Nos. 19-8903 & 19-8904

IN THE
Supreme Court of the United States

WILLIAM CLYDE GIBSON, III,
Petitioner,

v.

STATE OF INDIANA,
Respondent.

On Petitions for Writ of Certiorari to the
Indiana Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITIONS

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CAPITAL CASES

QUESTIONS PRESENTED

William Clyde Gibson, III, has filed two cert. petitions seeking review of a state post-conviction-review decision that rejected his attempts to invalidate his two separate capital murder convictions. The petitions each raise a different question.

No. 19-8903

The Court has held that a defendant's constitutional rights are violated when his counsel's representation of multiple clients produces "an actual conflict of interest [that] adversely affected his lawyer's performance." *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980). Gibson claims that one of his trial attorneys had an unconstitutional conflict because the attorney, as the county's chief public defender, had responsibility for the agency's finances. The question presented is thus: May a public defender with agency-finance authority represent a capital criminal defendant?

No. 19-8904

Gibson challenges his other capital sentence on the basis of one new expert's wavering, partial disagreement with two experts the trial counsel consulted regarding whether Gibson might have a traumatic brain injury. The question presented is: Did the state courts correctly find that counsel's consultation with two brain-injury experts neither constituted deficient performance nor likely prejudiced Gibson?

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STATEMENT

Gibson seeks plenary review of the Indiana Supreme Court's decision affirming the denial of state post-conviction relief for Gibson's two murder convictions and resulting death sentences. Case number 19-8903 involves Gibson's murder of 75-year old Christine Whitis, a longtime friend of Gibson's mother; Gibson not only strangled Whitis to death, but also sexually abused her corpse after he did so. 19-8903 Pet. App. A at 2. Case number 19-8904 involves Gibson's murder of Stephanie Kirk, whom Gibson also murdered via strangulation before sexually abusing her corpse—and whose body Gibson later buried in his backyard. *Id.*

1. Both murders took place in the spring of 2012. On March 24, 2012, Kirk gave her phone number to Gibson while at a bar in New Albany, Indiana. 19-8904 Pet. App. B at 4. Gibson called her the next day, and the two met, went to multiple bars, and had consensual sex at Gibson's house. *Id.* After again visiting more bars, they returned to Gibson's house. *Id.* At some point, Kirk realized Gibson had stolen drugs from her, and she confronted him. *Id.* While they argued, Gibson put both of his hands to Kirk's throat and strangled her to death. *Id.* He then performed various sex acts upon her body. *Id.* at 4–5. After "play[ing] around inside of [Kirk] . . . until [Gibson] got tired of that," he dragged her body to his garage, and, after a couple of days, buried her body in his backyard. *Id.* at 5.

About two-and-a-half weeks later, on the morning of Wednesday, April 19, 2012, Gibson asked Whitis to come to his house. 19-8903 Pet. App. B at 4. After she

arrived he attempted to touch her breast, and when she recoiled, he violently strangled Whitis to death and sexually abused her corpse. *Id.* at 4–5. "He then dragged her nude and lifeless body to the garage, where he severed one of her breasts before leaving for a night out drinking at the bars." 19-8903 Pet. App. A at 2. Gibson was apprehended the next day after his sisters discovered Whitis's corpse in his garage. *Id.* When police searched the vehicle in which he was apprehended, they found Whitis's severed breast in the vehicle's center console. *Id.* at 2–3.

"While in custody, Gibson repeatedly asked to speak with police, expressly waiving his *Miranda* rights each time." *Id.* at 3. He ultimately confessed to killing Whitis *and* Kirk—as well as a third woman, Karen Hodella (Kirk's and Hodella's murders were unsolved at the time, and Gibson had not been a suspect). *Id.* Gibson even led police to where he had buried Kirk in his yard, and police found Kirk's prescription pill bottle in Gibson's home. *Id.*

2. Following the confessions, the State charged Gibson with the Whitis and Hodella murders on April 24, 2012, *id.*, and charged Gibson with Kirk's murder a month later, on May 23, 2012, *id.* at 4. The State sought the death penalty in the Whitis and Kirk cases. *Id.*

The trial court appointed Patrick Biggs, the county's chief public defender, as counsel for Gibson on the same day Gibson was charged with the Whitis and Hodella murders, though Biggs did not receive formal notification of his appointment or the fact that his client was confessing to multiple homicides until two days later. *Id.* at 3.

Biggs immediately met with Gibson and strongly insisted that Gibson stop talking to police. *Id*. Gibson ignored him. *Id.* at 9.

While Gibson continued to talk to police, Biggs began assembling the defense team. *Id.* at 10. Biggs recruited co-counsel, hired two investigators, and consulted with numerous mental-health experts. *Id.* at 10–11, 18–19. Relative to his other responsibilities as chief public defender, Biggs had no concerns about being able to give ample time to Gibson's cases, and he never considered asking any other attorney to be lead counsel. 19-8903 Pet. App. B at 71. Biggs remained in compliance with Indiana Criminal Rule 24, which restricts the caseload of an attorney representing a capitally charged defendant. *Id.* at 76. Even though the defense would spend almost $700,000 on Gibson's defense in this case and in the two other murder cases resulting from Gibson's confessions, Biggs never felt pressure to minimize costs. *Id*. at 72, 76. No claim for costs was "ever denied or paid untimely" during the course of Biggs's representation. 19-8903 Pet. App. A at 38.

During the team's investigation, Biggs had Gibson undergo an MRI to assess Gibson for possible brain damage. *Id.* at 19. A neurologist reviewed the MRI and "ultimately f[ound] no evidence of brain damage." *Id.* Additionally, a second expert—a neuropsychologist—performed a "full battery of neuropsychological testing" and found "no evidence of any major cognitive impairment." 19-8904 Pet. App. B at 14.

3. A jury found Gibson guilty of Whitis's murder and recommended a sentence of death, which the trial court imposed. 19-8903 Pet. App. A at 4. The Indiana Supreme Court affirmed on direct appeal, rejecting each of the six issues Gibson

raised challenging his conviction and sentence. *Gibson v. State*, 43 N.E.3d 231, 234 (Ind. 2015), *cert. denied*, 137 S. Ct. 54 (2016).

After the trial and sentencing in the Whitis case, Gibson pleaded guilty to and was sentenced to 65 years' imprisonment for the Hodella murder in exchange for the State not using that murder as an aggravating circumstance in the still-pending Kirk case. 19-8903 Pet. App. A at 4. Gibson did not appeal this conviction.

After the trial began in the Kirk case, Gibson decided to plead guilty to the murder. 19-8904 Pet. App. B at 36–37. This allowed the sentencing phase of the trial to proceed to the judge alone, which Gibson and his counsel believed would be more favorable than presenting the issue to the jury. *Id.* The trial court concluded that "a sentence of death [was] the only appropriate sentence." *Id.* at 37 (internal quotation marks and citation omitted). The Indiana Supreme Court upheld Gibson's conviction and sentence on direct appeal, rejecting each of the four issues Gibson raised. *Gibson v. State*, 51 N.E.3d 204, 207 (Ind. 2016), *cert. denied*, 137 S. Ct. 1082 (2017).

4. Gibson then filed petitions for post-conviction relief challenging all three convictions. At the consolidated evidentiary hearing, Gibson presented evidence on a variety of claims, two of which he now presents to this Court. In case number 19-8903, Gibson asks the Court to vacate his conviction and capital sentence for the Whitis murder, 19-8903 Pet. at 8–10, on the ground that his lead counsel had unconstitutionally "divided loyalties" because he was responsible for both the budget of the public defender agency and Gibson's defense, *id.* at 24. Gibson contends that this con-

flict of interest adversely affected his counsel's performance and that, under the presumption of prejudice applied in *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980), he is therefore automatically entitled to a new trial without needing to show prejudice. *Id.* at 25. And in case number 19-8904, Gibson asks the Court to vacate his capital sentence for the Kirk murder, 19-8904 Pet. at 9–11, on the ground that his counsel rendered unconstitutionally ineffective assistance by failing to adequately investigate a traumatic brain injury (TBI) Gibson had allegedly suffered, *id.* at 12–24.

With respect to Gibson's conflict-of-interest claim, Biggs testified at the post-conviction hearing that he was not pressured to minimize costs, that he made decisions about costs "based on the needs of each of his cases," and that he never failed to do "anything that was necessary for [Gibson's] defense because of pressure to keep costs low." 19-8904 Pet. App. B at 45–46. The post-conviction court credited this testimony and concluded that "Gibson received high quality representation." *Id.* at 46. In denying Gibson's conflict claim, the post-conviction court concluded: "Gibson's unsupported accusation that trial counsel felt pressure to keep the cost of expenses for his defense down is not supported at any point in the record and is wholly insufficient to demonstrate an actual conflict of interest." *Id.*

And with respect to his failure-to-adequately-investigate claim, Gibson relied on the testimony of an expert in addiction psychiatry, Dr. Andrew Chambers. 19-8904 Pet. App. B at 31–32. Chambers disagreed with the two experts Biggs had hired, looked at Gibson's MRI, and opined that Gibson had suffered "a possible traumatic brain injury." 19-8904 Pet. App. A at 20. The post-conviction court, however, found

that a difference of expert opinion was insufficient to establish deficient performance: "To the extent Dr. Chambers disagrees with [the two trial experts], such disagreement does not establish ineffective assistance of counsel." 19-8904 Pet. App. B at 32. The post-conviction court emphasized that Biggs "consulted multiple doctors and mental health professionals, none of which Petitioner Gibson challenges as not having the appropriate experience, education or background." *Id.*

Ultimately, the post-conviction court rejected all of Gibson's claims. *Id.* Gibson appealed the denials of relief in both the Whitis and Kirk cases to the Indiana Supreme Court, which issued a single decision affirming the decisions below. 19-8903 Pet. App. A at 5.*

Regarding Gibson's conflict-of-interest claim, the Indiana Supreme Court rejected the idea that "[e]ffective legal representation in a resource-consuming capital case . . . stands irreconcilably at odds with trial counsel's duty, as Chief Public Defender, to ensure the efficient administration of public funds." *Id.* at 33. Noting that this Court has "question[ed] the propriety of extending the [*Sullivan*] standard beyond multiple-representation conflicts," *id.* at 35 (citing *Mickens v. Taylor*, 535 U.S. 162, 175–76 (2002)), the Indiana Supreme Court gave three reasons for declining to apply what the Court in *Strickland* referred to as the "limited, presumption of prejudice" set forth in *Sullivan*. *Strickland v. Washington*, 466 U.S. 668, 692 (1984) (citing

* Gibson's appeal of the post-conviction court's denial of relief in the Hodella murder case was filed in the Court of Appeals of Indiana because his sentence was a term of years. That court affirmed, Gibson's petition to transfer to the Indiana Supreme Court was denied, and he did not seek this Court's review. Pet. App. A at 5; *Gibson v. State*, No. 22A01-1711-PC-2528 (Ind. Ct. App. July 16, 2018) (mem.), *trans. denied* (accessible at https://www.in.gov/judiciary/opinions/pdf/07161801rra.pdf).

Sullivan, 446 U.S. at 345–50). First, it observed that if courts applied the *Sullivan* standard "to every case involving similar claims, the exception would effectively swallow the *Strickland* rule." 19-8903 Pet. App. at 36 (citing *Beets v. Scott*, 65 F.3d 1258, 1297 (5th Cir. 1995)). Second, it noted that it had previously refused to apply *Sullivan* to claims based on a public defender office's limited resources. *Id.* (citing *Brown v. State*, 698 N.E.2d 1132, 1145, 1145 n.17 (Ind. 1998); *Johnson v. State*, 693 N.E.2d 941, 953 (Ind. 1998)). And third, it pointed out that "regardless of the financial burden imposed on the county, trial counsel's undivided loyalty remained with Gibson." *Id.* Accordingly, the Indiana Supreme Court applied ordinary *Strickland* analysis to Gibson's claim and found—"[b]ased on the actual expenditures in representing Gibson and the employment of co-counsel, an investigator, a mitigation specialist, experts, and other consultants"—"neither deficient performance nor prejudice." *Id.* at 37–38.

With respect to Gibson's failure-to-adequately-investigate claim, the Indiana Supreme Court found neither deficient performance nor prejudice under *Strickland*. As to deficient performance, it explained that Gibson presented "no evidence that the experts at trial received inadequate information to conduct their analyses or to form their opinions"; that "there [was] nothing to conclusively establish the existence" of a TBI, particularly in light of Gibson's post-conviction expert acknowledging that Gibson may not have suffered a TBI at all; and that "trial counsel had no reason to question the qualifications of the experts he employed." *Id.* at 21–22. As for prejudice, it concluded that "a few more tidbits from the past or one more diagnosis of mental illness on the scale would not have tipped it in [Gibson's] favor," especially in light of

Gibson's horrific criminal history—he "committed three murders in the span of about a decade, two he committed while on probation and which included extremely violent sexual assaults, and one which involved dismemberment." *Id.* at 23.

REASONS TO DENY THE PETITIONS

The Court should deny both the petitions. Neither petition identifies a lower-court split on a question of national importance. Both petitions simply ask the Court to reconsider factual findings made by the state courts below. And this Court is a "'court of law, . . . rather than a court for correction of errors in fact finding,'" and does not exercise its certiorari jurisdiction to second-guess state courts' factual determinations. *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 841 (1996) (quoting *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949)); *see also United States v. Johnston*, 268 U.S. 220, 227 (1925).

First, this case is a poor vehicle to decide whether *Sullivan* should be extended beyond multiple-representation cases to apply whenever the head of a public defender's office represents a defendant in a capital case. There is no lower-court split on that question and its resolution would not help Gibson in any event—for even if he were relieved of the burden to prove prejudice, Gibson's claim would still fail because he has failed to prove any deficient performance caused by the alleged conflict of interest. After all, his counsel testified that cost was not an issue, that no bills went unpaid, and that no pressure was asserted on him to keep expenses down. Gibson's attempt to undermine the state courts' factual findings is nothing more than a request for this Court to reweigh the evidence. It should not do so.

Second, Gibson's failure-to-adequately-investigate claim is even less appropriate for the Court's consideration. He identifies no disputed legal question and merely asks the Court to reconsider evidentiary arguments the state courts rejected below. The Court does not grant writs of certiorari to reconsider state courts' resolution of such factbound questions, much less questions the state courts answered correctly. Gibson's petitions should be denied.

ARGUMENT

I. The conflict-of-interest question Gibson asks the Court to answer is neither the subject of a lower-court split nor squarely presented here

1. The Court has long held that the Sixth Amendment confers upon criminal defendants a right to the assistance of counsel—a right accorded "'not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial.'" *Mickens v. Taylor*, 535 U.S. 162, 166 (2002) (quoting *United States v. Cronic*, 466 U.S. 648, 658 (1984)). For this reason, "defects in assistance that have no probable effect upon the trial's outcome do not establish a constitutional violation. As a general matter, a defendant alleging a Sixth Amendment violation must demonstrate 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id.* (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)).

The Court has held, however, that "'a defendant who shows that a conflict of interest *actually affected the adequacy of his representation* need not demonstrate prejudice in order to obtain relief.'" *Id.* at 171 (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 349–350 (1980)) (emphasis in original). The Court has applied this rule in just

one context—where a defendant's counsel concurrently represented multiple defendants with conflicting interests. *Id.* at 175 (noting that *Sullivan* "stressed the high probability of prejudice arising from multiple concurrent representation, and the difficulty of proving that prejudice"). And while the lower courts have applied *Sullivan*'s presumed-prejudice rule in other conflict-of-interest contexts—such as where "there is a conflict rooted in counsel's obligations to *former* clients," *id.* at 174 (emphasis in original)—the Court has emphasized "that the language of *Sullivan* itself does not clearly establish, or indeed even support, such expansive application," *id.* at 175.

Here, Gibson asks the Court to expand *Sullivan* well beyond cases of clear conflicting interests. He urges the Court to prohibit public defenders with authority over their office's budgets—who will often be those attorneys with the most extensive litigation experience—from ever representing defendants in capital cases. 19-8903 Pet. at 20. Whether *Sullivan* should be so greatly expanded, however, is not a disputed question. As noted, the Court itself has said *Sullivan* does not support the sort of expansive application Gibson seeks. *Mickens*, 535 U.S. at 175. And Gibson does not even attempt to identify a single other state or federal court that has reached a conclusion different from the Indiana Supreme Court's answer to this question. *See* Sup. Ct. R. 10. There is thus no need for the Court to consider it.

2. In addition, the Court has reiterated that, in order to avoid *Strickland*'s prejudice requirement, a defendant must demonstrate that the asserted conflict of interest actually "affected counsel's performance." *Mickens*, 535 U.S. at 172 n. 5; *see also id.* ("An 'actual conflict,' for Sixth Amendment purposes, is a conflict of interest

that adversely affects counsel's performance."). In other words, before any conflict-of-interest claim can be won, the defendant must demonstrate that the conflict caused deficient performance under *Strickland*. *Id.* at 174–75. And Gibson did not—and cannot—make that showing, which makes this case a poor vehicle to decide the reach of *Sullivan*'s presumed-prejudice rule in any event.

The Indiana Supreme Court analyzed all of Gibson's numerous claims of ineffectiveness and concluded that counsel was not deficient in any regard. In this Court, Gibson complains about the timing of Biggs's hiring of a mental-health expert, but in no way connects that allegedly derelict timing to the expert's performance at trial. This expert had enough time to review numerous documents and records, interview Gibson, interview Gibson's sisters, and conduct a "full battery of neuropsychological testing." 19-8903 Pet. App. B at 18. And this expert determined that "Gibson was in the near normal range and had no evidence of any major cognitive impairment, an average IQ, suffered from Bi-polar disorder and self-medicated with significant alcohol use." *Id.*

The only adverse impact Gibson so much as asserts here is that the jury was not presented with evidence that he may have suffered a TBI 20 years before he murdered Whitis. 19-8903 Pet. at 22–23. Yet this argument rests on a false factual premise. As the Indiana Supreme Court held: "[T]here's nothing to *conclusively* establish the existence of a TBI." 19-8903 Pet. App. A at 21 (emphasis in original). While Gibson's post-conviction expert raised the possibility that he suffered a TBI, such a factual battle was already fought in state court, and Gibson persuaded no one. *Id.* at 21–

23. Absent a factual predicate for his claim, his case fails to present any legal question for the Court to resolve. The Court should deny the petition in case number 19-8903.

II. Gibson's failure-to-adequately-investigate claim does not raise a question of law and was properly rejected by the state courts below

Gibson's petition in the Kirk murder case (case number 19-8904) is even less worthy of review. It does not ask the Court to resolve any question of law, but merely urges the Court to reweigh the evidence and decide Gibson's case differently. Gibson simply faults the Indiana Supreme Court for not crediting his post-conviction evidence about a potential TBI he potentially suffered. Such factual second-guessing does not warrant the Court's consideration.

First, Gibson presents no substantial question of law and does not identify how the state court's analysis diverges from well-settled law. He merely urges the Court to agree with his version of the facts and legal analysis. The Court, however, does not and should not grant review unless a petitioner presents "compelling reasons" or shows some type of conflict between decisions of state high courts or federal appellate courts. Sup. Ct. R. 10; *see Braxton v. United States*, 500 U.S. 344, 347 (1991) ("A principal purpose for which we use our certiorari jurisdiction . . . is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law."). With no substantial question of federal law at stake or disagreement among the lower courts, the Court's review is unwarranted.

Second, the only issue Gibson truly raises is whether his counsel was ineffective for failing to further investigate a brain-injury mitigation strategy. The Indiana Supreme Court's rejection of this claim rested, in part, on a factual finding: "[W]hile

evidence of brain damage resulting in impulsive, violent behavior is certainly relevant to a defendant's moral culpability, there's nothing to *conclusively* establish the existence of a TBI" in Gibson's case. 19-8904 Pet. App. A at 21 (citing *Porter v. McCollum*, 558 U.S. 30, 41 (2009)) (emphasis in original). Gibson may disagree with this conclusion, but he has lost that factual battle and does not even now offer any reason to doubt the correctness of the state courts' findings.

Third, accepting Gibson's theory would require the Court to hold that the Sixth Amendment does not permit defense counsel to rely on the professional judgment of hired medical experts. Biggs employed a neurologist to investigate a potential brain-injury mitigation theory. 19-8903 Pet. App. A at 18. That qualified expert reviewed an MRI of Gibson's brain and found no evidence of brain damage sufficient to explain Gibson's gruesome acts. *Id.* at 19. For Gibson's claim to be successful, this Court would have to hold that the Sixth Amendment requires counsel always to obtain an expert willing to render a favorable opinion on every potential mitigation theory. Not only does the Constitution not require such action, the Court's decisions have long recognized that effective advocates will *not* do so: "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable . . . In other words, 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, 690–91 (1984).

Indeed, here the reasonableness of Biggs's decision is reinforced by the fact that he hired a neuropsychologist who performed a "full battery of neuropsychological

testing" and found "no evidence of any major cognitive impairment." 19-8903 Pet. App. B at 18. This is a paradigmatic example of counsel making a reasonable decision after adequately investigating a possible line of argument. "This is not a case in which the defendant's attorneys failed to act while potentially powerful mitigating evidence stared them in the face, or would have been apparent from documents any reasonable attorney would have obtained." *Bobby v. Van Hook*, 558 U.S. 4, 11 (2009) (per curiam). On the contrary, Gibson's case is one, like many of the Court's prior cases, "in which defense counsel's decision not to seek more mitigating evidence from the defendant's background than was already in hand fell well within the range of professionally reasonable judgments." *Id.* at 11–12 (internal quotation marks and citation omitted).

The petition in case number 19-8904 presents no important question of federal law, much less one on which the lower courts are divided. It should be denied.

CONCLUSION

The petitions for writ of certiorari should be denied.

Respectfully submitted,

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