full:

"I, Nicholas Bernard Acklin, hereby acknowledge that my attorneys, Behrouz K. Rahmati and Kevin C. Gray, have consulted with me and advised me regarding certain potentially mitigating evidence, which they are prepared to offer on my behalf. This mitigating evidence consists of testimony from my mother and possibly other siblings and family members that I suffered some degree of abusive behavior during my formative years at the hands of my father. Such behavior included, but was not limited to, my father pointing guns at me. My above-mentioned attorneys have advised me that this evidence could possibly be considered by a jury in mitigation of any aggravating circumstances

> argued by the State at my trial. However, I have advised my attorneys that I do not desire them to put such evidence before the Court or the jury. I have expressly forbidden them to mention or present such evidence or argue such evidence during any part of the trial proceeding, including either the guilt or penalty phase."

(C. 4978.)

Although he was subpoenaed to testify at the hearing, Theodis did not testify. Acklin also did not testify at the hearing.

Acklin raises a number of claims related to this waiver and the decision of his trial counsel not to put on evidence of the alleged abuse.

A.

First, Acklin argues that he "was denied his right to conflict-free counsel because his attorney (A) had divided loyalties due to the third-party payer arrangement, and (B) chose a course of action that helped the person paying him and harmed his client." (Acklin's brief, p. 13.)

As to a claim alleging ineffective assistance of counsel, this Court stated in *Marshall*, *supra*:

> "'To prevail on a claim of ineffective assistance of counsel, the petitioner must show (1) that counsel's performance was deficient and (2) that the petitioner was prejudiced by the deficient performance. *See Strickland v. Washington*, 466 U.S. 668 (1984).
>
> > "'"Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-

> guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way."

"'*Strickland*, 466 U.S. at 689.

> """[T]he purpose of ineffectiveness review is not to grade counsel's performance. *See Strickland [v. Washington*], [466 U.S. 668,] 104 S. Ct. [2052] at 2065 [(1984)]; *see also White v. Singletary*, 972 F.2d 1218, 1221 (11th Cir. 1992) ('We are not interested in grading lawyers' performances; we are interested in whether

> the adversarial process at trial, in fact, worked adequately.'). We recognize that '[r]epresentation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another.' *Strickland*, 104 S. Ct. at 2067. Different lawyers have different gifts; this fact, as well as differing circumstances from case to case, means the range of what might be a reasonable approach at trial must be broad. To state the obvious: the trial lawyers, in every case, could have done something more or something different. So, omissions are inevitable. But, the issue is not what is possible or 'what is prudent or appropriate, but only what is constitutionally compelled.' *Burger v. Kemp*, 483 U.S. 776, 107 S. Ct. 3114, 3126, 97 L. Ed. 2d 638 (1987)."
>
> "'*Chandler v. United States*, 218 F.3d 1305, 1313–14 (11th Cir. 2000) (footnotes omitted).
>
> "'An appellant is not entitled to "perfect representation." *Denton v. State*, 945 S.W.2d 793, 796 (Tenn. Crim. App. 1996). "[I]n considering claims of ineffective assistance of counsel, 'we address not what is prudent or appropriate, but only what is constitutionally compelled.'" *Burger v. Kemp*, 483 U.S. 776, 794 (1987)."'

Marshall, 182 So. 3d at 582 (quoting *Yeomans v. State*, 195 So. 3d 1018, 1025-26 (Ala. Crim. App. 2013)). Furthermore,

> """[w]hen courts are examining the performance of an experienced trial counsel, the presumption that his conduct was reasonable is even stronger.'" *Ray v. State*, 80 So. 3d 965, 977 n.2 (Ala. Crim. App. 2011) (quoting *Chandler v. United States*, 218 F.3d 1305, 1316 (11th Cir. 2000)).
>
> "We also recognize that when reviewing claims of ineffective assistance of counsel 'the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact.' *Strickland v. Washington*, 466 U.S. 668, 698, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)."

Marshall, 182 So. 3d at 582-83.

"Addressing a lawyer's conflict of interest as it relates to the Sixth Amendment right to effective counsel, this Court has explained:

> """"[I]n order to establish a violation of the Sixth Amendment, ... [a defendant] must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Cuyler v. Sullivan*, 446 U.S. [335] at 348, 100 S. Ct. [1708] at 1718 [(1980)]. Accord *Williams v. State*, 574 So. 2d 876, 878 (Ala. Cr. App. 1990). To prove that an actual conflict adversely affected his counsel's performance, a defendant must make a factual showing "that his counsel actively represented conflicting interests," *Cuyler v. Sullivan*, 446 U.S. at 350, 100 S. Ct. at 1719, "'and must demonstrate that the attorney "made a choice between possible alternative

> courses of action, such as eliciting (or failing to elicit) evidence helpful to one client but harmful to the other.'"" *Barham v. United States*, 724 F.2d 1529, 1532 (11th Cir.) (quoting *United States v. Mers*, 701 F.2d 1321, 1328 (11th Cir. 1983)), cert. denied, 467 U.S. 1230, 104 S. Ct. 2687, 81 L. Ed. 2d 882 (1984). Once a defendant makes a sufficient showing of an actual conflict that adversely affected counsel's performance, prejudice under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)—i.e., "that, but for counsel's unprofessional errors, the result of the proceeding would have been different"—is presumed. *Strickland*, 466 U.S. at 694, 692, 104 S. Ct. at 2068, 2067. See *United States v. Winkle*, 722 F.2d 605, 610 (10th Cir. 1983); *Williams v. State*, 574 So. 2d at 878.'""

"*Jones v. State*, 937 So. 2d 96, 99–100 (Ala. Crim. App. 2005) (quoting *Wynn v. State*, 804 So. 2d 1122, 1132 (Ala. Crim. App. 2000)). Additionally,

> '"'[a]n actual conflict of interest occurs when a defense attorney places himself in a situation 'inherently conducive to divided loyalties.' *Castillo [v. Estelle]*, 504 F.2d [1243] at 1245 [(5th Cir. 1974)]. If a defense attorney owes duties to a party whose interests are adverse to those of the defendant, then an actual conflict exists. The interests of the other client and the defendant are sufficiently

> adverse if it is shown that the attorney owes a duty to the defendant to take some action that could be detrimental to his other client."
>
> "'*Zuck v. Alabama*, 588 F.2d 436, 439 (5th Cir. 1979).'"

Ervin v. State, 184 So. 3d 1073, 1080–81 (Ala. Crim. App. 2015). *See also Smith v. State*, 745 So. 2d 922, 938 (Ala. Crim. App. 1999).

Acklin argues that Rahmati "had an actual conflict of interest because his loyalties were divided between his client and the person paying his fee." (Acklin's brief, p. 14.) In rejecting this conflict-of-interest claim, the circuit court stated:

> "This Court finds that the testimony of Mr. Rahmati and Mr. Gray, which was corroborated by their billing statement, proves that they were very diligent in preparing for Acklin's trial. The billing statement documents that Mr. Rahmati and Mr. Gray spent over 400 hours preparing for Acklin's trial. Mr. Rahmati also testified that not all of the time he and Mr. Gray spent preparing for trial was reflected in the billing statement.
>
> "....
>
> "Acklin claimed that his trial counsels suffered a conflict of interest because his parents were unable to pay the $25,000 retainer fee. In particular, Acklin claimed his parents' inability to pay created a conflict of interest because 'any work performed on [Acklin's] case would reduce the amount of

work counsel could do on a case which would actually generate income.'

"Mr. Rahmati acknowledged that he and Mr. Gray lost money by representing Acklin. However, the testimony of Mr. Rahmati and Mr. Gray, together with their billing statement, convinces this Court beyond any reasonable doubt that a lack of payment did not curtail their efforts to defend Acklin. Trial counsel's billing statement indicates they spent more than 400 hours preparing for Acklin's trial. Trial counsel thoroughly investigated for the guilt phase and penalty phase of trial, including whether Acklin was intoxicated the night of the murders.

"... The Court finds that Acklin failed to prove that his parents' failure to pay the entire retainer fee caused [trial counsel] to suffer a conflict of interest. ... The Court finds that no prejudice was suffered by Acklin. ...

"....

"Acklin also claims that a conflict of interest arose when his father threatened to stop making further payments to Mr. Rahmati and Mr. Gray if they presented evidence during the penalty phase of trial that Acklin's father was physically and emotionally abusive toward him and his family.

"Acklin's trial counsel questioned Acklin and his mother about his background, including whether Acklin had suffered any type of abuse. Initially, neither Acklin nor his mother disclosed that Acklin's father was verbally and physically abusive to Acklin and other

family members. It was not until mere days before Acklin's trial that his mother disclosed to Mr. Rahmati that Acklin's father was physically and emotionally abusive. Acklin confirmed his mother's belated disclosure about his father's abusive behavior only when he was confronted by trial counsel. When Acklin was informed by his trial counsel that evidence he was abused by [his] father could be presented as a mitigating circumstance during the penalty phase, Acklin presented them from presenting it.

"In *Adkins v. State*, 930 So. 2d 524, 540 (Ala. Crim. App. 200[1]), the Alabama Court of Criminal Appeals held that '[u]ltimately the decision to waive the presentation of mitigating evidence was Adkins' decision. We refuse to find an attorney's performance ineffective for following his client's wishes.' *See Schriro v. Landrigan*, 550 U.S. 465, 476-477 (2007) (holding that trial counsel was not ineffective during the penalty phase for failing to present certain potentially mitigating evidence where the defendant prohibited counsel from presenting said evidence).

"Mr. Rahmati testified that when he confronted [Theodis] about domestic abuse and informed [him] it could be presented at the penalty phase that he 'wasn't happy.' According to Mr. Rahmati, Acklin's father told him that '[y]ou tell Nick if he wants to go down this road, I'm done with him' and left Mr. Rahmati's office. Acklin presented no evidence that his father threatened to not pay trial counsel if they presented evidence that

> he was abusive during the penalty phase. From the time Mr. Rahmati agreed to represent Acklin he knew it was unlikely [Velma] could pay the retainer fee. At the evidentiary hearing, Mr. Rahmati stated that 'I suspected strongly we were never going to get paid from Day 1.' This Court finds that Mr. Rahmati's and Mr. Gray's failure to present potential mitigating evidence regarding domestic abuse to the jury and trial judge was not because of a conflict of interest with Acklin's father—it was because Acklin made the conscious decision that he did not want this evidence presented at trial."

(C. 4004-08.) Acklin has not demonstrated that these findings by the circuit court are erroneous.

Acklin argues that Theodis's comment he was "done helping with this case" necessarily meant that Theodis would have stopped paying trial counsel. Even if that is true, however, the evidence supports the circuit court's findings (1) that Rahmati and Gray did not expect to be paid the full retainer and (2) that the failure of the parents to pay the full retainer did not prejudice Acklin, particularly in light of the work Rahmati and Gray did on the case.[9]

Furthermore, Rahmati's testimony that he told Theodis that he would "do whatever [he] need[ed] to,

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[9] Acklin cites Rule 1.8(f), Ala. R. Prof'l Conduct, which states: "A lawyer shall not accept compensation for representing a client from one other than the client unless: (1) the client consents after consultation" and "(2) there is no interference with the lawyer's independence of professional judgment." The evidence in this case, however, supports a finding that trial counsel did not violate Rule 1.8(f).

to get [Theodis] to this sentencing phase" was uncontradicted (R. 112), as was Rahmati's testimony that he told Acklin everything about his interaction with Theodis including that Theodis could be required to testify. In short, Acklin failed to prove that an actual conflict existed or that Rahmati had "divided loyalties" between Acklin and Theodis. The evidence supports the circuit court's finding that the sole reason for trial counsel's failure to introduce evidence of the alleged abuse was that Acklin expressly forbade them from doing so.

Moreover, as the circuit court noted, this Court and the United States Supreme Court have rejected claims alleging ineffective assistance of counsel regarding the failure to introduce mitigating evidence where the decision not to introduce that evidence *was at the express direction of the accused. See, e.g., Adkins v. State*, 930 So. 2d 524, 539-40 (Ala. Crim. App. 2001) ("We join the majority of jurisdictions that have considered this issue and hold that a defendant is estopped from raising a claim of ineffective assistance of counsel for counsel's failure to present mitigating evidence when the defendant waived the presentation of mitigating evidence. To punish Adkins's attorneys for following his wishes would conflict with the doctrine of invited error. 'Under the doctrine of invited error, a defendant cannot by his own voluntary conduct invite error and then seek to profit thereby.' *Phillips v. State*, 527 So. 2d 154, 156 (Ala. 1988)."); *see also Schriro v. Landrigan*, 550 U.S. 465 (2007).[10] Here,

[10] Both *Adkins* and *Schriro* involved a defendant's waiver of all mitigation evidence, and in both cases the trial court engaged the defendant in a colloquy regarding the decision to waive all mitigation evidence. Neither circumstance is present here: Acklin did present some evidence in mitigation, and the circuit court therefore did not have an opportunity to engage Acklin in a

there was uncontradicted evidence that counsel's decision not to introduce evidence of the abuse was at the express direction of Acklin.

Acklin has not demonstrated that the circuit court's findings regarding this claim were erroneous, and he is due no relief.

B.

Acklin argues that his trial "counsel knowingly presented misleading testimony that was harmful to his client and helpful to the person paying him, which establishes that his divided loyalties adversely affected his representation." (Acklin's brief, p. 17.) In Acklin's rendering,

> "[w]ithin [36] hours of Theodis's statement that he would not support the case if Rahmati presented evidence of abuse, Rahmati had Acklin sign a typed document stating that he did not want evidence of abuse presented. Although the waiver itself is problematic, it is not necessary for this Court to address the waiver. Even assuming that the waiver was valid, Rahmati did not simply omit evidence that Theodis had abused Acklin; instead, he presented evidence suggesting the opposite: that Theodis was a supportive father and Acklin had a positive upbringing.

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colloquy regarding the decision not to offer all mitigating evidence that was potentially available.

Acklin raises issues pertaining to the sufficiency of the statement he signed and whether his trial counsel had a duty to inform the circuit court about it. We address those issues later in this opinion.

> "Rahmati knew Theodis would not be candid about the abuse, yet he affirmatively asked questions that would enable Theodis to mislead the jury and the court."

(Acklin's brief, pp. 18-19.)

At the outset, we reiterate our holdings in Part I.A.—first, Acklin failed to prove that Rahmati's loyalties were divided between Acklin and Theodis and, second, Rahmati's failure to introduce evidence of the abuse was at Acklin's express direction.

In denying this claim, the Rule 32 court did not directly address whether Theodis's testimony was misleading at the penalty phase or the sentencing hearing. The court noted:

> "This Court has reviewed penalty phase testimony presented by Mr. Rahmati and Mr. Gray. Most of this testimony concerned Acklin's character and personality. Acklin specifically prevented his trial counsel from presenting evidence concerning his abuse as a child to the jury or the trial judge."

(C. 4030.) The circuit court then found that Acklin failed to prove that he was prejudiced by the testimony given during the penalty phase or by Theodis's statements at the sentencing hearing. The court also held that Acklin did not prove that the introduction of evidence of the alleged abuse would have had any impact on the outcome of the penalty phase or the sentencing hearing. On appeal, Acklin has not demonstrated that those findings are erroneous.

As to Acklin's claim on appeal that Rahmati affirmatively elicited testimony from Theodis that Rahmati "knew" was "false," the record does not support that

conclusion. At the penalty phase, Theodis's testimony consisted of seven pages. (Trial R. 964-70.) After asking Theodis to state his name for the record and whether Theodis was Acklin's father, Rahmati asked Theodis nine questions.[11] Acklin's characterization of those questions as "enabl[ing] Theodis to mislead the jury and the court" is inaccurate. Illustrative of Acklin's mischaracterization of those questions is his description of the question—"Q. Let me ask you this,

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[11] Those questions were:

1. "Q. Tell me what this incident has brought to your family, [Acklin's] being involved in this case?" (Trial R. 964.)
2. "Q. Let me ask you this, sir, when you say you were traumatized, did you notice [Acklin] at any time in his life just drifting away to something like this or was this his character? What happened?" (Trial R. 965.)
3. "Q. Let me ask you this, the fact he was alone and quiet, did you notice him to be persuaded—or let me ask you this, did he have the qualities of a follower or qualities of a leader?" (Trial R. 966.)
4. "Q. When—you know it is hard to ask you questions in times like this. What is it that you--is there anything that you want to say to the families of the victims at this time?" (Trial R. 966.)
5. "Q. Let me ask you this, sir, did [Acklin] ever express to you anything that may have tipped you off about what was going on in his life that that caused him to be where he was on that night?" (Trial R. 967.)
6. "Q. How long had he been away from church?" (Trial R. 968.)
7. "Q. Let me ask you this, did you ever see Nick to be disrespectful to anyone and if so, did you ever discipline him for anything?" (Trial R. 968-69.)
8. "Q. How often do you see [Acklin] now?" (Trial R. 969.)
9. "Q. Is there anything that you would like to ask this jury at this time?" (Trial R. 969.)

did you ever see Nick to be disrespectful to anyone and if so, did you ever discipline him for anything?" Acklin suggests that Theodis's response to this question—i.e., "We didn't have that problem" and Acklin "was easily disciplined"—was false in light of the allegations of abuse. Acklin also asserts that Theodis's additional comments in response to that question—e.g., that Theodis was an "overly protective [parent], really a father who loves his children"—were false in light of the allegations of abuse.

Contrary to Acklin's assertions, Rahmati's question about discipline may fairly be seen as an attempt to elicit Theodis's assessment of Acklin's character—not as an affirmative attempt to get Theodis to mislead the court and the jury as to whether Theodis himself was a "good" parent. As to whether Rahmati had an obligation to inform the court as to parts of Theodis's testimony that he thought might be untrue, Acklin has not demonstrated either (1) that Rahmati thought the testimony was "untrue" or (2) that Rahmati had an obligation to inform the court of his thoughts about the veracity of that testimony.

As to what occurred at the sentencing hearing, we note that Acklin mischaracterizes Theodis's participation at that hearing. The statements made by Theodis at that hearing before the sentencing judge followed this statement from Rahmati: "This is not going to be testimony *and I am not going to ask [Theodis] Acklin questions.* As my client's father, he simply has something that he would like to tell the Court." (Trial R. 1025.)

Acklin directs this Court to that part of the sentencing order, also quoted above, in which the sentencing court stated:

> "The Court was impressed with the sincerity of the testimony by the defendant's mother and father. They are clearly good people and tried to do the right thing in raising him. However, the Court does not find this to be a mitigating circumstance. Most killers are typically the products of poverty, a dysfunctional family, physical or sexual abuse and/or social deprivation. Acklin was the product of a loving middle-class family. Acklin was exposed to all of the values that are central to an ordered society; however, he chose to reject them. Acklin made a conscious choice to become a killer; he was not born to it."

(Trial C. 294.) According to Acklin, Rahmati knew that the trial court's statements here were incorrect, and, Acklin says, Rahmati should have objected to them or at least brought the trial court's attention to them.

The Rule 32 court rejected this argument, however—finding, again, that the responsibility for Rahmati's failure to tell the sentencing court about the abuse is because Acklin had expressly prohibited Rahmati from doing so. The circuit court noted, again, that a "defendant cannot intentionally prevent his trial counsel from presenting evidence during trial and then, years later, attempt to profit from trial counsel's failure" to present that evidence. *See Adkins v. State*, 930 So. 2d at 539-40; *see also Gilreath v. Head*, 234 F.3d 547, 550 n.10 (11th Cir. 2000) ("We readily conclude that trial counsel—by relying on Petitioner's instruction not to present mitigating mental health and alcohol abuse evidence—did not perform in an unreasonable manner."). We agree with the circuit court.

Acklin's refusal to permit Rahmati to introduce evidence of the abuse left trial counsel with the task of presenting a mitigation case without the ability to present evidence of the abuse. Trial counsel chose a strategy of presenting evidence of Acklin's pleasant disposition and his remorse over the murders. That strategy included attempting to portray Acklin and his family "in the best light [they] possibly could forboth Judge Smith and for the jury." (R. 151.) Counsel presented testimony from eight witnesses, including Acklin's parents, his aunt, his grandmother, a retired police officer, an employee at a youth organization, and two reverends.

As noted above, we do not agree with Acklin's characterization of Rahmati's efforts during the penalty phase and the sentencing phase. Acklin has not shown that Rahmati intentionally elicited false evidence or failed to draw the court's attention to evidence Rahmati knew to be false.[12] Although Rahmati knew about the allegations of abuse, he had also been told by Velma that the alleged abuse was most intense during the year before Velma and Theodis divorced—which occurred when Acklin was

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[12] Acklin cites two cases in support of the proposition that a lawyer may not permit testimony that he knows is false or misleading: *Nix v. Whiteside*, 475 U.S. 157, 171 (1986), and *McCombs v. State*, 3 So. 3d 950, 953 (Ala. Crim. App. 2008). Those cases, however, are not applicable here.

First, as we have noted, Rahmati did not permit testimony that he "knew" to be false or misleading. Second, those cases involved scenarios in which the lawyer's "knowledge" about the falsity of the evidence was clear. In *Nix*, the defendant told his lawyer that he would testify to something that the lawyer knew was a lie. *Nix*, 475 U.S. at 160-62. In *McCombs*, the lawyer told his client to lie. *McCombs*, 3 So. 3d at 952. Neither of those situations is present here.

11 (he was 24 at the time of the crimes). At the time of the trial, Theodis had remarried and had been a reverend for some time. There was testimony that Acklin had regularly attended church and had participated in the youth choir at his church. Theodis had paid some of Acklin's legal bills, and he made an impassioned plea for mercy to the jury and to the trial court. [13] Thus, even if Rahmati believed that the allegations about the abuse were accurate, Theodis's comments about loving his children and raising them in a "Christian" home were not necessarily untrue.

Nor do we agree with Acklin's suggestion that, if the jury or the trial court had known about the abuse—or at least had not heard some evidence that Acklin was raised in a "loving middle-class family"—the outcome might have been different. The sentencing court did not expressly rely on Acklin's home environment as a basis for imposing the death sentence—rather, the court rejected his home environment as a mitigating circumstance.[14]

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[13] Theodis testified at the penalty phase:

> "I pray that you will have mercy. That you will understand. That you will empathize with me as a parent and I feel like maybe I am given more favor than the parents of the victims. They didn't have a chance to plead for their children's lives, but I seize this opportunity to ask you to have mercy. As Rev. Rogers said, there are no winners. We have all lost."

(Trial R. 970.)

[14] Had the evidence been as Acklin now argues it should have been—that his home environment had been bad and that he endured horrific abuse at the hands of his father—this Court has often noted that whether such evidence is mitigating "may be in the eye of the beholder." *Davis v. State*, 44 So. 3d 1118, 1141 (Ala. Crim. App. 2009).

After hearing much of the evidence that Acklin argues should have been introduced, the Rule 32 court found:

> "While Acklin presented evidence his father was abusive to him, his mother and siblings, he completely failed to prove why his exposure to abuse would have been considered a mitigating factor by the jury and the trial court. This is especially true given Acklin's age at the time of the offenses. The abuse Acklin endured at the hands of his father clearly had no effect on Acklin's ability to work, maintain relationships, or to function in society to conform his behavior to the requirements of the law if he chose to do so. *See Mills v. Singletarv*, 63 F.3d 999, 1025 (11th Cir. 1995) ('[E]vidence of Mills' childhood environment likely would have carried little weight in the light of the fact that Mills was twenty-six when he committed the crime.'); *see also Tompkins v. Moore*, 193 F.3d 1327, 1337 (11th Cir. 1999)(holding that 'where there are significant aggravating circumstances and the petitioner was not young at the time of the capital offense, "evidence of a deprived and abusive childhood is entitled to little, if any, mitigating weight."')(citation omitted)."

(C. 4032.)

In sum, Acklin has not demonstrated any reasonable probability that evidence of the alleged abuse would have altered the trial court's weighing of the aggravating and mitigating circumstances, particularly in light of the "savage brutality of these murders" and the sentencing court's determination "that *each*

of the two aggravating circumstances, *even standing alone*, outweigh all the mitigating circumstances." (Trial C. 295.) *Cf. Kansas v. Carr*, 136 S. Ct. 633, 646 (2016) (stating, in rejecting a claim that certain acts or evidence had rendered a sentencing proceeding fundamentally unfair: "None of that mattered. What these defendants did—acts of almost inconceivable cruelty and depravity—was described in excruciating detail [by one of the victims who had survived]."). Acklin also has not demonstrated that his trial counsel knowingly presented false testimony due to a conflict of interest.

The circuit court properly denied this claim, and Acklin is due no relief.

C.

Acklin next challenges the validity of the statement he signed instructing his counsel not to introduce evidence of the alleged abuse he suffered as a child. He argues that "to the extent that the Court addresses the waiver, it should hold that Rahmati's decision to obtain the waiver without informing Acklin or the court of his divided loyalties constitutes another adverse effect of the conflict."[15] (Acklin's brief, p. 24.)

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[15] Acklin's argument in this regard is made as an alternative one. Specifically, he argues:

> "Although it is not necessary for this Court to address the purported waiver of mitigation since Acklin is entitled to relief even if the waiver was valid, the waiver itself was a product of counsel's conflict. Because Rahmati presented misleading testimony that harmed his client and helped the person paying him, it is not necessary for this Court to address whether Acklin made a valid waiver of his right to present evidence that he was abused as a child."

(Acklin's brief, p. 24.)

In Part I.A. of this opinion we held that Acklin failed to show that Rahmati's loyalties were divided or that an actual conflict of interest existed.[16] Furthermore, Rahmati testified that Acklin knew about and consented to the third-party payer arrangement, whereby Velma and Theodis were paying his legal fees. Additionally, we held that there was no evidence that Rahmati's independent judgment was affected by this arrangement.

In addressing this claim, the circuit court first cited *Adkins*, *supra*, for the proposition that a defendant who decides to waive mitigation evidence is estopped from challenging his counsel's effectiveness based on a failure to present mitigating evidence. The circuit court then found:

> "Acklin did not testify at the evidentiary hearing. Therefore, *there is no evidence before this Court demonstrating that he did not knowingly and voluntarily waive having his trial counsel present evidence concerning his father's abuse toward him and members of his family to the jury during the penalty phase*. This Court is well satisfied that Mr. Rahmati and Mr. Gray were prepared to present such evidence on Acklin's behalf during the penalty phase of trial."

(C. 4012 (emphasis added).) The circuit court's findings are supported by the record, which indicated that Acklin voluntarily signed a statement acknowledging that he had prohibited his attorneys from introducing

[16] Acklin cites several authorities regarding disclosure of a conflict to the court. Because no conflict existed, however, those authorities are inapposite.

evidence of the alleged abuse. Acklin is due no relief on this claim.[17]

II.

Acklin argues that he "was denied the effective assistance of counsel at the penalty phase of his capital trial." (Acklin's brief, p. 26.) He alleges three ways in which counsel was allegedly ineffective.

A.

In Part II.A. of his brief, Acklin merely reiterates his arguments that his counsel presented misleading evidence at the penalty phase regarding Acklin's childhood. The circuit court rejected these arguments, as we did in Part I.B. of this opinion. Acklin is due no relief on this claim.

B.

Acklin argues next that his trial "counsel conducted an inadequate investigation such that Acklin could not possibly make a knowing and intelligent waiver of the abuse evidence." (Acklin's brief, p. 29.) Acklin cites decisions such as *Whitehead v. State*, 955 So. 2d 448, 460 (Ala. Crim. App. 2006) ("'[I]f *counsel failed to investigate and advise, then Petitioner's waiver was not knowing and intelligent and thus without legal effect.' Holloway [v. Horn]*, 161 F. Supp. 2d [452,] 569 [(E.D. Pa. 2001)] (emphasis added), rev'd on other grounds,

[17] In Part II.B. of his brief, Acklin challenges the adequacy of his trial counsel's investigation. Among other things, he asserts in that part of his brief that the statement he signed (prohibiting evidence of the alleged abuse) was invalid because of counsel's allegedly inadequate investigation. We address Acklin's claim regarding the adequacy of the investigation in Part II.B. of this opinion.

355 F.3d 707 (3d Cir. 2004)), and *Wiggins v. Smith*, 539 U.S. 510 (2003).

Those decisions are not controlling on the question presented here. *Whitehead* involved a petitioner who had allegedly waived the right to present *any* mitigation evidence. 855 So. 2d at 454. Further, the record in *Whitehead* did not disclose that counsel had performed *any* investigation for the penalty phase. Under the circumstances there, this Court appears to have held that a purported waiver of the right to present any mitigation evidence would not automatically foreclose a subsequent challenge to the adequacy of counsel's investigation and preparation for the penalty and sentencing phases of a capital-murder trial.

In the instant case, Acklin did *not* waive a mitigation presentation; rather, he prohibited his attorneys from introducing evidence during their mitigation presentation of alleged abuse. Further, as recounted above in Part I, counsel in fact prepared for the penalty phase. Thus, *Whitehead* is inapposite.

Additionally, *Whitehead* was based extensively on the United States Supreme Court's decisions in *Rompilla v. Beard*, 545 U.S. 374 (2005), and *Wiggins*, *supra*. *Rompilla* and *Wiggins* addressed claims of ineffective assistance of counsel related to the adequacy of counsel's penalty-phase investigation. Our 2006 *Whitehead* decision quoted extensively from *Rompilla* but failed to apply the decision in a significant manner. We did say, however, that "an examination of the investigation counsel conducted is critical to determining the validity of the waiver and the effectiveness of counsel's performance in relation thereto." 955 So. 2d at 470.

Subsequent to *Whitehead*, the United States Supreme Court in *Schriro v. Landrigan*, 550 U.S. 465 (2007), clarified that it has "never imposed an 'informed and knowing' requirement upon a defendant's decision not to introduce evidence." 550 U.S. at 479. Thus, Acklin has not demonstrated that he is entitled to relief on his claim that he was not knowing and informed when he signed the statement prohibiting his attorneys from introducing evidence of the alleged abuse.

To the extent Acklin challenges the adequacy of counsel's investigation, Acklin failed to show that the investigation was unreasonable under the circumstances. As outlined above in Part I, counsel spent considerable time on the case and planned for the penalty phase by getting the names of character witnesses from family members, interviewing several witnesses, and consulting expert witnesses.

Moreover, trial counsel specifically inquired about whether there had been any abuse in the family, but Acklin and his family members did not disclose the alleged abuse until two days before his trial. Again, once counsel found out about the alleged abuse, counsel confronted Theodis and then consulted extensively with Acklin, who expressly prohibited them from introducing any evidence of the alleged abuse.

Acklin is due no relief on this claim.

C.

Acklin argues that his trial counsel were ineffective for failing "to inform the court that the jail was medicating Acklin with Xanax, which affected his

demeanor at trial."[18] (Acklin's brief, p. 34.) Acklin asserts:

> "Three days before trial, the Madison County Jail began giving Nicholas Acklin Xanax, an anti-anxiety drug with sedative effects. As pharmacologist Dr. Pamela Sims explained at the Rule 32 hearing, Xanax is used primarily to treat anxiety and cause sedation: 'The purpose of Xanax is to remove emotion from [the patient].' R. 555. Acklin was receiving a 'significant dose' of the drug, R. 549, such that it would be expected to have sedative effects, moving a person toward sleep even if he were in a highly emotional situation.
>
> "....
>
> "Although Rahmati knew that the jail had begun giving Acklin a new drug shortly before trial 'to help him calm down,' R. 145, he did not take any steps to inquire about the drug or its effects. Accordingly, Rahmati did not request a jury instruction on the ways in which the drug might affect Acklin's demeanor. He also did not inform the court about the drug, even when the court specifically relied on Acklin's lack of remorse—displayed by his 'gaze that was devoid of emotion,' [Trial C. 294]—as a reason for imposing the death penalty."

(Acklin's brief, pp. 34-35.)

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[18] Acklin has abandoned any claim that he was involuntarily administered Xanax.

The circuit court rejected this claim. It found:

"Mr. Rahmati also testified at the evidentiary hearing that he was aware that Acklin was given additional medication at the Madison County Jail during his trial, but Mr. Rahmati could not recall specifically what Acklin was given. At the time of Acklin's trial Mr. Rahmati and Mr Gray had represented him for more than two years. During Acklin's trial, neither Mr. Rahmati nor Mr. Gray noticed his affect or demeanor was any different than at any other time during their representation. Mr. Rahmati also testified that Acklin's demeanor at the Rule 32 evidentiary hearing was the same as it was during his capital murder trial years before.

"This Court notes that there is nothing in the trial record, and Acklin presented no evidence at the evidentiary hearing, indicating that Acklin ever complained to Mr. Rahmati or Mr. Gray that the medication he was prescribed during his trial affected his ability to assist[] in his defense. Furthermore, in observing Acklin during the course of the evidentiary hearing, the Court notes that Acklin displayed a flat and subdued demeanor, which appeared to be consistent within his demeanor at trial based upon descriptions of same in the record. Acklin also presented no evidence proving that anyone that observed him during his trial informed Mr. Rahmati or Mr. Gray that Acklin's appearance or demeanor was anything other than normal. Acklin also failed to present any evidence establishing that he objected to being

> administered Xanax during his trial or that he or anyone reported to Mr. Rahmati, Mr. Gray, or to any jail personnel that he was experiencing side effects from the drug."

(C. 4001-02.) The findings of the circuit court are supported by the record, and Acklin has not demonstrated that he is entitled to relief on this claim.

D.

Acklin next argues that his "counsel's deficient performance prejudiced" him. (Acklin's brief, p. 37.) Acklin again cites (1) the sentencing court's alleged "misunderstanding of the facts" regarding Acklin's childhood and (2) the sentencing order's statements about Acklin's "demeanor."

We have already held that counsel did not perform deficiently as to either of those aspects of the sentencing court's order. Acklin expressly prohibited his counsel from introducing evidence of the alleged abuse in his childhood, and counsel did not mislead the court or have an obligation to ignore Acklin's instructions and tell the court about the allegations of abuse. Further, counsel's failure to notify the court or the jury about Acklin's taking Xanax during the trial was not deficient performance. Accordingly, a discussion of whether counsel's representation prejudiced Acklin is unnecessary.

Regardless, Acklin has not demonstrated that counsel's allegedly deficient performance prejudiced him. First, Acklin's statement that "the two main factors the trial court weighed against Acklin were his positive upbringing and his unemotional demeanor in court" is incorrect. The sentencing order is clear that the two main factors the court weighed against Acklin were the two aggravating circumstances—which, the

sentencing court said, would have *each* independently outweighed the mitigating circumstances. Furthermore, as the State notes in its brief, the sentencing court made clear that "[t]he vicious ruthlessness of the murders was more than sufficient" to justify the sentence of death. (State's brief, p. 59.)

As to the alleged prejudice suffered by not introducing evidence of Acklin's abuse as a child, Acklin's reliance on cases such as *Wiggins, supra*, *State v. Gamble*, 63 So. 3d 707 (Ala. Crim. App. 2010), and *Williams v. Allen*, 542 F.3d 1326 (11th Cir. 2008), is misplaced. Unlike counsel in those cases, Acklin's counsel learned about the alleged abuse and was willing to introduce evidence of it. Also, unlike the defendants in those cases, Acklin expressly prohibited his counsel from introducing the evidence.

Finally, to the extent Acklin argues that this Court should analyze his ineffective-assistance claims cumulatively, we have repeatedly declined similar requests from petitioners to do so. *See, e.g., Mashburn v. State*, 148 So. 3d 1094, 1118 (Ala. Crim. App. 2013); *Washington*, 95 So. 3d at 58. Furthermore, because Acklin has failed to demonstrate any deficient performance, there is no opportunity for this Court to engage in a cumulative-effect analysis.

Acklin is due no relief on this claim.

III.

Acklin argues that "the circuit court erred in excluding the testimony of ethics expert Norman Lefstein, which would have aided the court in its consideration of defense counsel's representation." (Acklin's brief, p. 41.) According to Acklin,

> "Lefstein is a leading expert in the field of legal ethics in criminal law and would have been well positioned to assist the court.
>
> "... Acklin ... proferred an affidavit in which Lefstein analyzed the ethical issues in the case and determined that (1) Rahmati faced an actual conflict of interest, and (2) his actions in the face of the conflict fell below professional norms."

(Acklin's brief, p. 41.)

In deciding to exclude this testimony, the circuit court relied on our decision in *McWilliams v. State*, 897 So. 2d 437 (Ala. Crim. App. 2004), *overruled in part on other grounds by Ex parte Jenkins*, 972 So. 2d 159 (Ala. 2005), in which this Court addressed a circuit court's decision to exclude testimony from an attorney who was called as an expert witness to offer opinions about what constituted ineffective assistance of counsel. In evaluating this issue, we stated:

> "[T]he appellant argues that the circuit court erred in striking attorney Kevin McNally's testimony. McNally was called as an expert to testify about what constituted ineffective performance of counsel. When it excluded his testimony, the circuit court stated:
>
> > "'The Court, as the trier of fact in these proceedings, plainly does not need the assistance of McWilliams's expert to "understand the evidence" or "determine a fact in issue." In fact, the Court is in a much *better* position than Mr. McNally to evaluate the legal issues presented by McWilliams's petition for relief. In

> addition to service on the bench, the Court has the benefit of the experience of having practiced law in Alabama for many years and was practicing law before, and at the time of, this trial. ...
>
> "'Mr. McNally, on the other hand, is not a licensed attorney in Alabama and has never even represented a client in this State. ... During voir dire, McNally repeatedly demonstrated his ignorance of Alabama law, but was offered as an expert both as to national and Alabama standards of practice.'

"(C.R. 1764.) We do not find that there was any error in the circuit court's ruling striking McNally's testimony. As the Supreme Court of New Mexico stated in *Lytle v. Jordan*, 130 N.M. 198, 211-12, 22 P.3d 666, 679-80 (2001):

> "'The issues of whether defense counsel performed below the level of a reasonably competent attorney and whether deficient performance affected the result of the trial "are mixed questions of law and fact," *Strickland*, 466 U.S. at 698, 104 S. Ct. 2052, which "require[] the application of legal principles to the historical facts of this case." *Cuyler v. Sullivan*, 446 U.S. 335, 342, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980). The district court's determination of these questions represents "a conclusion of law rather than a finding of fact." *Id.* at 341, 100 S. Ct. 1708 ....
>
> "'... We believe it is superfluous for expert witnesses to advise a court,

> whether it is the district court or an appellate court, about the proper application of existing law to the established historical facts and about the ultimate issue of trial counsel's effectiveness. *See Provenzano v. Singletary*, 148 F.3d 1327, 1331-32 (11th Cir. 1998); *Parkus v. State*, 781 S.W.2d 545, 548 (Mo. 1989) (en banc); *State v. Thomas*, 236 Neb. 553, 462 N.W.2d 862, 867 (1990); *State v. Moore*, 273 N.J. Super. 118, 641 A.2d 268, 272 (1994); *Commonwealth v. Neal*, 421 Pa. Super. 478, 618 A.2d 438, 439 n.4 (1992).'"

897 So. 2d at 456.

Acklin attempts to distinguish *McWilliams* by arguing that his "claim involves a conflict of interest resulting from a third-party payer agreement." (Acklin's brief, p. 42.) This argument is unavailing.

The claim for which Acklin sought to use Lefstein as an expert witness is a claim of *ineffective assistance of counsel* based on an alleged conflict of interest. Lefstein's testimony would have been an attempt to advise the circuit court about the proper application of the law to the facts and about the proper outcome of the case; in essence, Lefstein's testimony would have provided the circuit court with Lefstein's own legal conclusions.

The circuit court did not abuse its discretion in excluding Lefstein's testimony.

IV.

Acklin's final claim is that he was denied the effective assistance of counsel on direct appeal.[19] This claim includes two allegations.

A.

First, Acklin argues that appellate counsel should have argued on appeal that the jury instructions at the close of the penalty phase were erroneous. Specifically, he asserts that the jury was instructed "that it should recommend life if 'the mitigating circumstances *outweigh* any aggravating circumstances that exist.'" (Acklin's brief, pp. 44-45 (quoting Trial R. 1013).) Acklin argues: "As such, the trial court failed to make clear that the jury should vote for life if the aggravating and mitigating circumstances were in equipoise." (Acklin's brief, p. 45.) Acklin cites decisions such as *Ex parte Bryant*, 951 So. 2d 724 (Ala. 2002). Because Acklin's trial counsel did not object, this Court, had appellate counsel challenged the instructions, would have reviewed them for plain error only.

The jury instructions Acklin finds objectionable, however, are very similar to the instructions challenged in *Ex parte Mills*, 62 So. 3d 574, 599 (Ala. 2010). Those instructions stated, in relevant part, that the jury should recommend life imprisonment without the possibility of parole if it determined that "the defendant has overcome with the mitigating circumstances, that they outweigh the aggravating circumstances." In rejecting Mills's challenge to those instructions, the Alabama Supreme Court specifically distinguished Mills's case from *Ex parte Bryant*, noting:

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[19] Robert Tuten and John Butler represented Acklin on direct appeal.

"Mills ... argues that this instruction constitutes plain error under *Ex parte Bryant*, 951 So. 2d 724 (Ala. 2002). The State, citing *Ex parte McNabb*, 887 So. 2d 998 (Ala. 2004), and *Ex parte Walker*, 972 So. 2d 737 (Ala. 2007), argues that *Bryant* is distinguishable and that no plain error occurred. We agree with the State.

"In *Bryant*, the trial court's instructions to the jury suggested that the jury could recommend the death sentence if the mitigating circumstances did not outweigh the aggravating circumstances. In other words, the instructions suggested that the jury could recommend the death sentence if the aggravating circumstances and the mitigating circumstances were of *equal* weight. 951 So. 2d at 730. Even more significant to the plain-error analysis in *Bryant*, however, was that the trial court's instructions invited the jury to recommend a sentence of death *without finding the existence of any aggravating circumstance*. 951 So. 2d at 730.

"In *McNabb*, the sentencing instructions included the following:

> "'Now, ladies and gentlemen, if, after a full and fair consideration of all of the evidence in the case, you are convinced beyond a reasonable doubt that at least one aggravating circumstance does exist and *you are convinced that the aggravating circumstance outweighs the mitigating circumstances*, then your verdict would be: "We, the jury, recommend that the defendant be punished by death, and

> the vote is as follows....' However, if after a full and fair consideration of all of the evidence in the case, you determine that *the mitigating circumstances outweigh any aggravating circumstance* or circumstances that exist, or you are not convinced beyond a reasonable doubt that at least one aggravating circumstance does exist, your verdict should be to recommend the punishment of life imprisonment without parole ....'

"887 So. 2d at 1001 (emphasis added in *McNabb*). This Court in *McNabb* concluded that these instructions did not constitute plain error because the trial court had not taken the additional step of inviting the jury to recommend a death sentence without finding the existence of any aggravating circumstance. Specifically, this Court stated in *McNabb*:

> "'The charge in this case was not infected with the peculiar error present in *[Ex parte] Bryant*[, 951 So. 2d 724 (Ala. 2002)], that is, the jury in this case was not invited to recommend a sentence of death without finding any aggravating circumstance. It was that invitation in *Bryant* that caused the error in that case to rise to the level of plain error, rather than error reversible only by a proper objection. Thus, in this case, although the court did not specifically instruct the jury what to do if it found the mitigating and aggravating circumstances equally balanced, we cannot conclude, considering the charge in its entirety, that the error

> "seriously affect[ed] the fairness, integrity or public reputation of [these] judicial proceedings," *Ex parte Davis*, 718 So. 2d [1166,] at 1173–74 [(Ala. 1998)], so as to require a reversal of the sentence.'

"887 So. 2d at 1004.

> "Similarly, in *Walker*, which involved instructions regarding the balancing of the aggravating circumstances and the mitigating circumstances that were identical to the instructions in *McNabb*, this Court held that no plain error occurred in the sentencing instructions because 'the trial court did not invite the jury in Walker's case to recommend a sentence of death without finding any aggravating circumstance.' 972 So. 2d at 743.
>
> "In Mills's case, the trial court's instructions, taken as a whole, clearly informed the jury that the only way it could recommend a sentence of death was if the jury determined that aggravating circumstances existed and that those aggravating circumstances outweighed the mitigating circumstances. The trial court instructed the jury initially that 'the law also provides that the punishment which should be imposed upon the defendant depends on whether any aggravating circumstances exist beyond a reasonable doubt, and if so, *whether the aggravating circumstances outweigh any mitigating circumstances*.' (Emphasis added.) Even in the above-quoted portion of the instructions on which Mills relies for his argument, the trial court stated:

> "'[I]f after a full and fair consideration of all the evidence in this case and all reasonable inferences therefrom you are convinced that the aggravating circumstances ... which you determine the State of Alabama has proved to you beyond a reasonable doubt in today's proceeding, *if those outweigh the mitigating circumstances* which have been presented by the defense, your verdict would be, "We, the jury, recommend the defendant Jamie Mills be sentenced to death.'"
>
> "(Emphasis added.) Accordingly, we hold that there was no plain error in the trial court's instructions regarding the weighing of the aggravating circumstances and the mitigating circumstances."

Mills, 62 So. 3d at 599-601.

In Acklin's case, the instructions were virtually identical to those instructions that were upheld in *Ex parte Mills, supra*, and *Ex parte McNabb*, 887 So. 2d 998 (Ala. 2004). Thus, any challenge to those instructions by Acklin's appellate counsel would have been without merit. *See Bearden v. State*, 825 So. 2d 868, 872 (Ala. Crim. App. 2001) (holding that "Bearden's counsel could not be ineffective for failing to raise a baseless objection"). Accordingly, Acklin is due no relief on this claim.

B.

Acklin also argues that his appellate counsel should have challenged comments by the prosecution during its closing arguments. These comments, had they been challenged on appeal, would have been reviewed for plain error only.

Acklin describes the first comment as follows:

> "At the conclusion of his rebuttal argument at the penalty phase, the prosecutor described at length the military funeral of one of the victims and his own military service. For example, he provided his service history and said that this gave him a sense of 'kinship' with one of the victims, and he described his emotions upon hearing the bugle play Taps at the victim's funeral."

(Acklin's brief, p. 46.)

In *Thompson v. State*, 153 So. 3d 84, 159 (Ala. Crim. App. 2012), this Court stated:

> "'A prosecutor is entitled to argue forcefully .... "[E]nthusiatic rhetoric, strong advocacy, and excusable hyperbole" are not grounds for reversal .... The jury are presumed to have a certain measure of sophistication in sorting out excessive claims on both sides.'
>
> "*Commonwealth v. Wilson*, 427 Mass. 336, 350, 693 N.E.2d 158, 171 (1998). *Cf. Gonzalez v. State*, 115 S.W.3d 278 (Tex. Ct. App. 2003) (prosecutor's comparison of the defendant to terrorist Osama bin Laden was improper).
>
> """[S]tatements of counsel in argument to the jury must be viewed as delivered in the heat of debate; such statements are usually valued by the jury at their true worth and not expected to become factors in the formation of the verdict.'" *Duren v. State*, 590 So. 2d 360, 364 (Ala. Crim. App. 1990) (quoting

> *Bankhead v. State*, 585 So. 2d 97, 106 (Ala. Crim. App. 1989))."

When viewed in the context of the entire closing argument and in light of all the evidence presented at the trial, the prosecutor's brief reference to his military service and his comment about the military funeral of one of the victims did not undermine the reliability of the jury's verdict, and Acklin has not demonstrated that the comments were plainly erroneous. Accordingly, appellate counsel was not ineffective for failing to challenge those comments on appeal. *Bearden*, *supra*.

Acklin also argues that the prosecution "made an improper reference to the media's characterization of the offense, telling the jury that the crime 'has been described as the cell phone murders.'" (Acklin's brief, pp. 46-47.) When placed in context, it appears, as the circuit court found, that the prosecutor was arguing that the murders were, in fact, not committed because of a cellular telephone but because Acklin chose to kill senselessly and viciously. When viewed in the context of the entire closing argument and in light of all the evidence presented at the trial, the prosecutor's brief reference to "the cell phone murders" did not undermine the reliability of the jury's verdict, and Acklin has not demonstrated that the comment was plainly erroneous. Accordingly, appellate counsel was not ineffective for failing to challenge the comment on appeal. *Bearden*, *supra*.

Finally, Acklin asserts:

> "[T]he prosecutor made an inflammatory comment comparing Acklin's case to the O.J. Simpson case during [the] guilt-phase closing argument. While defining capital murder for

> the jury, he stated: 'O.J. Simpson ... was charged with capital murder because two people were killed.' The circuit court minimized this remark as a simple comparison. But it was far more than this; by comparing Acklin, a black defendant charged with killing several white victims, to O.J. Simpson, the prosecutor improperly fanned potential biases."

(Acklin's brief, p. 49.) In addressing this claim, the circuit court stated:

> "[T]his Court finds that a plain reading of the prosecutor's comment proves he was not comparing Acklin to O.J. Simpson as a person. This Court is convinced that the prosecutor was simply using an example to explain to the jurors the elements of the capital murder charge levied against Acklin. This Court concludes that when the prosecutor's comment is read in its proper context, there is no reasonable probability that this comment prejudiced Acklin and denied him a fair trial."

(C. 4020-21.) We agree with this finding. Acklin is due no relief on this claim. *Bearden*, *supra*.

Conclusion

The judgment of the circuit court is affirmed.

AFFIRMED.

Welch, Kellum, and Burke, JJ., concur. Windom, P.J., recuses herself.

APPENDIX B

IN THE CIRCUIT COURT OF
MADISON COUNTY, ALABAMA

Case No.: CC-1997-000162.60

STATE OF ALABAMA,

v.

ACKLIN NICHOLAS BERNARD,

Defendant.

ORDER ON DEFENDANT'S PETITION
FOR POST-CONVICTION RELIEF

Nicholas Bernard Acklin is currently on Alabama's death row after his conviction and death sentence for causing the deaths of two or more persons pursuant to one scheme or course of conduct in violation of Ala. Code § 13A-5-40(a)(10) (1975).

This matter is now before the Court on Nick Acklin's petition for relief pursuant to Rule 32 of the Alabama Rules of Criminal Procedure. The petition included many claims. The Court dismissed certain claims and held an evidentiary hearing on others from December 9-12, 2013. In his post-hearing brief, Nick Acklin submits that he is entitled to relief on five claims: 1) that trial counsel were ineffective because they operated under a conflict of interest; 2) that trial counsel were ineffective due to their failure to conduct an adequate penalty-phase investigation; 3) that trial counsel were ineffective for failing to investigate and request a jury instruction based on the fact that

Nick Acklin was given Xanax during his capital trial; 4) that appellate counsel were ineffective for failing to raise the issue of prosecutorial misconduct on direct appeal; and 5) that appellate counsel were ineffective for failing to raise on direct appeal the fact that the trial court issued an erroneous jury instruction at the penalty phase.

Based on the evidence presented during the hearing, and for the reasons set forth below, Nick Acklin's petition is DENIED as to the five claims noted above, as well as the other grounds asserted within the various amendments to his Rule 32 petition.

FACTS UNDERLYING ACKLIN'S CAPITAL MURDER CONVICTION AND DEATH SENTENCE

This Court adopts the summary of the facts of the crime stated in the trial court's sentencing order. (C.R. 280-284)[1] This Court also adopts and considers the official transcript of Acklin's trial and sentencing hearing.

PROCEDURAL HISTORY

On January 10, 1997, Acklin was indicted by the Madison County Grand Jury for capital murder (murder of two or more people pursuant to one scheme or course of conduct) and for two counts of attempted murder. Acklin's mother, Velma Evans, retained criminal defense attorney Behrouz Rahmati to represent Acklin. Attorney Kevin Gray assisted Mr. Rahmati in representing Acklin.

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[1] "C.R." refers to the clerk's record on direct appeal; "R." refers to the trial record; "PX" refers to Acklin's exhibits admitted at the evidentiary hearing; "SX" refers to the State's exhibits admitted at the evidentiary hearing; "H.R." refers to the transcript of the evidentiary hearing.

A trial began on October 19, 1998 and was presided over by Judge James P. Smith. On October 23, 1998, the jury found Acklin guilty of capital murder and both counts of attempted murder. On October 24, 1998, the jury recommended by a vote of 10-2 that Acklin be sentenced to death for the capital murder conviction. Following a sentencing hearing, the Honorable James P. Smith followed the jury's recommendation and sentenced Acklin to death for capital murder. Judge Smith also sentenced Acklin to 20 years for each conviction of attempted murder, to be served consecutively, and ordered he pay fines and assessments.

On April 28, 2000 after Acklin filed an appeal, the Alabama Court of Criminal Appeals affirmed Smith's convictions and sentences. *Acklin v. State*, 790 So.2d 975 (Ala. Crim. App. 2000). The Alabama Supreme Court denied Acklin's Petition for Writ of Certiorari and, on June 25, 2001, Acklin's Petition for Writ of Certiorari to the United State's Supreme Court was denied. *Acklin v. Alabama*, 533 U.S. 936 (2001).

Acklin filed a timely petition pursuant to Rule 32, Ala.R.Crim.P. attacking his capital murder conviction and death sentence. On August 9, 2002, Acklin filed an amended Rule 32 petition, which he subsequently amended multiple times. On April 12, 2004, the State filed motions requesting that the majority of the claims in Acklin's amended Rule 32 petition be summarily dismissed. On April 22, 2005, Judge Loyd H. Little, Jr. entered three orders dismissing some of Acklin's claims.[2] On May 16, 2005, Judge Little issued an order identifying the remaining claims in Acklin's amended Rule 32 petition and scheduling an evidentiary

[2] Judge Little was assigned to this case after Judge Smith recused.

hearing. Subsequent pleadings were filed by the parties and three amended scheduling orders were issued by Judge Little. In May 2013, this Court was assigned to preside in these post-conviction proceedings. On August 29, 2013, this Court held a status conference and heard arguments by Acklin and the State regarding pending motions. On September 18, 2013, this Court issued a fourth order scheduling an evidentiary hearing. In that order this Court also ruled on the outstanding motions and identified the remaining claims in Acklin's Third Amended Rule 32 Petition that this Court found Acklin was entitled to litigate at an evidentiary hearing.

On December 9-12, 2013, this Court held an evidentiary hearing and permitted Acklin and the State to call witnesses and submit evidence and arguments concerning the claims identified in this Court's scheduling order. Acklin called nine witnesses and submitted fifty-one exhibits. The State called no witnesses and submitted two exhibits.

Acklin and the State requested and received a copy of the evidentiary hearing transcript and this Court directed Acklin and the State to submit post-hearing briefs and orders.

This Court has received and thoroughly reviewed the post-hearing arguments and proposed orders submitted by Acklin and the State. Additionally, this Court has carefully reviewed the relevant portions of the trial record, the Alabama Court of Criminal Appeals' opinion affirming Acklin's capital murder conviction and death sentence, and the legal authorities cited by and relied on by Acklin and the State. This order addresses the allegations raised by Acklin and identified in this Court's September 18, 2013, order.

Furthermore, During the course of the evidentiary hearing, the State objected to a portion of the testimony proffered by one of the Petitioner's witnesses, Lori James-Townes. Specifically, the State objected to Ms. Townes' testimony regarding the impact of domestic violence on the victims of such violence. The Court took the objection under advisement and allowed the witness to testify provisionally, pending arguments by counsel in their post-hearing briefs. After considering the objection and arguments by both sides, the State's motion to exclude Ms. Townes' testimony is hereby OVERRULED.

In reviewing the facts of this case and in considering the Petitioner's arguments, the Court would be remiss not to at least acknowledge the atrocious and heinous nature of the acts committed by Acklin. He and his conspirators mercilessly tortured the victims in this case. The Court is cognizant that the death penalty is not to be imposed unless it is absolutely necessary and warranted. If the death penalty is not appropriate in this case, then the Court would be hard pressed to identify a factual scenario where it would be appropriate. Accordingly, and for the bases contained herein, the Petitioner's Rule 32 Petition is hereby DENIED.

I. ACKLIN'S CLAIM HIS RIGHT TO DUE PROCESS WAS VIOLATED BECAUSE HE WAS ADMINISTERED XANAX DURING HIS TRIAL.

In claim XX, paragraphs 135a-135o of Acklin's amendment to his his third amended Rule 32 petition, he alleged that he was administered Xanax during the course of his trial. Acklin contends that this medication had a profound effect on his demeanor and appearance during his trial. Acklin alleges the effects of Xanax were perceived by jurors as a lack of remorse.

He also alleges that he was entitled to a jury instruction during the penalty phase to inform the jurors that he was being medicated during his trial.

To support this claim Acklin relies on certain legal authorities, including the United States Supreme Court's decision in *Riggins v. Nevada*, 504 U.S. 127 (1992). In *Riggins*, the Supreme Court held that, absent a showing by the government demonstrating that forced medication was medically necessary and essential for the defendant's own safety or the safety of others, forcing a defendant to take antipsychotic medication during a criminal trial was unconstitutional. This Court finds that *Riggins* and the other cases relied on by Acklin are distinguishable from the facts in his case.

Acklin did not allege in his amendment to Claim XX nor did he present any evidence at the evidentiary hearing proving that he was involuntarily administered Xanax. This Court finds, therefore, that *Riggins* and the other legal authority Acklin relied on are inapplicable. *See Ex parte Thomas*, 906 S.W.2d 22, 24 (Tex. Crim. App. 1995)("Since the record does not demonstrate that the applicant's treatment with antipsychotic drugs was involuntary, *Riggins* is inapplicable and applicant's due process contention is without merit."); *see also Magwood v. State*, 689 So.2d 959, 985 (Ala. Crim. App. 1996).

Additionally, "'the procedural bars of Rule 32 apply with equal force to all cases, including those in which the death penalty has been imposed.' *State v. Tarver*, 629 So.2d 14, 19 (Ala. Crim. App. 1993)." *Boyd v. State*, 746 So.2d 364, 374 (Ala. Crim. App. 1999). Rule 32.3, Ala.R.Crim.P. states, in relevant part, that "once a ground of preclusion has been pleaded, the petitioner shall have the burden of disproving its existence by a

preponderance of the evidence." *See Ex parte Beckworth*, 2013 WL 3336983 (Ala. July 03, 2013).

On pages 30-31 of its answer to Acklin's third amended petition the State, citing Rules 32.2(a)(3) and (a)(5), Ala.R.Crim.P., argued that this claim was procedurally barred from post-conviction review because it could have been but was not raised by Acklin at trial or on direct appeal. Acklin, therefore, had the burden of proving at the evidentiary hearing that this claim was not procedurally barred. In an attempt to meet his burden Acklin submitted medical records from the Madison County Jail documenting the medications he was administered while in custody. (PX 51) These records indicate that Acklin was administered insulin for his diabetes. These records also indicate that Acklin was administered Alprazola, a generic version of Xanax, during his trial. Acklin also presented testimony from Dr. Pamela Sims, an expert in pharmacology. Dr. Sims testified about the properties of Xanax and about potential side effects that Xanax may cause individuals that take it. (H.R. 533-562)

Mr. Rahmati and Mr. Gray knew Acklin was diabetic and that he was administered insulin while he was incarcerated at the Madison County Jail. (H.R. 145, 286) Mr. Rahmati also testified at the evidentiary hearing that he was aware that Acklin was given additional medication at the Madison County Jail during his trial, but Mr. Rahmati could not recall specifically what Acklin was given. (H.R. 145) At the time of Acklin's trial Mr. Rahmati and Mr. Gray had represented him for more than two years. During Acklin's trial, neither Mr. Rahmati nor Mr. Gray noticed his affect or demeanor was any different than at any other time during their representation. (H.R. 146, 154, 299-300) Mr. Rahmati also testified that

Acklin's demeanor at the Rule 32 evidentiary hearing was the same as it was during his capital murder trial years before. (H.R. 154)

This Court notes that there is nothing in the trial record, and Acklin presented no evidence at the evidentiary hearing, indicating that Acklin ever complained to Mr. Rahmati or Mr. Gray that the medication he was prescribed during his trial affected his ability to assistance in his defense. (H.R. 300) Furthermore, in observing Acklin during the course of the evidentiary hearing, the Court notes that Acklin displayed a flat and subdued demeanor, which appeared to be consistent within his demeanor at trial based upon descriptions of same in the record. Acklin also presented no evidence proving that anyone that observed him during his trial informed Mr. Rahmati or Mr. Gray that Acklin's appearance or demeanor was anything other than normal. Id. Acklin also failed to present any evidence establishing that he objected to being administered Xanax during his trial or that he or anyone reported to Mr. Rahmati, Mr. Gray, or to any jail personnel that he was experiencing side effects from the drug.

This Court finds that Acklin failed to prove his right to due process was violated because he was administered Xanax during his trial. The Court further finds that such claim is procedurally barred from post-conviction review. Rule 32.3, Ala.R.Crim.P.

II. ACKLIN'S CLAIMS THAT HE WAS DENIED EFFECTIVE ASSISTANCE FROM HIS TRIAL COUNSEL DURING THE GUILT AND PENALTY PHASES OF HIS TRIAL.

At the evidentiary hearing Acklin had the burden of affirmatively proving, by a preponderance of the

evidence, that his trial and appellate counsel's performance was deficient and caused him to be prejudiced. *Strickland v. Washington*, 466 U.S. 668, 687 (1994). At an evidentiary hearing pursuant to Rule 32, Ala.R.Crim.P., the petitioner bears the sole burden of proving all of the facts necessary to entitle him to post conviction relief. Rule 32.3, Ala.R.Crim.P. *See Hunt v. State*, 940 So.2d 1041, 1049 (Ala. Crim. App. 2000) ("In a post-conviction proceeding under Rule 32, Ala.R.Crim.P., the petitioner bears the sole burden of pleading and proof."); *see also Chandler v. United States*, 218 F.3d 1305, 1314 n. 15 (11th Cir. 2000)(en banc)("Never does the government acquire the burden of showing competence, even when some evidence to the contrary might be offered by the petitioner.").

In order to prevail on a claim for ineffective assistance of trial counsel a petitioner must prove two components. First, the petitioner must prove that his counsel's performance was deficient, meaning that counsel's acts or omissions were outside the wide range of professionally competent assistance. *Strickland v. Washington*, 466 U.S. 687, 690; *Ex parte Green*, l5 So.3d 489, 492 (Ala. 2008). For counsel's performance to be deficient, it must fall below an objective standard of reasonableness under prevailing professional norms. *Williams v. Taylor*, 529 U.S. 362, 390-391 (2000). Second, the petitioner must prove that his counsel's deficient performance prejudiced the outcome of the trial. *Strickland v. Washington*, 466 U.S. at 687. To show prejudice, a petitioner must prove that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A reasonable probability is a "probability sufficient to undermine confidence in the outcome." *Id.*

With the appropriate legal standards in mind, this Court will address Acklin's claims of ineffective assistance of counsel.

A. Acklin's Claim His Trial Counsel Were Ineffective Due To A Lack Of Financial Resources.

Acklin alleges that Mr. Rahmati and Mr. Gray were ineffective due to financial constraints.

Acklin's mother, Velma Evans, retained Mr. Rahmati to represent him. The retainer agreement signed by Ms. Evans and Mr. Rahmati provided, *inter alia*, that she would pay a retainer fee of $25,000. (PX 1) Ms. Evans and Acklin's father, Ted, made some payments toward the retainer fee that totaled $5,025. (PX 5, p. 12) Further, at the time Acklin's case was tried, appointed lawyers were subject to a fee cap of $1,000 at the guilt phase and $1,000 at the penalty phase in capital cases. (H.R. 161)

This Court finds that the testimony of Mr. Rahmati and Mr. Gray, which was corroborated by their billing statement, proves that they were very diligent in preparing for Acklin's trial. (PX 5) The billing statement documents that Mr. Rahmati and Mr. Gray spent over 400 hours preparing for Acklin's trial. Mr. Rahmati also testified that not all of the time he and Mr. Gray spent preparing for trial was reflected in the billing statement. (H.R. 85, 160)

The Court finds that Acklin failed to prove that Mr. Rahmati's and Mr. Gray's pre-trial preparations for the guilt phase and penalty phase of trial were deficient because of a lack of compensation. Rule 32.3, Ala.R.Crim.P. This claim of ineffective assistance of counsel is, therefore, denied by this Court.

B. Acklin's Claims His Trial Counsel Were Ineffective Due To Conflicts Of Interest.

Acklin further claims that Mr. Rahmati and Mr. Gray suffered from conflicts of interest because they were not fully compensated for representing Acklin.

"The burden of proving that a conflict of interest rises to the level of ineffective assistance of counsel rests on the one asserting the conflict." *M.S. v. State*, 822 So.2d 449, 452 (Ala. Crim. App. 2000). The Alabama Court of Criminal Appeals has held to prevail on a conflict-of-interest claim that

> a defendant must show that "an actual conflict of interest adversely affected his lawyer's performance." *Cuyler v. Sullivan*, 446 U.S. 335, 348, 100 S.Ct. 1708, 1718, 64 L.Ed.2d 333 (1980). If a defendant shows both that an actual conflict existed, and that the conflict adversely affected his lawyer's performance, prejudice may be presumed. In the absence of proof of these two factors, however, the defendant must affirmatively prove prejudice.

Smith v. State, 745 So.2d 922, 938 (Ala. Crim. App. 1999).

With the appropriate legal standards in mind, this Court will address Acklin's claims that conflicts of interest adversely affected Mr. Rahmati's and Mr. Gray's performance in their representation.

1. Acklin's claim that his trial counsel had a conflict of interest because they were not fully paid.

Acklin claimed that his trial counsels suffered a conflict of interest because his parents were unable to pay the $25,000 retainer fee. In particular, Acklin

claimed his parents' inability to pay created a conflict of interest because "any work performed on [Acklin's] case would reduce the amount of work counsel could do on a case which would actually generate income." (3AP ¶219)

Mr. Rahmati acknowledged that he and Mr. Gray lost money by representing Acklin. (H.R. 73) However, the testimony of Mr. Rahmati and Mr. Gray, together with their billing statement, convinces this Court beyond any reasonable doubt that a lack of payment did not curtail their efforts to defend Acklin. Trial counsel's billing statement indicates they spent more than 400 hours preparing for Acklin's trial. (PX 5) Trial counsel thoroughly investigated for the guilt phase and penalty phase of trial, including whether Acklin was intoxicated the night of the murders.

The Alabama Court of Criminal Appeals found that "[t]he evidence supporting the State's case that Acklin shot and killed at least three of the victims and shared his specific intent to kill with Joey Wilson was overwhelming." *Acklin v. State*, 790 So.2d at 1010. This Court finds that Acklin failed to prove that his parents' failure to pay the entire retainer fee caused Mr. Rahmati and Mr. Gray to suffer a conflict of interest. Rule 32.3, Ala.R.Crim.P. The Court finds that no prejudice was suffered by Acklin. This claim of ineffective assistance of counsel is, therefore, be denied by this Court.

2. Acklin's claim that there was a conflict of interest existed between his trial counsel and his father.

Acklin also claims that a conflict of interest arose when his father threatened to stop making further payments to Mr. Rahmati and Mr. Gray if they

presented evidence during the penalty phase of trial that Acklin's father was physically and emotionally abusive toward him and his family.

Acklin's trial counsel questioned Acklin and his mother about his background, including whether Acklin had suffered any type of abuse. (H.R. 163) Initially, neither Acklin nor his mother disclosed that Acklin's father was verbally and physically abusive to Acklin and other family members. (H.R. 110, 163) It was not until mere days before Acklin's trial that his mother disclosed to Mr. Rahmati that Acklin's father was physically and emotionally abusive. (H.R. 109) Acklin confirmed his mother's belated disclosure about his father's abusive behavior only when he was confronted by trial counsel. (H.R. 120) When Acklin was informed by his trial counsel that evidence he was abused by this father could be presented as a mitigating circumstance during the penalty phase, Acklin prohibited them from presenting it. (H.R. 164; SX 2)

In *Adkins v. State*, 930 So.2d 524, 540 (Ala. Crim. App. 2004), the Alabama Court of Criminal Appeals held that "[u]ltimately the decision to waive the presentation of mitigating evidence was Adkins' decision. We refuse to find an attorney's performance ineffective for following his client's wishes." *See Schriro v. Landrigan*, 550 U.S. 465, 476-477 (2007)(holding that trial counsel was not ineffective during the penalty phase for failing to present certain potentially mitigating evidence where the defendant prohibited counsel from presenting said evidence).

Mr. Rahmati testified that when he confronted Ted Acklin about domestic abuse and informed it could be presented at the penalty phase that he "wasn't happy." (H.R. 112) According to Mr. Rahmati, Acklin's father told him that "'[y]ou tell Nick if he wants to go down

this road, I'm done with him" and left Mr. Rahmati's office. Id. Acklin presented no evidence that his father threatened to not pay trial counsel if they presented evidence that he was abusive during the penalty phase. From the time Mr. Rahmati agreed to represent Acklin he knew it was unlikely Ms. Evans could pay the retainer fee. At the evidentiary hearing, Mr. Rahmati stated that "I suspected strongly we were never going to get paid from Day 1." (H.R. 56) This Court finds that Mr. Rahmati's and Mr. Gray's failure to present potential mitigating evidence regarding domestic abuse to the jury and trial judge was not because of a conflict of interest with Acklin's father – it was because Acklin made the conscious decision that he did not want this evidence presented at trial.

This Court finds that Acklin failed to prove that Mr. Rahmati and Mr. Gray suffered from a conflict of interest with Acklin's father. Rule 32.3, Ala.R.Crim.P. This claim of ineffective assistance of counsel is, therefore, denied by this Court.

C. Acklin's Claims That His Trial Counsel Were Ineffective During The Guilt Phase And Penalty Phase Of His Trial For Failing To Adequately Investigate His Case.

The United States Supreme Court has held that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland v. Washington*, 466 U.S. 668, 691 (1984). That Court has also recognized that "the duty to investigate does not force defense lawyers to scour the globe on the off-chance something will turn up; reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste." *Rompilli v. Beard*, 545 U.S. 374, 383 (2005). Further, "'claims of

failure to investigate must show with specificity what information would have been obtained with investigation, and whether, assuming the evidence is admissible, its admission would have produced a different result.'" *Lee v. State*, 44 So.3d 1145, 1160 (Ala. Crim. App. 2009)(citation omitted).

With the appropriate legal standards in mind, this Court will address Acklin's claims that his trial counsel's investigation was deficient and caused Acklin to be prejudiced.

1. Acklin's claim that his trial counsel were ineffective for failing to adequately investigate and present evidence of intoxication.

Acklin claims that his trial counsel were ineffective for failing to investigate his history of alcohol and drug abuse and the substances he consumed the night of the offenses.

The fact that Acklin had a history of drug and alcohol abuse would not have been material or relevant to any issue in the guilt phase of trial. *Whitehead v. State*, 777 So.2d 781, 833 (Ala. Crim. App. 1999) ("Evidence that someone was a habitual drug user is not evidence that that person was intoxicated at the time of the murder."). Additionally, Acklin failed to present any witnesses at the evidentiary hearing that could have testified during the guilt or penalty phase about what particular drugs he consumed prior to committing the offenses. Acklin also presented no evidence regarding the amount of drugs and/or alcohol that he consumed prior to the offenses or any evidence that he was so intoxicated he could not form the specific intent to commit the offenses. *See Ex parte Bankhead*, 585 So. 2d 112, 121 (Ala. 1991)(holding that "the intoxication necessary to negate specific

intent and, thus, reduce the charge, must amount to insanity.").

This Court finds that Acklin failed to carry his burden of proving this allegation of ineffective assistance of counsel. Rule 32.3, Ala.R.Crim.P. This claim of ineffective assistance of counsel is, therefore, denied by this Court.

2. Acklin's claim that his trial counsel were ineffective for failing to adequately investigate whether he suffered from diabetic shock and/or hypoglycemia.

Acklin further claims that his trial counsel were ineffective for not investigating whether Acklin was suffering from hypoglycemia as a result of his diabetes at the time of the offenses.

Mr. Rahmati and Mr. Gray testified that they investigated whether Acklin's diabetic condition could have exacerbated the effects of drugs and alcohol he consumed the night of the murders. (H.R. 157, 286) Mr. Rahmati consulted an expert to determine whether Acklin's use of marijuana on the night of the offenses could have exacerbated his diabetes to the degree it could have negated Acklin's specific intent kill the victims. (H.R. 157) His testimony was corroborated by his billing statement. (PX 5, p. 9) At the evidentiary hearing, Acklin failed to present any evidence that Mr. Rahmati and Mr. Gray could have presented that would have been admissible during the guilt or penalty phase to prove his mental capacity was affected in any way by his diabetic condition. *See Lee v. State*, 44 So.3d 1145, 1160 (Ala. Crim. App. 2009).

This Court finds that Acklin failed to carry his burden of proving this allegation of ineffective assistance of counsel. Rule 32.3, Ala.R.Crim.P. This claim

of ineffective assistance of counsel is, therefore, denied by this Court.

3. Acklin's claim that his trial counsel were ineffective for failing to adequately investigate Acklin's physically and verbally abusive childhood.

Acklin further claims his trial counsel were ineffective for failing to investigate and present evidence that Acklin was physically and mentally abused during his childhood. In support of this claim, Acklin called his mother, Velma Evans, and one of his brothers, Steven Acklin, to testify at the evidentiary hearing. Acklin's mother and brother testified about instances of verbal and physical abuse perpetrated by Ted Acklin. Acklin also presented testimony from Lori James-Towns, a professional social worker from Baltimore, Maryland. (H.R. 400-509, 524-528) Ms. James-Towns testified about the potential long-term effects of domestic violence on individuals. She also testified that Ms. Evans' medical records, records from the Department of Human Resources, and Dr. Maier's outpatient evaluation and report (SX 1) contained information that, in her opinion, might lead to potential mitigating evidence.

a. Acklin's claim that his decision not to have his trial counsel present evidence during the penalty phase about his father's abusive behavior was not knowingly and voluntarily made.

Ms. Evans did not disclose to Mr. Rahmati that Ted Acklin had been abusive until days before trial began despite the fact that she had been asked previously by Mr. Rahmati. When confronted with his mother's disclosure about abuse, Acklin confirmed to his trial counsel that abuse had occurred. (H.R. 164) When trial

counsel informed Acklin that evidence of abuse could be presented during the penalty phase and could be considered mitigating by the jury and trial court, Acklin refused to allow them to present it. Id. Acklin signed a statement acknowledging that he forbade his trial counsel from presenting evidence that his father was abusive. (H.R. 165; SX 2)

In *Adkins v. State*, 930 So.2d 524 (Ala. Crim. App. 2004), the Alabama Court of Criminal Appeals specifically addressed the question of "whether a defendant's waiver of the presentation of mitigation evidence at the penalty phase of a capital-murder trial bars that defendant from arguing that his counsel's performance was deficient for failing to present mitigation evidence." *Id.* at 438. The *Adkins* Court answered in the affirmative, holding that:

> We join the majority of jurisdictions that have considered this issue and hold that a defendant is estopped from raising a claim of ineffective assistance of counsel for counsel's failure to present mitigating evidence when the defendant waived the presentation of mitigating evidence.
>
> To punish Adkins' attorneys for following his wishes would conflict with the doctrine of invited error. "Under the doctrine of invited error, a defendant cannot by his own voluntary conduct invite error and then seek to profit thereby." *Phillips v. State*, 527 So.2d 154, 156 (Ala. 1988).
>
> Ultimately the decision to waive the presentation of mitigating evidence was Adkins' decision. We refuse to find an attorney's

> performance ineffective for following his client's wishes.

Id. at 539-540 (footnote omitted).

Acklin did not testify at the evidentiary hearing. Therefore, there is no evidence before this Court demonstrating that he did not knowingly and voluntarily waive having his trial counsel present evidence concerning his father's abuse toward him and members of his family to the jury during the penalty phase. This Court is well satisfied that Mr. Rahmati and Mr. Gray were prepared to present such evidence on Acklin's behalf during the penalty phase of trial. Mr. Rahmati and Mr. Gray were not ineffective for not presenting potentially mitigating evidence that Acklin expressly prevented them from presenting. *See Morton v. Secretary*, *Florida Dept. of Corrections*, 684 F.3d 1157, 1170-1173 (11th Cir. 2012)(relying on *Schriro v. Landrigan*, 550 U.S. 465, 476-477 (2007) and holding that "[w]hen a defendant prevents his trial counsel from presenting mitigating evidence, he cannot argue on collateral review that he was prejudiced by the failure to present that evidence.").

This Court finds that Acklin failed to prove that his trial counsel were ineffective for failing to present evidence of abuse as mitigation to the jury and the trial counsel during the penalty phase of trial. Rule 32.3, Ala.R.Crim.P. This claim of ineffective assistance of counsel is, therefore, denied by this Court.

Moreover, even if Acklin had permitted his trial counsel to present evidence of domestic abuse during the penalty phase, this Court finds there is no reasonable probability the outcome would have been different. According to Ms. Evans, her ex-husband began abusing her and their children shortly after she

disclosed to him that she had been unfaithful. (H.R. 237) She and Acklin's father divorced less than a year after her disclosure. (H.R. 266) At the time his parents divorced Acklin was 11 or 12 years old. Acklin and his brothers lived with their father after their parent's divorce. (H.R. 246)

"[W]here there are significant aggravating circumstances and the petitioner was not young at the time of the capital offense, 'evidence of a deprived and abusive childhood is entitled to little, if any, mitigating weight.'" *Tompkins v. Moore*, 193 F.3d 1327, 1337 (11th Cir. 1999)(citation omitted). Further, "[t]he United States Supreme Court has recognized that a difficult family history is a mitigating circumstance that may be entitled to little or great weight depending on the circumstances of the case and the age of the defendant." *Hodges v. State*, 856 So.2d 875, 892 (Ala. Crim. App. 2001).

The abuse that Acklin witnessed and suffered occurred years before he committed the murders and attempted murders. Acklin was almost 25 years old when he committed the offenses. He had graduated from high school, had a history of maintaining employment, had fathered two children, and was in a committed relationship with the mother of one of his daughters. This Court finds that, even if Acklin had not prevented his trial counsel from presenting evidence during the penalty phase that Acklin's father had been abusive toward his mother and brother years before he committed the murders, there is no reasonable probability the outcome of the penalty phase or the trial counsel's ultimate sentencing decision would have been different. This claim of ineffective assistance of counsel is, therefore, denied by this Court.

b. Acklin's claim that his trial counsel were ineffective for failing to hire a mitigation specialist.

Testimony from Acklin's trial and appellate counsels demonstrates that, at the time of Acklin's trial in Madison County in 1998, retaining a mitigation specialist to investigate for the penalty phase, while not unheard of, was not a common practice in capital defense. The Alabama Court of Criminal Appeals has held that "'hiring a mitigation specialist in a capital case is not a requirement of effective assistance of counsel.'" *Daniel v. State*, 86 So.3d 405, 437 (Ala. Crim. App. April 29, 2011).

Moreover, Acklin failed to prove that Ms. James-Towns, or another qualified mitigation investigator, would have been available to testify at his trial even if his trial counsel had sought to retain one. Ms. James-Town has never advertised her professional services in Alabama and Acklin's evidentiary hearing was the first time that she had testified in a circuit court in Alabama. (H.R. 496) In short, Acklin failed to present any evidence demonstrating that Ms. James-Town or another qualified mitigation investigator would have been "available to testify at [Acklin's] trial." *Id. See also Davis v. Singletary*, 119 F.3d 1471, 1474 (11th Cir. 1997)(stating that "we have held more than once that the mere fact a defendant can find, years after the fact, a mental health expert who will testify favorably for him does not demonstrate that trial counsel was ineffective for failing to produce that expert at trial."). Additionally, as stated above, since Acklin did not testify at the evidentiary hearing, there is no evidence before this Court proving that, even if his trial counsel has retained Mr. James-Town or another mitigation investigator, Acklin would have permitted his trial

counsel to present such testimony during the penalty phase.

This Court finds that Acklin failed to prove that his trial counsel were ineffective for electing not to retain a mitigation specialist. Rule 32.3, Ala.R.Crim.P. This claim of ineffective assistance of counsel is, therefore, denied by this Court.

4. Acklin's claim that his trial counsel were ineffective for failing to adequately investigate whether Acklin suffered dissociative identity disorder, Post-Traumatic Stress Disorder, and other unidentified disorders.

Acklin further claims his trial counsel were ineffective for failing to discover that he suffered from a host of mental disorders, including dissociative identity disorder (multiple-personality disorder), Post-Traumatic Stress Disorder, and other unidentified mental disorders.

Acklin failed to present any evidence at the hearing proving these allegations of ineffective assistance of counsel; therefore, this Court finds that he has abandoned them. *See Brooks v. State*, 929 So.2d 491, 497 (Ala. Crim. App. 2005).

Moreover, this Court finds that Acklin's claim his trial counsel failed to investigate Acklin's mental health is directly refuted by the record. Trial counsel filed a motion for a diagnostic evaluation and mental health exam of Acklin on February 10, 1997. (C.R. 20-21) The trial court granted trial counsel's request and ordered Acklin to be evaluated to determine if he was competent to stand trial and to determine his mental state at the time of the offenses. (C.R. 74) Acklin was evaluated by Dr. Lawrence R. Maier, a licensed psychologist and certified forensic examiner, on March

14, 1997. (SX 1) Dr. Maier reported that it did not appear that Acklin "was suffering from or displaying symptoms of any major psychiatric illness at the time of the alleged offenses." Id. Dr. Maier also determined that Acklin "d[id] not suffer from any major psychiatric disturbance." Id.

The record proves that Mr. Rahmati and Mr. Gray did investigate Acklin's mental health and they were informed by a mental health professional that Acklin did not suffer from any psychiatric disorders at the time of the offenses. Mr. Rahmati testified he saw nothing in Dr. Maier's report that he believed could have been beneficial to Acklin during the guilt or penalty phase. (H.R. 160) Mr. Rahmati and Mr. Gray were not ineffective because Dr. Maier's report or testimony would not have benefited Acklin at the guilt or penalty phases of his trial. *See Callahan v. Campbell*, 427 F. 3d 897, 934 (11th Cir. 2005)(holding that "counsel is not required to seek an independent evaluation when the defendant does not display strong evidence of mental problems."); *see also Waldrop v. State*, 987 So.2d 1186, 1193 (Ala. Crim. App. 2007) (holding that "'[c]ounsel is not ineffective for failing to shop around for additional experts.'")(citation omitted).

The record directly refutes the allegations in paragraphs 277-288d of Acklin's third amended petition; therefore, they are denied by this Court.

5. Acklin's claim that his trial counsel were ineffective during the guilt phase and penalty phase for failing to retain certain experts.

Acklin further claims that his trial counsel were ineffective for not retaining experts in endocrinology,

psychiatry, ballistics, pathology, crime scene analysis, accident reconstruction, statistics, mental health, and polling.

Acklin failed to present any evidence at the hearing proving this allegation of ineffective assistance of counsel; therefore, this Court finds that he has abandoned it. *See Brooks v. State*, 929 So.2d 491, 497 (Ala. Crim. App. 2005).

Moreover, since Acklin failed to call experts in the fields of endocrinology, psychiatry, ballistics, pathology, crime scene analysis, accident reconstruction, statistics, mental health, or polling, this Court finds that Acklin failed to carry his burden of proving this allegation of ineffective assistance of counsel. Rule 32.3, Ala.R.Crim.P. This claim of ineffective assistance of counsel is, therefore, denied by this Court.

6. Acklin's claim that his trial counsel were ineffective for failing to adequately investigate Acklin's history and background.

In addition to claiming Mr. Rahmati and Mr. Gray were ineffective for not presenting evidence of domestic abuse by his father, Acklin also claimed that his trial counsel were ineffective for not presenting other evidence concerning his background and history. Acklin claimed his trial counsel should have presented evidence regarding Acklin being born premature, his history of drug and alcohol abuse, and that he was a good father to his two daughters.

Acklin failed to question Mr. Rahmati or Mr. Gray concerning why they did not present evidence regarding him being born premature, having a history of drug and alcohol abuse, and regarding him being a good father to his two daughters. This Court, therefore, finds that he has abandoned this claim of

ineffective assistance of counsel. *See Dunaway v. State*, 2009 WL 4980320, *12 (Ala. Crim. App. Dec. 18, 2009)("'If the record is silent as to the reasoning behind counsel's actions, the presumption of effectiveness is sufficient to deny relief on ineffective assistance of counsel claim.'")(citation omitted), reversed on other ground, *Ex parte Dunaway*, 2014 WL 1508697 (Ala. April 18, 2014); *see also Broadnax v. State*, 2013 WL 598056, *19 (Ala. Crim. App. Feb. 15, 2013)("It is extremely difficult, if not impossible, to prove a claim of ineffective assistance of counsel without questioning counsel about the specific claim[.]").

In the alternative, because Acklin failed to question his trial counsel about why they did not present this evidence, this Court finds that Acklin failed to carry his burden of proving this allegation of ineffective assistance of counsel. Rule 32.3, Ala.R.Crim.P.

Moreover, while Ms. Evans testified that Acklin was born premature and stayed in the hospital for approximately a week after his birth, (H.R. 259), Acklin failed to prove why this fact, if presented to the jury and the trial court, would have been considered mitigating. Acklin also failed to prove why his being a good father to his children, even assuming it were true, would have been considered mitigating by the jurors and the trial judge in light of the fact the State presented overwhelming evidence proving that Acklin was responsible for murdering four individuals that were the children of others. Finally, Acklin offered no explanation as to why evidence he had a history of drug and alcohol abuse, even if it had been presented during the penalty phase, would have changed the outcome of the jury's recommendation or his ultimate sentence. *See Clisby v. Alabama*, 26 F.3d 1054, 1057 n. 2 (11th Cir. 1994)(finding "we doubt that many

sentencers view substance abuse as a mitigating factor."); *see also Housel v. Head*, 238 F.3d 1289, 1296 (11th Cir. 2001)(holding "[e]vidence of drug and alcohol abuse is 'a two-edged sword,' . . . and a lawyer may reasonably decide that it could hurt as much as help the defense.").

This Court finds that Acklin failed to carry his burden of proof regarding this allegation of ineffective assistance of counsel. Rule 32.3, Ala.R.Crim.P. This claim of ineffective assistance of counsel is, therefore, denied by this Court.

D. Acklin's Claim That His Trial Counsel Were Ineffective During The Guilt Phase And Penalty Phase Of Trial For Failing To Object To Prosecutorial Misconduct And Request Curative Instructions.

In *Moore v. State*, 659 So.2d 205 (Ala. Crim. App. 1994), the Alabama Court of Criminal Appeals held that

> objections are a matter of trial strategy, and an appellant must overcome the presumption that "counsel's conduct falls within the wide range of reasonable professional assistance," that is, the presumption that the challenged action "might be considered sound trial strategy." *Strickland*, 466 U.S. at 687-88, 104 S.Ct. at 2064, 80 L.Ed.2d at 693 (1984).

Id. at 209. The Court of Criminal Appeals has also held that "'requests for jury charges are included in the "practical questions" that an attorney must deal with in formulating trial strategy, . . ., and, consequently, should be left to the trial attorney's judgment.'" *Parker v. State*, 510 So.2d 281, 286 (Ala. Crim. App. 1987)(citations omitted).

With the appropriate legal standards in mind, this Court will address Acklin's claims of ineffective assistance of counsel.

1. Acklin's claims that his trial counsel were ineffective for failing to object during the prosecutor's guilt-phase closing arguments.

Acklin claims that his trial counsel were ineffective for not objecting to comments by the prosecutor during the State's guilt phase closing arguments.

a. Acklin claim that his trial counsel were ineffective for not objecting when the prosecutor referenced the O.J. Simpson case.

Acklin claimed his trial counsel were ineffective for not objecting when, according to Acklin, the prosecutor improperly compared him to O.J. Simpson. (3AP ¶s 144-146)

Acklin failed to question his trial counsel about why they did not object to the prosecutor's comment; therefore, this Court finds that he has abandoned this claim of ineffective assistance of counsel. *See Dunaway v. State*, 2009 WL 4980320, *12 (Ala. Crim. App. Dec. 18, 2009), reversed on other ground, *Ex parte Dunaway*, 2014 WL 1508697 (Ala. April 18, 2014); *see also Broadnax v. State*, 2013 WL 598056, *19 (Ala. Crim. App. Feb. 15, 2013).

In the alternative, because Acklin failed to question his trial counsel about why they did not object to the prosecutor's comment, this Court finds that Acklin failed to carry his burden of proving this allegation of ineffective assistance of counsel. Rule 32.3, Ala.R.Crim.P.

Moreover, this Court finds that a plain reading of the prosecutor's comment proves he was not comparing Acklin to O.J. Simpson as a person. This Court is convinced that the prosecutor was simply using an example to explain to the jurors the elements of the capital murder charge levied against Acklin. (R. 855-856) This Court concludes that when the prosecutor's comment is read in its proper context, there is no reasonable probability that this comment prejudiced Acklin and denied him a fair trial.

Having found that Acklin's claim the prosecutor compared him to O.J. Simpson is without merit, this Court further finds that his claim his trial counsel were ineffective for failing to object is also without merit. *See Bearden v. State*, 825 So.2d 868, 872 (Ala. Crim. App. 2001)(holding that "Bearden's counsel could not be ineffective for failing to raise a baseless objection."). Acklin failed to prove his trial counsel's performance was deficient and prejudicial. Rule 32.3, Ala.R.Crim.P. This claim of ineffective assistance of counsel is, therefore, denied by this Court.

b. Acklin's claim that his trial counsel were ineffective for not objecting when the prosecutor referred to the crimes as "the cell phone murders."

Acklin claims his trial counsel were ineffective for not objecting when, according to Acklin, the prosecutor improperly referred to the crimes as "the cell phone murders". (3AP ¶s 147-149) Acklin argued that this comment was based on pre-trial publicity and that no evidence was ever admitted during his trial concerning the reference, "cell phone murders".

Acklin failed to question his trial counsel about why they did not object to this comment; therefore, this

Court finds that he has abandoned this claim of ineffective assistance of counsel. *See Dunaway v. State*, 2009 WL 4980320, *12 (Ala. Crim. App. Dec. 18, 2009), reversed on other ground, *Ex parte Dunaway*, 2014 WL 1508697 (Ala. April 18, 2014); *see also Broadnax v. State*, 2013 WL 598056, *19 (Ala. Crim. App. Feb. 15, 2013).

Alternatively, because Acklin failed to question his trial counsel about why they did not object to the prosecutor's comment, this Court finds that Acklin failed to carry his burden of proving this allegation of ineffective assistance of counsel. Rule 32.3, Ala.R.Crim.P.

Moreover, this Court notes that evidence was presented during Acklin's trial that the murders occurred because Acklin and his co-defendants were angry that a warrant had been issued over a stolen cell phone. This Court further notes that after the reference to the cell phone murders, the prosecutor stated:

> This has been described as the cell phone murders. You can't listen to this stuff and come away with a feeling that it wasn't even that, it wasn't even murders over a cell phone.

(R. 874)

After reviewing the relevant portions of the record this Court finds that the prosecutor was not trying to remind the jurors about pre-trial publicity – he was, in fact, arguing that the murders were not committed because of a cell phone. This Court finds that, when viewed in the context of the prosecutor's entire closing argument and in the light of all of the evidence presented at trial, there is no reasonable probability that this comment prejudiced Acklin and denied him a fair trial.

Having found that Acklin's claim the prosecutor improperly referred to the crimes as the cell phone murders is without merit, this Court finds that Acklin's claim his trial counsel were ineffective for failing to object is also without merit. *See Bearden v. State*, 825 So.2d 868, 872 (Ala. Crim. App. 2001) (holding that "Bearden's counsel could not be ineffective for failing to raise a baseless objection."). Acklin failed to prove his trial counsel's performance was deficient and prejudicial. Rule 32.3, Ala.R.Crim.P. This claim of ineffective assistance of counsel is, therefore, denied by this Court.

c. Acklin's claim that his trial counsel were ineffective for not objecting when the prosecutor referred to victim impact and engaged in name calling.

Acklin further claims that his trial counsel were ineffective for failing to object when, according to Acklin, the prosecutor argued victim impact evidence during the State's guilt phase closing. (3AP ¶s 152-153) Acklin also claimed his trial counsel were ineffective for not objecting when the prosecutor referred to Acklin as a "murderer" and a "cold-blooded killing machine" and when the prosecutor referenced his combat experience during closing arguments. (3AP ¶s 155-156)

Acklin failed to question his trial counsel any of these claims of ineffective assistance of counsel; therefore, this Court finds that Acklin has abandoned them. *See Dunaway v. State*, 2009 WL 4980320, *12 (Ala. Crim. App. Dec. 18, 2009), reversed on other ground, *Ex parte Dunaway*, 2014 WL 1508697 (Ala. April 18, 2014); *see also Broadnax v. State*, 2013 WL 598056, *19 (Ala. Crim. App. Feb. 15, 2013).

In the alternative, because Acklin failed to question his trial counsel about why they did not object to these comments by the prosecutor, this Court finds that Acklin failed to carry his burden of proving these allegations of ineffective assistance of counsel. Rule 32.3, Ala.R.Crim.P.

Moreover, even if Acklin had not abandoned these claims of ineffective assistance, this Court finds he failed to prove that he is entitled to any relief. On direct appeal, the Alabama Court of Criminal Appeals reviewed Acklin's argument that the prosecutor commented on punishment during his guilt phase closings. The Court of Criminal Appeals rejected this argument, specifically finding that "we can find no place in the record where the prosecutor improperly commented on punishment." *Acklin v. State*, 790 So.2d at 1002. The Court of Criminal Appeals went on to conclude that "[t]here was no error here, plain or otherwise." *Id.* Acklin's trial counsels were not ineffective for failing to object to a non-error. *See Bearden v. State*, 825 So.2d 868, 872 (Ala. Crim. App. 2001)(holding that "Bearden's counsel could not be ineffective for failing to raise a baseless objection"). This claim of ineffective assistance of counsel is, therefore, denied by this Court. Rule 32.3, Ala.R.Crim.P.

Concerning Acklin's claim that the prosecutor improperly engaged in name-calling, the Alabama Court of Criminal Appeals addressed a similar argument in *Melson v. State*, 775 So.2d 857 (Ala. Crim. App. 1999). In *Melson*, the prosecutor referred to the defendant as an "animal" during closing arguments. *Id.* at 885. The Court of Criminal Appeals held that the prosecutor's comments were not improper because they were based on the evidence presented at Melson's trial. *Id.* The Court of Criminal Appeals reiterated in

Melson that "[i]n a proper case, the prosecuting attorney may characterize the accused or his conduct in language which, although it consists of invective or opprobrious terms, accords with the evidence of the case." *Id.* (internal quotations omitted).

The State presented overwhelming evidence during the guilt phase proving beyond any reasonable doubt that Acklin had the specific intent to murder three of the victims, shared the specific intent with Joey Wilson to murder a fourth, and attempted to murder two others. Based on the evidence presented by the State during Acklin's trial this Court finds that the prosecutor's references to Acklin as a "murderer" and a "vicious, cold-blooded killing machine" were not improper because they were fully supported by the evidence introduced by the State. Because the prosecutor's comments were supported by the evidence, this Court is convinced beyond a reasonable doubt that an objection by Acklin's trial counsel would have been overruled by the trial court. As such, Acklin cannot demonstrate his trial counsel were ineffective for not objecting to these comments. *See Bearden v. State*, 825 So.2d 868, 871 (Ala. Crim. App. 2001)(holding that "Bearden's counsel could not be ineffective for failing to raise a baseless objection"). This claim of ineffective assistance of counsel is, therefore, denied by this Court. Rule 32.3, Ala.R.Crim.P.

Finally, this Court finds that Acklin's claim that his trial counsel were ineffective for not objecting when the prosecutor made a reference to his own combat experience is without merit. The prosecutor made a similar comment during his closing argument during the trial of Acklin's co-defendant Joseph Wilson. On Wilson's direct appeal the Alabama Court of Criminal Appeals held the prosecutor's combat analogy did not

constitute plain error, concluding that "the prosecutor appears to have been arguing that the jurors should consider the extent of the trauma the surviving victims endured when weighing their testimony." *Wilson v. State*, 777 So.2d 856, 901 (Ala. Crim. App. 1999).

This Court has reviewed the prosecutor's comment during his closing argument at Acklin's trial and finds it was made in the same context as it was made during Wilson's trial. (R. 889-891) This Court finds that this claim of ineffective assistance of counsel is without merit. This claim of ineffective assistance of counsel is, therefore, be denied by this Court. Rule 32.3, Ala.R.Crim.P.

2. Acklin's claim that his trial counsel were ineffective for failing to object to during the State's penalty-phase closing arguments.

Acklin further claims that his trial counsel were ineffective for not objecting to comments by the prosecutor during the State's penalty phase closing arguments.

a. *Acklin's claim that his trial counsel were ineffective for failing to object when the prosecutor stated he had a kinship with one of the victims and had attended one of the victim's funeral.*

Acklin further claims that his trial counsel were ineffective for not objecting when the prosecutor expressed a kinship to victim Lamar Hemphill because he was a Marine and attended Mr. Hemphill's funeral.

Acklin failed to question his trial counsel about why they did not object to this comment by the prosecutor;

therefore, this Court finds that he has abandoned this claim of ineffective assistance of counsel. *See Dunaway v. State*, 2009 WL 4980320, *12 (Ala. Crim. App. Dec. 18, 2009), reversed on other ground, *Ex parte Dunaway*, 2014 WL 1508697 (Ala. April 18, 2014); *see also Broadnax v. State*, 2013 WL 598056, *19 (Ala. Crim. App. Feb. 15, 2013).

In the alternative, because Acklin failed to question his trial counsel about why they did not object to the prosecutor's comment, this Court finds that Acklin failed to carry his burden of proving this allegation of ineffective assistance of counsel. Rule 32.3, Ala.R.Crim.P. This claim of ineffective assistance of counsel is, therefore, denied by this Court.

b. Acklin failed to prove his trial counsel were ineffective for not objecting when, according to Acklin, the prosecutor misstated the law.

Acklin claimed his trial counsel were ineffective for objecting when, according to Acklin, the prosecutor improperly told the jurors that the law prohibited them from taking forgiveness, mercy or sympathy into account in their penalty phase deliberations. (3AP ¶161)

Acklin failed to question his trial counsel about why they did not object to this comment by the prosecutor; therefore, this Court should find that he has abandoned this claim of ineffective assistance of counsel. *See Dunaway v. State*, 2009 WL 4980320, *12 (Ala. Crim. App. Dec. 18, 2009), reversed on other ground, *Ex parte Dunaway*, 2014 WL 1508697 (Ala. April 18, 2014); *see also Broadnax v. State*, 2013 WL 598056, *19 (Ala. Crim. App. Feb. 15, 2013).

In the alternative, because Acklin failed to question his trial counsel about why did not object to this comment, this Court finds that Acklin failed to carry his burden of proving this allegation of ineffective assistance of counsel. Rule 32.3, Ala.R.Crim.P.

Moreover, even if Acklin had not abandoned these claims of ineffective assistance, he failed to prove he is entitled to any relief. The Alabama Court of Criminal Appeals has specifically held that "it is [] well settled that 'the prosecutor, as an advocate, may argue to the jury that it should give the defendant's mitigating evidence little or no weight.'" *Mashburn v. State*, 2013 WL 3589300, *64 (Ala. Crim. App. July 12, 2013) (citation omitted). Acklin failed to present any relevant legal authority in his third amended Rule 32 petition or at the evidentiary hearing affirmatively proving this claim of ineffective assistance.

This claim of ineffective assistance of counsel is denied by this Court. Rule 32.3, Ala.R.Crim.P.

E. Acklin Failed To Prove His Trial Counsel Were Ineffective For Failing To Object To The Indictment On The Ground It Did Not Correspond With The State's Proof.

Acklin claims his trial counsel were ineffective for not objecting to his indictment on the ground it did not correspond to the State proof.

Acklin failed to question his trial counsel about why they did not object to his indictment on this, or any other, ground; therefore, this Court finds that he has abandoned this claim of ineffective assistance of counsel. *See Dunaway v. State*, 2009 WL 4980320, *12 (Ala. Crim. App. Dec. 18, 2009), reversed on other ground, *Ex parte Dunaway*, 2014 WL 1508697 (Ala.

April 18, 2014); *see also Broadnax v. State*, 2013 WL 598056, *19 (Ala. Crim. App. Feb. 15, 2013).

In the alternative, because Acklin failed to question his trial counsel about why they did not object to his indictment on this ground, this Court finds that Acklin failed to carry his burden of proving this allegation of ineffective assistance of counsel. Rule 32.3, Ala.R.Crim.P.

Moreover, even if Acklin had not abandoned this claim of ineffective assistance, this Court finds that he failed to prove he is entitled to relief. Acklin argued on direct appeal that "the evidence presented at trial was insufficient to justify convictions for capital murder and attempted murder and that the trial court erred in not granting his motion for a directed verdict of not guilty." *Acklin v. State*, 790 So.2d at 1008. The Alabama Court of Criminal Appeals rejected Acklin's argument, finding that "[t]he evidence supporting the State's case that Acklin shot and killed at least three of the victims and shared his specific intent to kill with Joey Wilson was overwhelming; certainly, it was sufficient to sustain the jury's finding of guilty as to the capital-murder charge as well as the attempted-murder charges." *Id.* at 1010.

This claim of ineffective assistance of counsel is without merit; therefore, it is denied by this Court. Rule 32.3, Ala.R.Crim.P.

F. Acklin Failed To Prove His Trial Counsel Were Ineffective During His Trial Failing To Object To, Or, Request An Instruction Regarding Acklin Being Given Xanax During Trial.

Acklin further claims his trial counsel were ineffective for failing to object to him being administered Xanax during trial. Acklin also claimed his trial

counsel were ineffective for not requesting the jurors be given an instruction informing them that Acklin was taking Xanax.

Mr. Rahmati was aware that Acklin was prescribed medication during his trial in addition to his insulin, but could not recall what. (H.R. 145) Neither Mr. Rahmati nor Mr. Gray noticed any difference in Acklin's behavior or demeanor during trial. Mr. Rahmati stated that Acklin acted no different during the Rule 32 evidentiary hearing than he did during his trial. (H.R. 154) Acklin never complained to his trial counsel that he was experiencing any adverse effects during trial. (H.R. 153, 300) While Dr. Sims testified that Xanax may cause certain side effects, Acklin presented no evidence proving he suffered from any such side effects during his trial to any evident degree.

Acklin failed to prove his trial counsel's performance was deficient because they did not object or request a jury instruction regarding him being medicated. *See Smith v. State*, 112 So.3d 1108, 1144-1145 (Ala. Crim. App. 2012)(holding that Smith failed to prove his trial counsel were ineffective during the penalty phase of trial for failing to bring to the attention of the judge and the jury that he was being administered the anti-psychotic drug Haldol). Therefore, and based upon the Court's observation of the Petitioner's demeanor during the evidentiary hearing, this Court finds that Acklin failed to carry his burden of proving this allegation of ineffective assistance of counsel. Rule 32.3, Ala.R.Crim.P.

G. Acklin Failed To Prove His Trial Counsel Were Ineffective During The Penalty Phase And The Judicial Sentencing For Presenting, Or For Failing To Correct, False Evidence.

This Court has reviewed penalty phase testimony presented by Mr. Rahmati and Mr. Gray. Most of this testimony concerned Acklin's character and personality. Acklin specifically prevented his trial counsel from presenting evidence concerning his abuse as a child to the jury or the trial judge.

The Alabama Court of Criminal Appeals has recognized that "[w]hat one juror finds to be mitigation another juror may find aggravating," and that "'mitigation may be in the eye of the beholder.'" *Davis v. State*, 44 So.3d 1118, 1141 (Ala. Crim. App. 2009). It is axiomatic that a defendant's trial counsel cannot control how a juror or a sentencing judge will view or interpret mitigating evidence that is presented during the penalty phase of a capital murder trial. Moreover, based on Acklin's own actions, any blame for the trial court's findings regarding Acklin's home life rests solely with Acklin – not his trial counsel. A defendant cannot intentionally prevent his trial counsel from presenting evidence during trial and then, years later, attempt to profit from trial counsel's failure to prevent such evidence. *See Adkins v. State*, 930 So.2d at 539-540; *see also Gilreath v. Head*, 234 F.3d 547, 550 n. 10 (11th Cir. 2000)("We readily conclude that trial counsel – by relying on Petitioner's instruction not to present mitigating mental health and alcohol abuse evidence – did not perform in an unreasonable manner.")

Furthermore, Acklin failed to demonstrate at the evidentiary hearing there is any reasonable probability that if he had not prevented his trial counsel from

presenting evidence of abuse the outcome of the penalty phase and his ultimate sentence would been different. Acklin was almost 25 years old when he committed the murders. He was a high school graduate, had a good work history, and was employed at the time of the offenses. Acklin was also cohabitating with the mother of one of his two daughters at the time of the offenses and was employed. Further, according to the pre-sentence investigation and report, Acklin's only contact with law enforcement prior to the murders occurred in April 1991 when he was 18 years old. (C.R. 303) Acklin was arrested for breaking into a vehicle and theft of property first degree. Acklin was adjudicated a youthful offender, was sentenced to Boot Camp, and served three years of probation without incident. Id.

While Acklin presented evidence his father was abusive to him, his mother and siblings, he completely failed to prove why his exposure to abuse would have been considered a mitigating factor by the jury and the trial court. This is especially true given Acklin's age at the time of the offenses. The abuse Acklin endured at the hands of his father clearly had no effect on Acklin's ability to work, maintain relationships, or to function in society to conform his behavior to the requirements of the law if he chose to do so. *See Mills v. Singletary*, 63 F.3d 999, 1025 (11th Cir. 1995)("Evidence of Mills' childhood environment likely would have carried little weight in the light of the fact that Mills was twenty-six when he committed the crime."); *see also Tompkins v. Moore*, 193 F.3d 1327, 1337 (11th Cir. 1999)(holding that "where there are significant aggravating circumstances and the petitioner was not young at the time of the capital offense, 'evidence of a deprived and abusive childhood is entitled to little, if any, mitigating weight.'")(citation omitted).

This Court finds that Acklin failed to carry his burden of proving this allegation of ineffective assistance of counsel. Rule 32.3, Ala.R.Crim.P. This claim of ineffective assistance of counsel is, therefore, denied by this Court.

III. ACKLIN'S CLAIMS THAT HE WAS DENIED EFFECTIVE ASSISTANCE FROM HIS APPELLATE COUNSEL.

Robert Tuten and John Butler were appointed to represent Acklin on direct appeal. Attorney Tiffin Miller Taylor assisted Mr. Tuten and Mr. Butler by conducting legal research. (H.R. 336) Attorney Mark McDaniel was also consulted about potential issues related to voir dire because he assisted Mr. Rahmati and Mr. Gray in striking the jury. Id. It is clear from Mr. Tuten's and Mr. Butler's testimony that they were responsible for the issues raised in Acklin's brief on direct appeal. Since Acklin only called Mr. Tuten and Mr. Butler to testify at the evidentiary hearing, this Court concludes that his claims of ineffective assistance of appellate counsel are directed specifically at them.

In *Payne v. State*, 791 So.2d 383, 399 (Ala. Crim. App. 1999), the Alabama Court of Appeals held that "[a Rule 32 petitioner's] claims of ineffective assistance of appellate counsel depend on whether [the petitioner] proves that appellate counsel failed to present on direct appeal a claim that would have entitled him to relief." In *Whitson v. State*, 109 So.3d 665 (Ala. Crim. App. 2012), the Court of Criminal Appeals held:

> "'The standards for determining whether appellate counsel was ineffective are the same as those for determining whether trial counsel was ineffective.' 'The process of evaluating a

> case and selecting those issues on which the appellant is most likely to prevail has been described as the hallmark of effective appellate advocacy.'"

Id. at 671 (citations omitted).

With the appropriate legal standards in mind, this Court will address Acklin's claims that his appellate counsel's performance was deficient and caused him to be prejudiced.

A. Acklin's Claim That His Appellate Counsel Were Ineffective For Failing To Adequately Raise On Appeal The Argument That The Indictment Did Not Correspond With The State's Proof.

Acklin claimed his appellate counsel were ineffective for not arguing on direct appeal that Acklin's indictment did not correspond to the State's proof. (3AP ¶ 326(3))

Acklin did not question Mr. Tuten and Mr. Butler about why they did not raise this argument on direct appeal; therefore, this Court finds that Acklin abandoned this claim of ineffective assistance of appellate counsel. *See Dunaway v. State*, 2009 WL 4980320, *12 (Ala. Crim. App. Dec. 18, 2009), reversed on other ground, *Ex parte Dunaway*, 2014 WL 1508697 (Ala. April 18, 2014); *see also Broadnax v. State*, 2013 WL 598056, *19 (Ala. Crim. App. Feb. 15, 2013).

In the alternative, because Acklin failed to question Mr. Tuten and Mr. Butler about why they did not raise this argument on direct appeal, this Court finds that Acklin failed to carry his burden of proof. Rule 32.3, Ala.R.Crim.P.

Moreover, this Court finds that, even if Acklin had not abandoned this claim of ineffective assistance of appellate counsel, he failed to prove he is entitled to relief. On direct appeal the Alabama Court of Criminal Appeals held that "[t]he evidence supporting the State's case that Acklin shot and killed at least three of the victims and shared his specific intent to kill with Joey Wilson was overwhelming." *Acklin v. State*, 790 So.2d at 1010. Acklin presented no evidence at the evidentiary hearing proving his appellate counsel's performance was deficient and caused him to be prejudiced. *See Southall v. State*, 835 So.2d 1073, 1076 (Ala. Crim. App. 2001)(holding that Southall's appellate counsel was not ineffective for failing to raise and argue a meritless issue).

In addition to being abandoned, this Court finds that Acklin failed to prove this claim of ineffective assistance of appellate counsel. Rule 32.3, Ala.R.Crim.P. This claim of ineffective assistance of appellate counsel is, therefore, denied by this Court.

B. Acklin's Claims That His Appellate Counsel Were Ineffective For Failing To Adequately Raise On Appeal That He Was Denied A Fair Trial Due To Prosecutorial Misconduct.

These claims of ineffective assistance of appellate counsel are in part XXXI(F) of Acklin's third amended Rule 32 petition.

1. Acklin's claim that his appellate counsel were ineffective for failing to raise on direct appeal the prosecutor compared him to O.J. Simpson.

Acklin claimed that his appellate counsel were ineffective for not arguing on direct appeal the

prosecutor improperly compared Acklin to O.J. Simpson.

While Acklin did question his appellate counsel concerning this claim, (H.R. 337 340; 366-369), he failed to prove that they were ineffective for not raising this issue on direct appeal. As stated above, this Court finds that Acklin's contention that the prosecutor compared him to O.J. Simpson is without merit. This Court has read the prosecutor's comment and finds that he was not comparing Acklin to O.J. Simpson as a person – the prosecutor was simply using an example to explain to the jurors the elements of the capital murder charge levied against Acklin. (R. 855-856) This Court finds that, when the prosecutor's comment is read in its proper context, there is no reasonable probability that this comment so infected the trial with unfairness as to make the resulting conviction a denial of due process.

Having found that Acklin's claim the prosecutor compared him to O.J. Simpson is factually incorrect and without merit, this Court further finds that his claim that Mr. Tuten and Mr. Butler were ineffective for failing to raise and argue this issue on direct appeal is also without merit. *See Southall v. State*, 835 So.2d 1073, 1076 (Ala. Crim. App. 2001)(holding that Southall's appellate counsel was not ineffective for failing to raise and argue a meritless issue).

This claim of ineffective assistance of appellate counsel is without merit; therefore, it is denied by this Court. Rule 32.3, Ala.R.Crim.P.

2. Acklin's claim that his appellate counsel were ineffective for failing to raise on direct appeal the prosecutor improperly referred to the murders as "the cell phone murders."

Acklin claimed his appellate counsel were ineffective for not raising and arguing on direct appeal that the prosecutor improperly referred to pre-trial publicity when he referred to the crimes as "the cell phone murders".

While Acklin did question his appellate counsel concerning this claim, (H.R. 341 343; 369), he failed to prove that they were ineffective for not raising this issue on direct appeal. As stated above, the record affirmatively proves that the prosecutor was not trying to remind the jurors about any pre-trial publicity – he was actually arguing that the murders were not committed because of a cell phone. When viewed in the context of the prosecutor's entire closing argument and in the light of all of the evidence presented at trial, this Court finds that the prosecutor's argument was not unfair and did not undermine the reliability of the jury's verdict. *See Melson v. State*, 775 So.2d 857, 884 (Ala. Crim. App. 1999)("'A prosecutor's statement must be viewed in the context of all of the evidence presented and in the context of the complete closing arguments to the jury.'")(citation omitted).

Having found that Acklin's claim the prosecutor improperly referred to the crimes as "the cell phone murders" is without merit, this Court further finds that his claim that his appellate counsel were ineffective for failing to raise and argument this issue on direct appeal is also without merit. *See Southall v. State*, 835 So.2d 1073, 1076 (Ala. Crim. App. 2001) (holding that Southall's appellate counsel was not

ineffective for failing to raise and argue a meritless issue).

This claim of ineffective assistance of appellate counsel is without merit; therefore, it is denied by this Court. Rule 32.3, Ala.R.Crim.P.

C. Acklin's Claim That His Appellate Counsel Were Ineffective For Failing To Adequately Raise On Appeal That Trial Counsels' Objection To The Trial Court's Definition Of Capital And Non-Capital Murder Was Improperly Denied.

This claim of ineffective assistance of appellate counsel is in part XXXI(G) of Acklin's third amended Rule 32 petition.

Acklin did not question his appellate counsel regarding why they did not raise this issue on direct appeal; therefore, this Court finds that Acklin abandoned this claim of ineffective assistance of appellate counsel. *See Brooks v. State*, 929 So.2d 491, 497 (Ala. Crim. App. 2005)(holding that "a petitioner is deemed to have abandoned a claim if he fails to present any evidence to support the claim at the evidentiary hearing.").

Moreover, because Acklin failed to question his appellate counsel concerning why they did not raise this argument on direct appeal, this Court further finds that Acklin failed to carry his burden of prove this allegation of ineffective assistance of appellate counsel. Rule 32.3, Ala.R.Crim.P.

This claim of ineffective assistance of appellate counsel is, therefore, denied by this Court.

D. Acklin's Claim That His Appellate Counsel Were Ineffective For Failing To Adequately Raise On Appeal That Trial Counsels' Objection To The Trial Court's Penalty Phase Jury Charge Was Improperly Denied.

This claim of ineffective assistance of appellate counsel is in part XXXI(M) of Acklin's third amended Rule 32 petition.

Acklin did not question his appellate counsel about why they did not raise this issue on direct appeal; therefore, this Court finds that Acklin abandoned this claim of ineffective assistance of appellate counsel. *See Brooks v. State*, 929 So.2d 491, 497 (Ala. Crim. App. 2005)(holding that "a petitioner is deemed to have abandoned a claim if he fails to present any evidence to support the claim at the evidentiary hearing.").

Moreover, because Acklin failed to question his appellate counsel about why they did not raise this issue on direct appeal, this Court finds that Acklin failed to carry his burden of prove this claim of ineffective assistance of appellate counsel. Rule 32.3, Ala.R.Crim.P.

This claim of ineffective assistance of appellate counsel, therefore, is denied by this Court.

E. Acklin's Claim That His Appellate Counsel Were Ineffective For Failing To Adequately Raise On Direct Appeal That The Trial Court's Penalty Phase Instructions Were Erroneous.

This claim of ineffective assistance of appellate counsel is in part XXXV of Acklin's third amended Rule 32 petition.

Acklin failed to question his appellate counsel about why they did not raise this issue on direct appeal; therefore, this Court finds that he has abandoned this claim of ineffective assistance of appellate counsel. *See Dunaway v. State*, 2009 WL 4980320, *12 (Ala. Crim. App. Dec. 18, 2009), reversed on other ground, *Ex parte Dunaway*, 2014 WL 1508697 (Ala. April 18, 2014); *see also Broadnax v. State*, 2013 WL 598056, *19 (Ala. Crim. App. Feb. 15, 2013).

Moreover, on direct appeal the Alabama Court of Criminal Appeals "searched the record and have found no error in the sentencing proceedings adversely affecting Acklin's rights." *Acklin v. State*, 790 So.2d at 1011. Further, because Acklin failed to question his appellate counsel about why they did not raise this argument on direct appeal, this Court finds that Acklin failed to carry his burden of prove this allegation of ineffective assistance of appellate counsel.

This claim of ineffective assistance of appellate counsel is, therefore, denied by this Court. Rule 32.3, Ala.R.Crim.P.

CONCLUSION

For the reasons stated above, this Court holds that Acklin failed to prove by a preponderance of the evidence that he is entitled to any post-conviction relief. His request for relief is, therefore, DENIED.

Acklin has 42 days from this order in which to appeal this Court's order.

DONE this 8th day of April, 2015.

/s/ CHRIS COMER
CIRCUIT JUDGE

APPENDIX C

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA

CR-14-1011 Death Penalty
(Appeal from Madison Circuit Court: CC97-162.60)

NICHOLAS BERNARD ACKLIN

v.

STATE OF ALABAMA

April 20, 2018

D. Scott Mitchell Clerk
Gerri Robinson Assistant Clerk
P.O. Box 301555
Montgomery, AL 36130-1555
(334) 229-0751
Fax (334) 229-0521

NOTICE

You are hereby notified that on April 20, 2018, the following action was taken in the above referenced cause by the Court of Criminal Appeals:

Application for Rehearing Overruled.

/s/ D.Scott Mitchell
D. Scott Mitchell, Clerk
Court of Criminal Appeals

cc: Hon. Chris Corner, Circuit Judge
Hon. Debra Kizer, Circuit Clerk
Katherine Chamblee, Attorney - Pro Hac
William Robert Montross, Jr, Attorney
Patrick Mulvaney, Attorney
John Selden, Asst. Attorney General
Lisa Wright Borden, Attorney

APPENDIX D

IN THE SUPREME COURT OF ALABAMA

[SEAL]

June 15, 2018

1170677

Ex parte Nicholas Bernard Acklin. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Nicholas Bernard Acklin v. State of Alabama) (Madison Circuit Court: CC-97-162.60; Criminal Appeals: CR-14-1011).

CERTIFICATE OF JUDGMENT

WHEREAS, the petition for writ of certiorari in the above referenced cause has been duly submitted and considered by the Supreme Court of Alabama and the judgment indicated below was entered in this cause on June 15, 2018:

Writ Denied. No Opinion. Sellers, J. - Stuart, C.J., and Bolin, Parker, Shaw, Main, Wise, Bryan, and Mendheim, JJ., concur.

NOW, THEREFORE, pursuant to Rule 41, Ala. R. App. P., IT IS HEREBY ORDERED that this Court's judgment in this cause is certified on this date. IT IS FURTHER ORDERED that, unless otherwise ordered by this Court or agreed upon by the parties, the costs of this cause are hereby taxed as provided by Rule 35, Ala. R. App. P.

I, Julia J. Weller, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true, and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 15th day of June, 2018.

/s/ Julia Jordan Weller
Clerk, Supreme Court of Alabama