No. _____

In The
Supreme Court of the United States

JAMES BURKHART,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Under *Cuyler v. Sullivan*, 446 U.S. 335 (1980), to establish a Sixth Amendment violation, a defendant must prove that his lawyer had an "actual conflict," which means a conflict that "adversely affected" his lawyer's performance. In the 42 years since *Cuyler* was decided, the Court has never explained ***how*** a defendant shows such an adverse effect. The first question presented is whether the Seventh Circuit's formulation of the adverse effect standard—which focuses on the execution of strategies and tactics rather than the lawyer's overall performance—is too demanding a burden, particularly in the guilty plea context.

2. In *Machibroda v. United States*, 368 U.S. 487 (1962), this Court held that 28 U.S.C. § 2255 requires courts to grant hearings to those who make specific and detailed factual allegations that, even if improbable, would entitle them to relief if true. The second question presented is whether a defendant is entitled to an evidentiary hearing under 28 U.S.C. § 2255 to resolve his claim under *Cuyler* where the petitioner establishes his trial counsel had a conflict of interest and seeks to prove the conflict "adversely affected" his counsel's performance.

PARTIES TO THE PROCEEDING

Petitioner James Burkhart was the petitioner in the district court proceedings and appellant in the court of appeals proceedings.

RELATED CASES

- *United States v. Burkhart*, Case No. 1:16-CR-00212-TWP-TAB
- *Burkhart v. United States,* Case No. 1:18-CV-04013-TWP-DLP
- *Burkhart v. United States*, 27 F.4th 1289 (7th Cir. 2022), U.S. Court of Appeals for the Seventh Circuit. Judgment entered on March 7, 2022
- *Burkhart v. United States*, No. 21-2009, U.S. Court of Appeals for the Seventh Circuit. Judgment entered on June 16, 2022.

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PETITION FOR A WRIT OF CERTIORARI

James Burkhart petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The decision of the Seventh Circuit (Pet. App. 1-20) is reported at 27 F.4th 1289 (7th Cir. 2022). The decision of the Seventh Circuit on Petitioner's Petition for Rehearing and Suggestion for Rehearing *En Banc* (Pet. App. 49-50) is unreported. The district court's order regarding Petitioner's motion to vacate his conviction under 28 U.S.C. § 2255 (Pet. App. 21-48) is unreported.

JURISDICTION

The decision of the Seventh Circuit on Petitioner's appeal was entered on March 7, 2022. The final judgment of the Seventh Circuit on the Petition for Rehearing and Suggestion for Rehearing *En Banc* was entered on June 16, 2022. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

There are two provisions involved. First, the Sixth Amendment to the United States constitution. It reads,

in relevant part, that "the accused shall enjoy the right . . . to have assistance of counsel for his defense." Second, 28 U.S.C. § 2255(b), which states that "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall . . . grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto."

INTRODUCTION

From 2003 through 2021, a law firm and at least fourteen of its lawyers represented a hospital in a variety of matters, including defending a federal *qui tam* lawsuit alleging that the hospital and its CEO committed Medicaid fraud. From September 2015 through 2018, that same law firm and those same lawyers represented a criminal defendant charged with defrauding that same hospital and CEO as part of a health fraud scheme. That defendant, Mr. James Burkhart, eventually pled guilty.

After he was sentenced, Burkhart discovered the conflict and moved to vacate his conviction pursuant to 28 U.S.C. § 2255. Burkhart argued that his lawyers had an actual conflict (i.e., a conflict that adversely affected their performance). In his petition, which was supported by a sworn declaration, he outlined the myriad ways that his lawyers had pulled punches or neglected to advise him of tactics and strategies that might "hurt" their other client, his alleged victim. In

connection with his petition, Burkhart asked the court to hold an evidentiary hearing.

The district court denied Burkhart's habeas petition. Although agreeing that the law firm had a conflict that Burkhart had never waived, the court held that the law firm and lawyers' representation of both him and his alleged victim did not adversely affect their representation of him. The district court also declined to hold an evidentiary hearing. Burkhart appealed, arguing that the district court had erred in both failing to find an adverse effect and refusing to hold an evidentiary hearing. On appeal, the Seventh Circuit affirmed.

Burkhart asks this Court to grant his petition for a writ of certiorari for two reasons.

First, when affirming the denial of Burkhart's habeas petition, the Seventh Circuit applied the "adverse effect" standard set out by this Court in *Cuyler v. Sullivan*. There, this Court said that a defendant need only prove that the conflict adversely affected the lawyer's performance. That standard is being misinterpreted by lower courts, including the Seventh Circuit. Specifically, courts are holding criminal defendants to a virtually impossible standard, demanding they identify alternative trial "strategies" and "tactics" that were objectively superior to the ones chosen by conflicted counsel. This standard is particularly ill suited in the guilty plea context, where the focus on alternative strategies or tactics makes little sense.

Second, the district court's denial of an evidentiary hearing—and the Seventh Circuit's affirmance of that denial—so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power. Under 28 U.S.C. § 2255, a court must hold an evidentiary hearing if the movant alleges facts that, if proven to be true, would entitle him to relief. 28 U.S.C. § 2255(b). A hearing is not required, however, "if the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255(b). On this record, the district court's denial of an evidentiary hearing was indefensible. Burkhart identified fourteen lawyers from Barnes & Thornburg who had represented both him and his alleged victim. Worse yet, to this day, Barnes & Thornburg has refused to disclose the precise nature of their representation of his alleged victim (a hospital), producing redacted time entries from a prior case in which they defended the hospital and its CEO against allegations they committed Medicaid fraud. Until an evidentiary hearing is held, there is no way to know what punches Barnes & Thornburg pulled when defending Burkhart.

STATEMENT OF THE CASE

A. Background

On October 4, 2016, the government indicted Burkhart and others, charging them with various federal financial crimes arising out of their business

dealings with Health and Hospital Corporation, a hospital system. The government's theory was that Burkhart and others had conspired to and did overcharge Health and Hospital Corporation for various goods and services. *See* Sealed Indictment [D.E. 1] (Oct. 4, 2016). Burkhart hired Barnes & Thornburg LLP to defend him.

While Barnes & Thornburg was representing Burkhart, it was simultaneously representing his alleged victim, Health and Hospital Corporation. Barnes & Thornburg's attorney-client relationship with Health and Hospital Corporation dates back to at least 2003 and extends through today. The law firm's representation of Burkhart's victim included its 2003 defense of Health and Hospital Corporation as well as its then CEO, Matthew Gutwein, in a lawsuit alleging they violated the False Claims Act by creating false or fraudulent records and claims. *See* Compl., United States ex rel. Black v. Health & Hospital Corp. of Marion Cty., 1:03-cv-01599-DFH-TAB [D.E. 1] (S.D. Ind. Oct. 20, 2003) ("Black v. HHC"). Altogether, ***fourteen*** of Burkhart's lawyers represented both Burkhart and Health and Hospital Corporation.

Ultimately, Burkhart pled guilty and was sentenced. After discovering the conflict, he filed a habeas corpus petition, arguing that his law firm's simultaneous representation of him and his alleged victim was an "actual conflict" that adversely affected the firm's representation of him.

B. Burkhart identifies various adverse effects.

Both at the trial and appellate level, Burkhart argued that, because of the conflict, Barnes & Thornburg failed to advise him about various trial strategies he could deploy against Health and Hospital Corporation and Gutwein were he to go to trial. Chief among these was the ability to attack Health and Hospital Corporation and Gutwein for their own fraudulent conduct.

By way of background, Barnes & Thornburg knew that its other clients—Health and Hospital Corporation and Gutwein—had engaged in a facially deceptive and potentially criminal financial scheme. Specifically, they had agreed to pay inflated rents to an entity named Formation Capital to conceal who was paying Burkhart's fee for serving as a "puttee" with respect to certain nursing facilities (i.e., the person who would take over ownership of the nursing facilities at a moment's notice). Not only was this financial scheme deceptive, it would have resulted in Health and Hospital Corporation submitting false cost reports to Indiana Medicaid, reports that lied about the true cost of nursing facility rents.

Had the case gone to trial, Barnes & Thornburg could have leveraged this evidence—classic Federal Rule of Evidence 608(b) impeachment evidence—to do many things, including (1) to help prove Burkhart's *mens rea* defense (if Health and Hospital Corporation was comfortable with the Formation Capital financial arrangement, it could hardly cry foul at Burkhart having a financial interest in vendors) and (2) to undermine jury sympathy for the hospital (an entity the

government was portraying as an innocent victim). Instead, Barnes & Thornburg undisputedly did not advise Burkhart of how he could leverage this evidence.

C. Burkhart identifies facts that need vetting at an evidentiary hearing.

In addition to identifying how his attorneys' conflict adversely affected their representation of him, Burkhart moved for an evidentiary hearing. He identified multiple grounds for such a hearing.

1. Defense counsel refuses to disclose the nature of its prior representation of his alleged victim.

Two of the lawyers who represented both Burkhart and Health and Hospital Corporation were Larry Mackey and Harold Bickham. Back in 2003, Mackey and Bickham defended the hospital and its then CEO, Matthew Gutwein, from a lawsuit alleging they violated the False Claims Act by creating false or fraudulent records and claims.

In representing Health and Hospital Corporation in connection with the *Black* litigation, both Mackey and Bickham offered privileged, confidential advice to the hospital/Gutwein and had privileged, confidential communications with the hospital/Gutwein. To this day, Barnes & Thornburg has refused to share with Burkhart the substance of these communications. The following (and redacted) timesheet entries, which Burkhart attached in his briefing to the trial court, are merely illustrative:

THE HEALTH & HOSPITAL CORPORATION OF MARION	Government Subpoenas re Black Case	03/25/05	Mackey, Larry A.	1.1	396.00	1.1	396.00	05/24/05	Telephone conversation with Matt Gutwein regarding [redacted]; telephone conversation with AUSA Christina McKee, Criminal Chief, regarding response to OIG subpoena; reviewed [redacted]; prepared email to Matt Gutwein regarding [redacted].	Attorney Client/ Work Product
THE HEALTH & HOSPITAL CORPORATION OF MARION	United States ex rel. Paul R. Black v. HHC United States District Court, Southern District of IN Case No. 1:03-cv-01599	05/15/06	Bickham, Harold R.	2.4	708.00	2.4	708.00	06/30/06	Reviewed, analyzed and edited [redacted]; had conference call with legal team and Matt Gutwein to discuss [redacted]; reviewed and analyzed [redacted]; sent e-mail to legal team regarding [redacted].	Attorney Client/ Work Product
THE HEALTH & HOSPITAL CORPORATION OF MARION	United States ex rel. Paul R. Black v. HHC United States District Court, Southern District of IN Case No. 1:03-cv-01599	10/09/09	Bickham, Harold R.	1.7	637.50	1.7	637.50	11/30/09	Completed drafting of [redacted] for Larry Mackey [redacted].	Work Product

2. Mackey tells Burkhart he is "glad" that Burkhart pled guilty because that meant his other client's "exposure" had gone away.

After Burkhart pled guilty and was sentenced in this case, he met with Mackey. Burkhart covertly recorded the meeting. During the meeting, Burkhart raised Health and Hospital Corporation's potentially improper use of a federal reimbursement program known as the Upper Payment Limit-Intergovernmental Transfer Program, or UPL-IGT.

By way of background, the UPL-IGT program is intended to help government-run hospitals avoid losses when they service persons covered by Medicaid, a government-funded health insurance program for low-income individuals who cannot afford to pay for healthcare services. The general concept is that hospitals lose money on Medicaid patients, and the UPL-IGT program is intended to help cover or limit those losses. *See United States ex rel. Black v. Health & Hosp. Corp. of Marion Cty.*, No. CIV.A. RDB-08-0390, 2011 WL 1161737, at *2 (D. Md. Mar. 28, 2011) ("These UPL regulations allow states to reimburse hospitals, nursing homes, and other providers for uncompensated care."). As Burkhart was prepared to demonstrate at a future trial, however, because Health and Hospital Corporation ran such a fiscally efficient long-term care operation between 2003 and 2015, it was technically ineligible for the UPL-IGT program. In other words, it did not need UPL-IGT money to cover losses on Medicaid patients and did not use those funds on those

patients. Nevertheless, between 2003 and 2015, Health and Hospital Corporation collected hundreds of millions of dollars in UPL-IGT reimbursement.

During his recorded conversation with Mackey, Burkhart noted that, if there had been a trial in this case, there would have been questions asked about the hospital's use of the UPL-IGT money. Mackey agreed. The exchange, captured in a transcript that Burkhart attached to his trial court brief, was as follows:

> **Burkhart**: They would have. There would have been some serious questions asked –
>
> **Mackey**: Yeah, yeah.
>
> **Burkhart**: – in the public's eye.
>
> **Mackey**: Yeah, right.
>
> **Burkhart**: Okay, Health and Hospital Corp, what did you do with the f***ing money?
>
> **Mackey**: Exactly. Where is it?

SA936 at 5:25-6:7.

Following this exchange, Mackey called the hospital's (i.e., his other client's) use of the UPL-IGT program a "scam." *Id.* at 6:13. When Mackey later noted that Health and Hospital Corporation was "aware of the political risk" Burkhart's criminal case had posed to it, the two had the following exchange:

> **Burkhart**: I guess [Health and Hospital Corporation's] exposure has gone away unless . . . unless there's been a lawsuit.

> **Mackey**: Lawsuit.
>
> **Burkhart**: Yeah. (inaudible).
>
> **Mackey**: As far as I'm concerned, I'm glad, you know.

Id. at 9:4-9.

To sum up, Burkhart's primary defense lawyer, Mackey, had previously represented his alleged victim in connection with a whistleblower lawsuit attacking the hospital's use of the UPL-IGT program. Mackey had concluded that the hospital's use of the program was a "scam" and that the hospital was aware of the "political risk" associated with Burkhart's criminal case. When Burkhart observed (1) that, had there been a trial, there would have been "serious questions" asked about the program and (2) that the hospital's "exposure has gone away," Mackey not only agreed, but said that he was "glad."

D. The Seventh Circuit's Decision

On March 7, 2022, the Seventh Circuit affirmed the trial court's denial of Burkhart's habeas petition and his request for an evidentiary hearing. *Burkhart v. United States*, 27 F.4th 1289 (7th Cir. 2022). App. 2.

With respect to Burkhart's Sixth Amendment claim, the Seventh Circuit held that Burkhart had failed to establish an "adverse effect." App. 18. The court agreed with the district court that Barnes & Thornburg had a conflict of interest, noting that "[t]he question" was "not close." App. 10. Yet, despite the

Seventh Circuit's recognition of the obviousness of the conflict, the court held that Burkhart had failed to identify an adverse effect. The Seventh Circuit formulated the "test" for adverse effect as requiring Burkhart to identify "specific instances where [his] attorney could have, ***and would have***, done something different." *Id.* (emphasis added) (citation and internal quotation marks omitted). Although Burkhart had identified a number of things any competent, unconflicted defense lawyer would have done—including simply ***advising*** Burkhart about his ability to impeach Health and Hospital Corporation/Gutwein with their own prior deceptive conduct—the Seventh Circuit dismissed such a strategy as "implausible," noting that it could have backfired at a future trial. App. 15-16.

With respect to Burkhart's request for an evidentiary hearing, the Seventh Circuit noted that "[a] district court has the discretion to deny a habeas petitioner an evidentiary hearing if the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, 28 U.S.C. § 2255(b), or if the petitioner makes conclusory or speculative allegations rather than specific factual allegations." App. 19. The Seventh Circuit held that both criteria were satisfied here. *Id.* In so ruling, the panel did not discuss Barnes & Thornburg's refusal to disclose the substance of their prior advice to Health and Hospital Corporation/Gutwein, the redacted time entries it had produced in discovery, or Mackey's recorded statement in which he said he was "glad" Burkhart pled guilty

because it meant Health and Hospital Corporation's exposure had gone away.

REASONS FOR GRANTING THE PETITION

The Court should grant certiorari for two independent reasons. First, the *Cuyler* standard is being misinterpreted by lower courts, including the Seventh Circuit. According to the Seventh Circuit's formulation of the standard, a defendant is required to establish that an unconflicted lawyer would have pursued objectively superior defense strategies. The result is that it is virtually impossible for defendants who plead guilty to establish Sixth Amendment violations. Second, the Seventh Circuit's affirmance of the trial court's denial of an evidentiary hearing so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

I. The *Cuyler* standard is being misinterpreted by lower courts, including the Seventh Circuit

Under the Sixth Amendment to the United States Constitution, a defendant in a criminal case has the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). This includes a "right to representation that is free from conflicts of interest." *Wood v. Georgia*, 450 U.S. 261, 271 (1981). Where there is an actual conflict, the defendant is entitled to relief under 28 U.S.C. § 2255. *See Mickens v.*

Taylor, 535 U.S. 162 (2002). An "actual conflict" is a "conflict [that] adversely affected counsel's performance." *Id.* at 174.

In *Cuyler*, this Court held that, to establish a violation of the Sixth Amendment, a defendant must "demonstrate that an actual conflict of interest adversely affected his lawyer's performance." 446 U.S. at 348. Critically, though, this "adverse effect" standard is different (and more defendant-friendly) than the standard in *Strickland v. Washington*, 466 U.S. 668, 694 (1984). *See Mickens v. Taylor*, 535 U.S. 162, 166 (2002). Specifically, under the *Strickland* standard, a defendant has to meet both a performance prong ***and*** a prejudice prong. *Strickland*, 466 U.S. at 687. With respect to performance, the defendant must prove that his lawyer's performance was objectively unreasonable. *Id.* at 688 ("[T]he defendant must show that counsel's representation fell below an objective standard of reasonableness."). With respect to prejudice, a defendant must prove that the lawyer's objectively unreasonable performance affected the outcome of this case. *Id.* ("The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.").

Although *Cuyler's* adverse effect standard is certainly less demanding than the *Strickland* standard—something all lower courts understand—what kind of showing it requires is less clear. In the 42 years since *Cuyler* was decided, the Court has yet to clarify precisely ***how*** a criminal defendant establishes an

adverse effect. The lower courts are conflicted about it. *Eisemann v. Herbert*, 401 F.3d 102, 107 (2d Cir. 2005) ("The circuits are divided as to how a defendant may demonstrate that a conflict adversely affected his counsel's performance."); *McFarland v. Yukins*, 356 F.3d 688, 706 (6th Cir. 2004) (acknowledging conflict).

The result is a hodge-podge of formulations from the various circuit courts. Generally speaking, these "tests" say that a defendant proves an adverse effect by showing that a hypothetical unconflicted lawyer would have pursued a "plausible" alternative strategy or defense tactic.

In number circuit order, here are the formulations. *United States v. Simon*, 12 F.4th 1, 53 (1st Cir. 2021) ("Such a showing requires a demonstration that (1) the lawyer could have pursued a plausible alternative defense strategy or tactic and (2) the alternative strategy or tactic was inherently in conflict with or not undertaken due to the attorney's other interests or loyalties.") (citations omitted); *United States v. Rivernider*, 828 F.3d 91, 109 (2d Cir. 2016) ("The defendant thus need only prove that some plausible alternative defense strategy or tactic might have been pursued.") (citation omitted); *United States v. Gambino*, 864 F.2d 1064, 1070–71 (3d Cir. 1988) ("Clearly, a defendant who establishes that his attorney rejected a plausible defense because it conflicted with the interests of another client establishes not only an actual conflict but the adverse effects of it."); *Woodfolk v. Maynard*, 857 F.3d 531, 553 (4th Cir. 2017) ("We have articulated a three-part standard for demonstrating adverse effect, which

requires the defendant to (1) identify a plausible alternative defense strategy or tactic that his defense counsel might have pursued, (2) show that this strategy was objectively reasonable under the facts of the case known to the attorney at the time, and (3) show that the defense counsel's failure to pursue that strategy or tactic was linked to the actual conflict.") (citation and internal quotation marks omitted); *United States v. Palacios*, 928 F.3d 450, 455 (5th Cir. 2019) ("An [a]dverse effect may be established with evidence that some plausible alternative defense strategy or tactic could have been pursued, but was not because of the actual conflict impairing counsel's performance.") (citation and internal quotation marks omitted); *McFarland v. Yukins*, 356 F.3d 688, 707 (6th Cir. 2004) ("[W]here counsel fails to pursue a strong and obvious defense, when pursuit of that defense would have inculpated counsel's other client, and where there is no countervailing benefit to the defendant from foregoing [sic] that defense or other explanation for counsel's conduct, these facts amount to evidence of disloyalty under any interpretation of *Sullivan*."); *United States v. Grayson Enterprises, Inc.*, 950 F.3d 386, 399 (7th Cir. 2020) ("For there to be an adverse effect under *Sullivan*, however, Grayson must prove that this abandoned defense presented a plausible alternative to the strategy actually pursued at trial.") (citation omitted); *Morelos v. United States*, 709 F.3d 1246, 1252 (8th Cir. 2013) ("To prove a conflict produced an adverse effect, a defendant must identify a plausible alternative defense strategy or tactic that defense counsel might have pursued, show that the alternative strategy was objectively reasonable

under the facts of the case, and establish that the defense counsel's failure to pursue that strategy or tactic was linked to the actual conflict.") (citations and internal quotation marks omitted); *Noguera v. Davis*, 5 F.4th 1020, 1037 (9th Cir. 2021) ("To make this showing, [the petitioner] must demonstrate that some plausible alternative defense strategy or tactic might have been pursued but was not and that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests.") (citations and internal quotation marks omitted); *United States v. Bowie*, 892 F.2d 1494, 1500 (10th Cir. 1990) ("We hold that defense counsel's performance was adversely affected by an actual conflict of interest if a specific and seemingly valid or genuine alternative strategy or tactic was available to defense counsel, but it was inherently in conflict with his duties to others or to his own personal interests."); *Tuomi v. Sec'y, Fla. Dep't of Corr.*, 980 F.3d 787, 796 (11th Cir. 2020) ("To prove adverse effect, a habeas corpus petitioner must show: (1) the existence of a plausible alternative defense strategy or tactic that might have been pursued; (2) that the alternative strategy or tactic was reasonable under the facts; and (3) a link between the actual conflict and the decision to forgo the alternative strategy of defense.") (citation and internal quotation marks omitted).

Putting aside that these formulations amount to sheer guesswork because of the absence of guidance from this Court, courts are applying them in a way that renders the Sixth Amendment right to unconflicted

counsel meaningless. This is particularly true in the guilty plea context, where the focus on "alternative strategies or tactics" makes little sense.

The instant case—which involves a defendant who pled guilty—proves the need for more concrete guidance from this Court as to the meaning of adverse effect. According to the Seventh Circuit, for a defendant to establish an adverse effect, he must "show specific instances where [unconflicted] counsel both could have ***and would have*** pursued an alternative strategy." *Burkhart*, 27 F.4th at 1296 (emphasis added). So, according to the Seventh Circuit, a criminal defendant has to do more than prove that an alternative defense strategy ***existed*** (i.e., the "could have" inquiry). Specifically, he has to prove that the alternative defense strategy was ***superior*** to the one actually pursued (the "would have" inquiry). Put another way, the criminal defendant has to prove that a hypothetical unconflicted lawyer would have chosen a hypothetical strategy ***over*** the actual strategy pursued by the conflicted lawyer. Formulating this as an objective standard, a defendant must prove that a hypothetical unconflicted lawyer would have performed ***objectively better*** than the actual conflicted lawyer.

Such a standard is completely untethered to *Cuyler*. In *Cuyler*, this Court focused broadly on the performance of the lawyer. And, of course, a criminal defense lawyer performs in ways beyond picking and choosing between strategy A, B, or C. Indeed, because nearly all criminal defendants plead guilty, a critical responsibility of the criminal defense lawyer is to

advise his client about whether to plead guilty or go to trial. And, in so doing, the criminal defense lawyer does not ***choose*** a strategy at all, but, rather, ***advises*** his client about potential defense strategies. Extending *Cuyler's* teachings to the guilty plea context, if an unconflicted lawyer would have advised his or her client about different defense strategies (i.e., if an unconflicted lawyer would have performed differently), there is an adverse effect. In other words, if a defendant can prove that his lawyer failed to present him with plausible (even if not objectively superior) strategies or tactics because of a conflict, that should suffice to establish an adverse effect.

The incongruity between the *Cuyler* standard and the standard articulated by the Seventh Circuit was outcome determinative here. The Seventh Circuit never defended defense counsel's failure to even ***advise*** Burkhart about the various defense strategies at his disposal, including, most prominently, the well-established criminal defense strategy of aggressively attacking the victim. To be sure, the Seventh Circuit defended the law firm's decision of not ***executing*** such a strategy, noting that, by advising Burkhart to plead guilty, "Barnes & Thornburg chose not to risk Burkhart throwing a boomerang at trial." App. 16. But, again, in the guilty plea context, it was not defense counsel's risk to take. It was Burkhart's. And failing to tell a client that he has the ability to impeach his victim with that victim's criminal acts is indefensible. After all, to use the Seventh Circuit's parlance, sometimes boomerangs actually hit their mark.

Certainly, lawyers can reasonably disagree about whether to ***execute*** high-risk/high-reward legal strategies like the Formation Capital impeachment strategy. What is inexcusable—and proof of adverse effect—is defense counsel's failure to even ***advise*** Burkhart about the strategy, including laying out its potential risks and rewards. It is that omission (an ***undisputed*** one) that constitutes an adverse effect here and, standing alone, required the vacation of Burkhart's conviction.

In sum, since *Cuyler*, this Court has not told lower courts how to apply the adverse effect standard. Left to their own devices, the circuits are saddling defendants with standards that are virtually impossible to satisfy, particularly in the context of guilty pleas. Guidance is needed.

II. The denial of an evidentiary hearing so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

Under 28 U.S.C. § 2255, the Court must hold an evidentiary hearing if the movant alleges facts that, if proven to be true, would entitle him to relief. 28 U.S.C. § 2255(b). A hearing is not required, however, "if the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255(b).

On this record, the Seventh Circuit's refusal to order an evidentiary hearing so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power. At the trial court level, Burkhart established the following facts, which are not in dispute:

- (1) During his criminal case, Burkhart was represented by the law firm Barnes & Thornburg;
- (2) Fourteen of that law firm's lawyers, including lead attorney Mackey, also represented Burkhart's alleged victim, Health and Hospital Corporation. The firm also represented a witness who was going to testify against Burkhart at trial, Health and Hospital Corporation's CEO Matthew Gutwein;
- (3) To this day, Barnes & Thornburg has refused to disclose the advice they previously provided to Health and Hospital Corporation and Gutwein in connection with a False Claims Act lawsuit brought against them, choosing instead to produce redacted time entries;
- (4) After Burkhart pled guilty in the criminal case, his lead attorney, Mackey, confirmed to Burkhart that he was "glad" that Burkhart's guilty plea meant that the hospital's "exposure has gone away."

In light of these undisputed facts, the Seventh Circuit's affirmance of the trial court's failure to order an evidentiary hearing constitutes error.

A. The files and records of the case are not conclusive.

Through his own investigative efforts and discovery in the habeas case, Burkhart established important issues of fact that required the trial court to hold an evidentiary hearing.

First, Burkhart produced a recording in which his lead counsel, Mackey, confirmed he was "glad" that Burkhart pled guilty because it meant that his other client's "exposure" had gone away.

Second, during the discovery phase of the habeas proceeding, Burkhart issued a subpoena to Barnes & Thornburg. In response to that subpoena, Burkhart discovered that fourteen Barnes & Thornburg lawyers had represented both him and his alleged victim. The government obtained sworn interrogatory responses from only one of these fourteen attorneys—Mackey. That is hardly the "conclusive" evidence required to deprive a habeas petitioner of an evidentiary hearing.

Third, and also during the discovery phase, Barnes & Thornburg produced ***redacted*** time entries from Mackey and Bickham regarding their prior representation of Burkhart's victim (Health and Hospital Corporation) and Gutwein (a putative government witness) in connection with a False Claims Act lawsuit that accused them both of fraud. To this day, Burkhart's lawyers have refused to disclose the substance of their advice to his alleged victim. Again, without understanding the substance of that advice, a holding that the record "conclusively demonstrate[s]

that the petition is entitled to no relief" is untenable. For example, it is possible that the firm was aware that Gutwein—slated to be a witness against Burkhart at Burkhart's trial—was the architect of a massive Medicare/Medicaid fraud scheme that could give rise to liability under the False Claims Act, if not federal criminal charges. Because it never held an evidentiary hearing, the trial court has no idea what defense counsel held back from Burkhart, much less whether it may have adversely affected its representation of him.

B. Burkhart's allegations were not speculative or conclusive.

Burkhart's allegations were neither speculative nor conclusive. Burkhart filed a forty-four page verified memorandum of law that detailed, in granular fashion, Barnes & Thornburg's conflict and the myriad ways that conflict adversely affected the firm's representation of him. Through discovery, Burkhart learned, for the first time, that a total of fourteen separate lawyers represented both him and his alleged victim and obtained the redacted time sheets outlined above. Burkhart established that his firm did not present him with various impeachment strategies and, to the contrary, told him that any cross-examination of Gutwein would need to be done with "kid gloves."

Of course, the Seventh Circuit held that the trial court did not abuse its discretion in failing to hold an evidentiary hearing. According to the Seventh Circuit,

(1) the discovery in the case "provided the district court with a sufficient basis to make informed findings on Burkhart's motion because it showed that Burkhart lacked evidence that Barnes & Thornburg's conflict had an adverse effect on his representation"; (2) "Burkhart took no steps to depose his former attorneys, despite having the ability to do so"; and (3) "the contemporaneous evidence aligns with Barnes & Thornburg's interrogatory responses." *Burkhart*, 27 F.4th at 1289.

As an initial matter, Burkhart could not have possibly deposed all fourteen of his former attorneys given that the Federal Rules of Civil Procedure limit parties to ten depositions, and habeas petitioners have to seek leave before even taking a single deposition. Fed. R. Civ. P. 30(a)(2); Rule 6, Rules Governing Section 2255 Proceedings. But, more importantly, Burkhart did not need to depose his attorneys because the existing record demanded an evidentiary hearing. In holding otherwise, the panel made no mention of Barnes & Thornburg's refusal to disclose their prior legal advice to Burkhart's victim and a putative government witness. They made no mention of Mackey's recorded statement in which he noted that he confirmed that he was "glad" that Burkhart pled guilty because it meant Health and Hospital Corporation's exposure had gone away. They made no mention of the fact that discovery had revealed that no less than fourteen of Burkhart's lawyers held what the trial court had characterized as a "conflict," but that the government had produced sworn interrogatory responses from only one of those

fourteen attorneys. In short, there is nothing "conclusive" about the files and records of this case. The Seventh Circuit affirmance of the denial of an evidentiary hearing in this case so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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