No. 18-640

IN THE

Supreme Court of the United States

NICHOLAS BERNARD ACKLIN,
Petitioner,

v.

ALABAMA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE ALABAMA COURT OF CRIMINAL APPEALS

BRIEF OF LEGAL ETHICS SCHOLARS AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

Amici curiae Bruce Green, Peter A. Joy, W. Bradley Wendel, and Ellen Yaroshefsky are law professors who teach and write about legal ethics and professional responsibility. Amici come together in this capital case because of their shared concern that the decision below misapprehends the nature of attorney conflicts of interest and incorrectly analyzes the conflict in this case in a manner that could have negative consequences in many contexts involving third-party fee arrangements—arrangements that are common and can be beneficial, but which carry inherent risks of undermining criminal defendants' Sixth Amendment rights. Amici agree that, for the reasons set forth in the petition and below, the Court should grant certiorari to provide needed guidance regarding these arrangements and their consequences under the Sixth Amendment.

SUMMARY OF ARGUMENT

Under ethics norms and rules of professional responsibility applicable across every jurisdiction, Nicholas Acklin's trial attorney labored under an acute and obvious conflict of interest that resulted in a denial of Acklin's Sixth Amendment rights. Two days before trial, Acklin's attorney, Behrouz Rahmati, discovered evidence he considered "critical" to the penalty phase

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[1] No counsel for a party authored this brief in whole or in part, and no entity or person other than amici or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to this Court's Rule 37.2(a), counsel of record for all parties received timely notice of amici's intent to file this brief at least 10 days prior to its due date. Letters from the parties consenting to the filing of this brief are on file with the Clerk.

of Acklin's capital case—that Acklin had suffered severe physical and emotional childhood abuse at the hands of his father, Theodis. Pet. App. 22a, 24a & n.8. Rahmati believed the evidence could provide a basis for the jury to show leniency in sentencing and that presenting it would be Acklin's best chance to avoid the death penalty. *Id.* But Rahmati also knew that presenting the evidence could hurt his own bottom line, because Theodis was paying Rahmati's fees. Pet. App. 19a. Rahmati consulted with Theodis, who instructed Rahmati in no uncertain terms that, if Rahmati introduced evidence of Theodis's abusive conduct, Theodis would be "'done helping with this case.'" Pet. App. 36a.

These circumstances created a textbook division of loyalties. Once the interests of the third party paying Rahmati's fees diverged from the interests of Rahmati's client, Rahmati had an incentive to advance the interests of the payor—both in his strategic decisions and in his advice to Acklin. Ethics rules unanimously required Rahmati to secure an alternative fee arrangement or obtain Acklin's informed consent to the conflict, or else seek to end the representation. None of those things occurred. Moreover, the conflict affected Rahmati's representation in several respects—including by tainting his consultation with Acklin as to whether to present the abuse evidence. When Acklin expressed his view on that major trial-strategy decision, he accordingly did so without the advice of unconflicted counsel, without any understanding of the conflict and how it might have affected his options or the advice he was receiving, and under threat of losing support for his defense just days before his capital trial began. Counsel thus operated under an "actual conflict" that "adversely affect[ed] [his] performance," in violation of Acklin's Sixth Amendment right to conflict-

free counsel. *Mickens* v. *Taylor*, 535 U.S. 162, 172 n.5 (2002); *see Wood* v. *Georgia*, 450 U.S. 261, 271 (1981); *Cuyler* v. *Sullivan*, 446 U.S. 335, 346 (1980).

In rejecting that claim, the Alabama Court of Criminal Appeals held that Rahmati faced no divided loyalties and there was no actual conflict because "the sole reason for [Rahmati]'s failure to introduce evidence of the alleged abuse was that Acklin expressly forbade [him] from doing so." Pet. App. 37a; *see also* Pet. App. 39a, 47a-48a. That analysis ignores that Acklin's decision to do so—even assuming it was Acklin's decision to make—was tainted by the advice of a conflicted attorney and rested on a misunderstanding of Theodis's role in strategic decision making. Under the Alabama courts' approach, so long as a defendant agrees to a particular trial strategy, his attorney's conflicts become irrelevant—even if those conflicts infected the defendant's decision. That approach contravenes precedent and threatens to weaken important protections for criminal defendants. The Court should grant review to ensure the proper and uniform application of the Sixth Amendment's guarantee of conflict-free counsel.

ARGUMENT

I. UNDER PREVAILING ETHICS RULES, TRIAL COUNSEL FACED A SEVERE AND UNDISCLOSED CONFLICT OF INTEREST

A. Prevailing Ethics Rules Prohibited Counsel From Representing Acklin Under A Third-Party Fee Arrangement That Gave Rise To A Conflict Of Interest Unless He Exercised Independent Judgment And Obtained Acklin's Informed Consent To The Conflict

Constitutionally effective assistance of counsel "entails certain basic duties" to the client, including "a duty of loyalty" and a corresponding "duty to avoid conflicts of interest." *Strickland* v. *Washington*, 466 U.S. 668, 688 (1984). The Sixth Amendment in turn "relies … on the legal profession's maintenance of standards" to give these duties content. *Id.* For constitutional purposes, "[t]he proper measure of attorney performance [of these duties] remains simply reasonableness under prevailing professional norms." *Id.*

Because this standard "is necessarily linked to the practice and expectations of the legal community," this Court "long ha[s] recognized that '[p]revailing norms of practice as reflected in American Bar Association standards and the like … are guides to determining what is reasonable … .'" *Padilla* v. *Kentucky*, 559 U.S. 356, 366 (2010) (last two alterations in original) (quoting *Strickland*, 466 U.S. at 688, and collecting cases). Particularly in the context of evaluating alleged conflicts of interest, the Court has regularly looked to prevailing norms of practice and professional responsibility. *See, e.g.*, *Wood* v. *Georgia*, 450 U.S. 261, 270-271 & n.17 (1981); *Holloway* v. *Arkansas*, 435 U.S. 475, 485-486 &

n.8 (1978). Although "breach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel," canons of ethics and professional codes carry significant if not dispositive weight when "virtually all of the sources speak with one voice." *Nix* v. *Whiteside*, 475 U.S. 157, 165-166 (1986).

Here, prevailing ethics norms speak with one voice: In the circumstances of this case, the third-party fee arrangement and Theodis's threats produced an untenable conflict of interest by creating an incentive for trial counsel to promote Theodis's objectives instead of Acklin's. Arrangements under which a criminal defendant's parents or other supporters pay for defense counsel are certainly not uncommon and may often be beneficial—particularly where the arrangement serves to protect the defendant's right to his or her counsel of choice. Standing alone, such arrangements do not violate ethics rules. But such arrangements can also carry inherent risks. "[In] family arrangements [like this one,] in which parents secure counsel for their children … , the risk that the lawyer will serve the interests of the paymaster, rather than those of the client, is obvious." Hazard et al., *The Law of Lawyering* § 13.21, at pp. 13-44 to 13-45 (4th ed. 2015). That risk materialized here when Theodis made clear that he opposed the trial strategy Rahmati judged to be Acklin's best chance to avoid the death penalty and that he would withdraw his support for the defense if Rahmati pursued that strategy. From that moment, Rahmati faced a choice: He could serve his client's interest by making the best argument possible against the imposition of the death penalty, or he could protect his own interests by avoiding antagonizing the paymaster. He could not do both.

"[T]his is the kind of representational incompatibility that is egregious on its face." *Mickens* v. *Taylor*, 535 U.S. 162, 210 (2002) (Breyer, J., dissenting). To guard against it, ethics norms across the board require two conditions to be met when a lawyer's fee is to be paid by a third party. First, there must be "no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship"; and second, the client must give informed consent. ABA Model R. of Prof'l Conduct ("Model Rules") 1.8(f).[2]

The ABA Model Rules of Professional Conduct impose these requirements on third-party fee arrangements because such arrangements can in some cases give rise to concurrent conflicts of interest. Model Rule 1.7 provides that a concurrent conflict of interest exists where "there is a significant risk" that the representation "will be materially limited by the lawyer's responsibilities to ... a third person or by a personal interest of the lawyer." Model Rule 1.7(a)(2). A lawyer's representation can continue in the face of a concurrent conflict only if, among other things, the lawyer "reasonably believes that [he or she] will be able to provide competent and diligent representation" and the client gives informed consent. Model Rule 1.7(b); *see also* Model Rule 1.8 cmt. 12.[3] And as a corollary, Model Rule 5.4(c) mandates that lawyers "shall not permit" a third-party

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[2] In addition, confidential information related to the representation must be protected consistent with the requirements of Model Rule 1.6. *See* Model Rule 1.8(f)(3).

[3] Model Rule 1.8(f) thus addresses a special case of concurrent conflicts as defined in Model Rule 1.7. *See* Model Rule 1.7 cmt. 1. Although the two rules employ different wording, "no [substantive] difference was intended." Hazard, *supra*, § 13.21, at p. 13-46; *see also* Model Rule 1.7 cmt. 13.

payor "to direct or regulate the lawyer's professional judgment." Together, these rules "prohibit[] [lawyers] from accepting or continuing" representation under a third-party fee arrangement "unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client." Model Rule 1.8 cmt. 11.

All fifty States and the District of Columbia impose identical or substantively equivalent requirements. *See* ABA, *Variations of the ABA Model Rules of Professional Conduct: Rule 1.8* (Sept. 29, 2017), https://bit.ly/2PauyfV; *see also, e.g.*, Cal. R. Prof'l Conduct 1.8.6 (formerly Cal. R. Prof'l Conduct 3-310(F)).

The ABA's Model Code of Professional Responsibility, which preceded the Model Rules, was similarly emphatic. Because each lawyer has an "obligation … to exercise professional judgment solely on behalf of his client," the Code explained, the lawyer must "disregard the desires of others that might impair his free judgment." *ABA Model Code of Professional Responsibility* EC 5-21 (1980). That is especially so when "that person is in a position to exert strong economic, political, or social pressures upon the lawyer." *Id.* "These influences are often subtle, and a lawyer must be alert to their existence. *A lawyer subjected to outside pressures should make full disclosure of them to his client* … ." *Id.* (emphasis added). Thus, like the Model Rules, the Model Code prohibited a lawyer from accepting or continuing representation under a third-party fee arrangement unless (1) the third party did not "direct or regulate his professional judgment," *id.* DR 5-107(B); and (2) the lawyer obtained "the consent of his client after full disclosure," *id.* DR 5-107(A). The ABA's Criminal Justice Standards for the Defense

Function take the same approach. *See ABA Criminal Justice Standard for the Defense Function* 4-1.7(g) (4th ed. 2015).

These same requirements are also central to Section 134 of the American Law Institute's *Restatement (Third) of the Law Governing Lawyers* (2000), which governs third-party fee arrangements. Section 134(1) requires that the client give informed consent to the fact of the third-party fee arrangement itself; but even with that consent, Section 134(2) further prohibits the third-party payor from directing the attorney's conduct unless "the direction does not interfere with the lawyer's independence of professional judgment" *and* the client additionally gives informed consent to the direction.[4]

Accordingly, Rahmati was obligated to ensure that Theodis's role as third-party payor did not interfere with his independent judgment, to fully disclose to Acklin the pressures on his representation that resulted from Theodis's threats, and to obtain Acklin's informed consent to the conflict. As discussed below, these obligations were not satisfied.

[4] The Restatement further requires that any direction of the lawyer's professional conduct by a third-party be "reasonable in scope and character, such as by reflecting obligations borne by the person directing the lawyer." *Restatement (Third) of the Law Governing Lawyers* § 134(2)(b) (2000).

B. The Ethics Requirements Were Not Met

1. Theodis's exploitation of the fee arrangement threatened to interfere with counsel's independent judgment

Acklin's case presents a textbook example of third-party interference with a lawyer's "independence of professional judgment." Although that phrase is broad enough to encompass even subtle influences on a lawyer's behavior, there can be no doubt that impermissible "interference" occurs—and a "significant risk" arises that the representation "will be materially limited" by counsel's "responsibilities to [the payor] or by personal interest of the lawyer," Model Rule 1.7(a)(2)—when the third-party payor instructs the lawyer to forego a strategy that the lawyer has judged to be the best and threatens to withhold further support unless the lawyer complies with that instruction.

Thus, while third-party fee arrangements are common and often benign, an attempt by the third-party payor to direct or control the representation can create a conflict of interest under Rules 1.7 and 1.8 that requires the client's informed consent after full disclosure. That is because the lawyer's overwhelming financial incentive to serve the interests of the payor makes "[t]he risk of adverse effect on [the] representation … inherent in any such payment or direction." *Restatement (Third) of the Law Governing Lawyers* § 134 cmt. a; *see also Wood*, 450 U.S. at 268-269 & n.15 (noting "the inherent dangers that arise when a criminal defendant is represented by a lawyer hired and paid by a third party"). "The critical questions are the likelihood that [the skewed incentive] will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in consid-

ering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client." Model Rule 1.7 cmt. 8. This interference can manifest both in the lawyer's own strategic decisions and in the lawyer's advice to the client.

As the Restatement explains, impermissible interference with counsel's judgment occurs and a conflict can arise when the paymaster directs counsel to pursue a strategy that serves the payor's interest instead of the client's, such as when a criminal defendant's employer offers to pay for the defendant's representation only on the condition that the defendant not implicate the employer in the crimes with which the defendant is charged. *See Restatement (Third) of the Law Governing Lawyers* § 134 cmt. d, illus. 2. Absent the client's informed consent, the lawyer "may not accept the representation on those terms." *Id.*

The risk of third-party control is particularly acute in the "increasingly common and troublesome scenario" in which a criminal defendant's attorney fees are paid by a third party with an independent interest in clearing his own name. Hazard, *supra*, § 13.21, at p. 13-45 n.38. "The possibility exists that the payor is controlling the representation to ensure that [he] will not be implicated … . When that is the case, of course, the defendant is by definition not receiving the undivided loyalty to which he is entitled." *Id.*

Indeed, when the third-party payor might reasonably be implicated in the defendant's alleged crimes, the risk of interference is so great that the mere act of accepting payment can expose attorneys to discipline. In *In re Abrams*, 266 A.2d 275 (N.J. 1970), for example, the New Jersey Supreme Court disciplined an attorney who accepted payment from a criminal gambling syndi-

cate to represent the syndicate's employees. *See id.* at 277-278. It was "inherently wrong" for the attorney to accept payment from a third-party "whose criminal liability may turn on the employee's testimony." *Id.* at 278. "[S]uch an arrangement has the inherent risk of dividing an attorney's loyalty between the defendant and the gambler-employer who will pay for the services." *Id.* "An attorney must realize that the employer who agrees to pay him is motivated by the expectation that he will be protected." *Id.*; *see also In re Disciplinary Proceedings Against Buchanan*, 2007 WL 3287353, at *10-11 (N.D. Tex. Nov. 6, 2007) (disciplining attorneys who knowingly accepted payment from client's criminal co-conspirator without informing client, because doing so prevented the client from "mak[ing] an informed decision regarding the representation" and "interfered with the independence of [the attorneys'] professional judgment").

In other contexts, as well, express direction of trial strategy by the third-party payor can give rise to precisely the concerns the ethics rules are intended to prevent. *See, e.g.*, *Restatement (Third) of the Law Governing Lawyers* § 134(2) & cmt. d ("[N]o third person [may] control or direct a lawyer's professional judgment on behalf of a client."). In one Wisconsin disciplinary proceeding, for example, a criminal defendant's girlfriend retained an attorney on the defendant's behalf to prepare a postconviction motion to modify the defendant's sentence. *In re Disciplinary Proceedings Against Gorokhovsky*, 824 N.W.2d 804, 808 (Wis. 2012). The defendant disagreed with that approach; he instructed the attorney to challenge the underlying conviction. *Id.* The attorney obeyed the girlfriend, not the client, resulting in a violation of Rule 1.8(f). *Id.*

Similarly, it creates a conflict under the rules for an insurer to pay for the insured's counsel while instructing counsel not to opine as to the case's settlement value, *see* Florida Bar Ethics Op. 81-5 (1981), https://bit.ly/2ChLfmF, or for a police union to pay for an officer's representation in an internal investigation while instructing counsel not to raise the possibility of cooperating, *see Pirillo* v. *Takiff*, 341 A.2d 896, 903-904 (Pa. 1975). It can likewise create a conflict for third-party payors to unilaterally vest themselves with veto power over counsel's conduct of the case, such as by requiring preapproval for any billing related to motion practice, discovery, or legal research. *See In re Rules of Prof'l Conduct & Insurer Imposed Billing Rules & Procedures*, 2 P.3d 806, 810, 815-817 (Mont. 2000). "[T]he requirement of prior approval fundamentally interferes with defense counsels' exercise of their *independent* judgment, as required by Rule 1.8(f)." *Id.* at 815.

Here, Theodis's wishes—and Rahmati's incentive to fulfill them—posed a significant risk of limiting the representation and interfering with Rahmati's independent judgment. Theodis had an obvious ability to leverage his status as payor to "control[] the representation [and] ensure that [he] w[ould] not be implicated" in socially unacceptable and potentially criminal conduct (in this case, his alleged history of abuse). Hazard, *supra*, § 13.21, at p. 13-45 n.38. Moreover, not only did this "possibility exist[]," *id.*, but Theodis in fact exerted such control. When Theodis told Rahmati that he would be "'done helping with [Acklin's] case'" if Rahmati presented the abuse evidence, Pet. App. 36a, Theodis in effect conditioned any further payment or support on Rahmati's willingness to follow his instructions. He was thus "directing," "regulating," and "interfer-

ing" with counsel's judgment in the most literal sense, undermining counsel's loyalty to his client in precisely the manner the ethics rules are meant to prevent.

2. Acklin did not give informed consent to the conflict after full disclosure

Under the ethics rules, a client whose counsel will be paid by a third party must at a minimum give "consent regarding the fact of the payment and the identity of the third-party payer." Model Rule 1.8 cmt. 12; *accord Restatement (Third) of the Law Governing Lawyers* § 134(1). If, however, the fee arrangement "creates a conflict of interest for the lawyer"—that is, if it entails a significant risk of materially limiting the representation and interferes with the lawyer's exercise of professional judgment, as discussed above—then the client must additionally consent to continuing the representation notwithstanding the conflict. Model Rule 1.8 cmt. 12; *see also* Model Rule 1.7(b)(4) & cmt. 13; *Restatement (Third) of the Law Governing Lawyers* § 134(2)(c).

For such consent to be effective, "the law of lawyering universally requires as an initial step full disclosure of all aspects of the conflict." Hazard, *supra*, § 11.08, at p. 11-34. "This includes [disclosure of] the source of the competing demands on the lawyer's loyalties, the posture of the matter, the potential ways in which the conflict could change (either for worse or for better), and the potential harm that could result." *Id.* "A lawyer must also evaluate and analyze the risks involved, and give concrete advice about the wisdom of consenting." *Id.* In short, "[i]nformed consent requires that [the] client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on [his] in-

terests." Model Rule 1.7 cmt. 18; *see also* Model Rule 1.0(e); *Restatement (Third) of the Law Governing Lawyers* § 122(1) & cmt. c(i).

The record nowhere suggests that Acklin gave the requisite consent after full disclosure. To be sure, it appears that Acklin knew some of the key underlying facts, including that Theodis was paying his legal fees and how Theodis had responded when Rahmati broached the subject of the abuse evidence. *E.g.*, Pet. App. 25a, 47a. But an attorney must disclose "more than the fact[s]" that give rise to the conflict; he or she must also "explain … in detail the risks and the foreseeable pitfalls that may arise in the course of the transaction." *Acheson* v. *White*, 487 A.2d 197, 199 n.5 (Conn. 1985) (collecting cases). Rahmati's testimony contains no assurance that he communicated the conflict of interest to Acklin—let alone explained how that conflict might affect his continued representation or that Theodis had no right to dictate trial strategy. The record thus provides no basis to conclude that Acklin had the knowledge and context necessary to give effective informed consent.

Contrary to the Alabama court's decision, the written statement Rahmati procured from Acklin regarding the presentation of the abuse evidence does not enter into this analysis under the applicable ethics rules. That statement does not purport to waive any conflict of interest at all. *See* Pet. App. 27a-28a. Nor does it indicate that Rahmati made the disclosures necessary to make consent effective. *See id.* Under prevailing ethics norms, then, this was an open-and-shut conflict of interest. The Alabama court's inexplicable contrary conclusion warrants this Court's intervention.

II. THE ALABAMA COURTS' RELIANCE ON ACKLIN'S SIGNED STATEMENT TO CONCLUDE THAT THE CONFLICT DID NOT AFFECT COUNSEL'S REPRESENTATION SETS A DANGEROUS PRECEDENT

An attorney's conflict of interest violates a criminal defendant's Sixth Amendment rights when it amounts to an "actual conflict"—*i.e.*, one that "adversely affects [the attorney's] performance." *Mickens*, 535 U.S. at 172 n.5. Here, as the petition explains (at 15-17), multiple aspects of Rahmati's conduct "luminate[] the cross-purposes under which he was laboring." *Glasser* v. *United States*, 315 U.S. 60, 73 (1942).

Among other things, Rahmati could have asked for time to investigate the alleged abuse so that he and Acklin could make a more informed decision about its use; and he could have explained to Acklin that Theodis had no right to make that decision for him. Instead, Rahmati decided to elicit testimony from Theodis that was at best counterproductive and at worst false. Lacking any motivation to help Theodis cast himself in a positive light, unconflicted counsel would have had little reason to elicit Theodis's testimony as to whether he ever "disciplined" Acklin, Pet. App. 40a-41a & n.11—and in particular would have had no reason to give Theodis the opportunity to testify in narrative form, contrary to Acklin's interests, because "'he simply has something that he would like to tell the Court.'" Pet. App. 41a. Had Theodis been the client, that strategy would have added up—*i.e.*, standing mute while Theodis "undertook to present the false version in narrative form in his own words unaided by any direct examination." *Nix*, 475 U.S. at 170 n.6. But Rahmati had no duty to allow Theodis, who was neither a party nor his client, to testify—particularly where his testimony

was known to be at best misleading, at worst perjurious, and in any event unhelpful.

In finding no actual conflict affecting the representation, the Alabama Court of Criminal Appeals relied heavily on the statement Rahmati obtained from Acklin memorializing Acklin's instruction not to introduce the abuse evidence at sentencing. *See*, *e.g.*, Pet. App. 37a. That analysis significantly undermines Sixth Amendment protections by holding Acklin to a decision that was tainted by the very conflict it supposedly cured.

"[I]f the client is to make turning-point decisions about his legal affairs, he must be armed with sufficient information for intelligent decisionmaking." Hazard, *supra*, § 8.05, at p. 8-10. Defense counsel thus has a duty to consult with a criminal defendant regarding "important decisions" in the course of the defense. *Strickland*, 466 U.S. at 688; *see also Florida* v. *Nixon*, 543 U.S. 175, 187 (2004). Under prevailing rules of professional responsibility, the lawyer must "explain [the] matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Model Rule 1.4(b); *see also Restatement (Third) of the Law Governing Lawyers* § 20.[5]

But a conflicted attorney's advice regarding these decisions is likely to provide a conduit for influence by the attorney's outside interests. The attorney's advice is likely to be influenced, even subconsciously, by the

[5] In some circumstances, this duty of communication may require the lawyer to withhold information, especially when that information is legally irrelevant and "when the client would be likely to react imprudently." Model Rule 1.4 cmt. 7.

attorney's own interests.[6] And that advice in turn is likely to be extremely influential to the client.[7] The risk that a conflicted attorney's representation will be compromised by his competing loyalties therefore animates both the rules of professional responsibility and this Court's precedent. Hazard, *supra*, § 13.21, at p. 13-45 ("[T]he risk that the lawyer will serve the interests of the paymaster, rather than those of the client, is obvious."); *see also Wood*, 450 U.S. at 272 ("[W]e cannot be sure whether counsel was influenced in his basic strategic decisions by the interests of the [person] who hired him.").

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[6] *See* Eldred, *The Psychology of Conflicts of Interest in Criminal Cases*, 58 U. Kan. L. Rev. 43, 69 (2009) ("[W]hile [a] decision-maker [faced with a conflict of interests] will believe that the[ir] decision comes from rational deliberation … in actuality the automatic bias toward self-interest will often create an error in judgment that favors self-interest, 'automatically and without conscious awareness.'"); Nolan, *Removing Conflicts From the Administration of Justice*, 79 Geo. L.J. 1, 52 (1990) ("The human-nature rationale for regulation of potential conflicts of interest accepts that the ability of individuals to rise above their conflicting loyalties … is limited.").

[7] *See generally* Kahneman & Tversky, *Choices, Values, and Frames*, 39 Am. Psychologist 341, 343 (1984) (describing the cognitive phenomenon of framing—*i.e.*, the tendency of certain choices in the description of a problem to determine the response—as "both pervasive and robust," "resembl[ing] perceptual illusions more than computational errors"); *see also, e.g.*, Ellmann, *Lawyers and Clients*, 34 UCLA L. Rev. 717, 779 (1987) (concluding that the "protection of the autonomy of clients is an ambiguous and complex task," because even "the effort to enable clients to make their own decisions may well entail manipulating them as well," rendering it "ultimately impossible to assist clients' decisionmaking without at the same time jeopardizing it"); Korobkin & Guthrie, *Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer*, 76 Tex. L. Rev. 77, 120 (1997) (discussing lawyers' effects on their clients' decision making in the settlement context).

That risk was realized in this case. Even assuming, as the Alabama courts did, that the decision whether to introduce the abuse evidence was Acklin's alone to make, Acklin did not make that decision in a vacuum. He made it while consulting with conflicted counsel, aware that Theodis would withdraw support for his defense if he allowed the evidence to be introduced, but uninformed of his right to unconflicted advice. And to the extent the decision was one for counsel to make, the record indicates that counsel's own decisions were affected by his incentive to promote Theodis's interests. For example, upon learning of the potentially mitigating abuse evidence, Rahmati immediately met not with his client, but with his patron. Pet. App. 22a. Only after gauging Theodis's reaction did Rahmati meet with Acklin to discuss the potential use of the evidence. Pet. App. 24a-25a. By approaching Theodis first, Rahmati invited Theodis to interfere in the representation. And when Rahmati spoke to Acklin about the evidence, he "told him everything that [his] father said," Pet. App. 25a—apparently including Theodis's threats—thus couching the strategic decision whether to use the evidence at trial as a decision whether to antagonize Theodis at risk of losing financial support for the defense. Theodis's preferences need not have entered into the conversation with Acklin at all, but to the extent they did, counsel ought to have explained that Theodis had no right to direct the representation and that Acklin had a right to be represented by counsel with undivided loyalties.

An unsophisticated client might well have assumed that the person paying for the legal representation was

entitled to influence strategic decisions.[8] Indeed, Rahmati testified that Acklin's decision rested in part on a desire to avoid upsetting Theodis. Pet. App. 26a. Lacking an understanding of his rights and Rahmati's obligations in the face of Theodis's threats, Acklin opted to avoid "put[ting] his father in that position"—effectively keeping Theodis happy in order to keep his lawyer. *Id.*

The Alabama courts' reliance on Acklin's statement to find no actual conflict affecting the representation thus ignores that the statement was itself a product of the conflict. Allowing the courts' approach to stand would undermine Sixth Amendment protections in a host of situations. For example, suppose the leader of a large criminal enterprise hires an attorney to represent an underling in the enterprise. During the course of the representation, evidence implicating the leader and exonerating the underling comes to light. The attorney immediately alerts the leader. The leader makes clear that, if the attorney uses the evidence, their financial arrangement is finished. Meeting with her client, the attorney advises the client to use the evidence, but she makes clear as she does so that the leader knows about the evidence, that he is angry, and that he will no longer support the client's representation if the evidence is used. The client believes that his attorney will no longer represent him without the leader's payments, and that he will be unable to hire another. The attorney

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[8] The duty of communication varies with the sophistication of the client. *See* Hazard, *supra* § 11.08, at p. 11-33 ("[T]he explanation [of a lawyer's conflict of interest] must be tailored to the client's apparent level of sophistication … . Th[is] [is an] obvious outgrowth[] of the duty of communication to enable meaningful client participation in the representation … .").

knows this and, without explaining the client's right to unconflicted counsel, she asks the client whether he wants use the evidence. Unsurprisingly, the client declines. The attorney promptly drafts a document on the client's behalf, forbidding her from using the evidence, and obtains the client's signature.

The courts below would find no conflict in that situation—and no Sixth Amendment violation—even though it clearly departs from prevailing professional standards. A client in that situation is unlikely to be able to participate in strategic decisions free of his or her attorney's divided loyalties. *See Wood*, 450 U.S. at 267-268. "Where a constitutional right to counsel exists, [this Court's] Sixth Amendment cases hold that there is a correlative right to representation that is free from conflicts of interest." *Id.* at 271. A strategic decision that is made or influenced by a conflicted attorney, who is being paid by a third party whose interests diverge from the client's, cannot suffice where the attorney allows the third-party's influence to reach the client. By holding to the contrary, Alabama not only "condone[s] a dangerous laxity" by defense counsel, *Glasser*, 315 U.S. at 71, but also holds criminal defendants to strategic decisions made without the representation guaranteed by the Sixth Amendment. This Court should step in to correct this departure from precedent and prevailing ethics norms.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted.

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