No. 18-640

In the
Supreme Court of the United States

NICHOLAS BERNARD ACKLIN,
Petitioner,
v.
STATE OF ALABAMA,
Respondent.

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

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED

Behrouz Rahmati represented Nicholas Acklin in his capital murder case. Acklin's mother, Velma Evans, agreed to pay Rahmati $150 per hour, but ultimately paid only $1900. Acklin's father, Theodis Acklin, also made three payments totaling $2900. Rahmati and his partner nevertheless spent more than 400 hours over two years representing Acklin.

Two days before trial, Evans revealed that, for about a year during Acklin's childhood, Theodis had severely abused Evans and Acklin. Rahmati questioned Theodis, who angrily denied the allegations and said, "You tell Nick if he wants to go down this road, I'm done with him" and "done helping with this case." Rahmati responded that he would do whatever he needed to do to get Theodis to present the evidence. Rahmati then explained to Acklin that this information was "important" mitigating evidence that he "certainly … would need to try to introduce" at a potential sentencing phase. Acklin, however, ordered Rahmati to withhold this evidence because Acklin did not "want to ruin [his family members'] lives or have anything like this to come out on them." Rahmati memorialized his advice and Acklin's instructions in a writing that Acklin signed.

Acklin was later found guilty of murdering four people and was sentenced to death. In state post-conviction proceedings, he alleged that Rahmati had a conflict of interest because Theodis had threatened to withhold payments if Rahmati introduced evidence of abuse. After hearing from nine witnesses over four days, the state circuit court found that Rahmati was not conflicted because there was "no evidence" that Theodis had issued such a threat. The court also

found "that the sole reason" Rahmati did not "introduce evidence of the alleged abuse was that Acklin expressly forbade [him] from doing so."

The questions presented are:

1. Did the circuit court clearly err when it found that Rahmati did not suffer an actual conflict of interest?
2. Did the circuit court clearly err when it found that the strategy to withhold evidence of abuse resulted from Acklin's decision to withhold that evidence?

PARTIES

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STATEMENT

A. Acklin Tortures Then Executes Multiple Victims

Over the course of one horrifying night in September 1996, Petitioner Nicholas Acklin "mercilessly tortured the victims in this case" before killing four of them and attempting to kill two others by shooting them in the head. R.3999; App.2a.[1] The senselessness of these killings was underscored by the mundane nature of the dispute that led Acklin to his victims. A week before the massacre, two of Acklin's friends—Joseph Wilson and Corey Johnson—had stolen a cell phone and small bag of marijuana from the home of Ashley Rutherford. App.3a. When Wilson learned that Rutherford had filed a report with the Huntsville Police Department regarding the stolen phone, Wilson was incensed. App.3a. So much so, that on September 25, 1996, Wilson, Johnson, and Acklin—armed with multiple guns—stormed Rutherford's apartment seeking revenge. App.3a.

Earlier that evening, Rutherford's fiancée (Michelle Hayden) and two of his friends (Brian Carter and Lamar Hemphill) were watching television at Rutherford's apartment while they waited for him to return from work. App.3a. Another friend, Michael Beaudette, joined later in the evening. App.3a. And around 10:00 p.m., Mike Skirchak and Johnny Couch noticed Beaudette's car by the apartment and decided to drop by to say hello. But when they tried to leave a few minutes later, they were met by Acklin,

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

Wilson, and Johnson, who forced them back into the crowded apartment. App.3a.

Acklin and his companions demanded to know, "Who filled out the warrant?" App.4a. Unsatisfied with their victims' answers, the assailants brandished handguns and began savagely beating the five young men. The assailants kicked, slapped, punched, spat on, and beat the men with a whiskey bottle. App.4a. Acklin took several breaks from these assaults so he could take Michelle Hayden outside and sexually assault her by fondling her breasts and demanding that she pull down her pants. App.4a. After an hour of this torment, Rutherford arrived home from work. Johnson immediately forced Rutherford into his apartment, where he was interrogated about the police report while being threatened and beaten. App.4a.

The torture continued, with Acklin and Wilson growing "increasingly violent and more demanding." App.4a. Acklin, for example, shoved a .357 magnum revolver down Rutherford's throat until he gagged, and then later put Beaudette in a headlock and held a gun under his chin. App.4a. Wilson, for his part, kicked and stomped Couch until he was nearly unconscious and then used scissors to cut off his ponytail. App.4a. Acklin then forced Hayden to join him outside while he stole a stereo from Carter's car. Acklin returned to the apartment with a pocket-knife, threw it at Carter's feet, and mockingly exclaimed, "Look, he has a knife!" App.4a-5a.

Acklin and Wilson continued to humiliate their victims by, for example, forcing them to take off their pants and sit in their underwear. App.5a. At one point, Wilson teased his victims by placing his handgun on a dresser and daring them to grab it. App.5a.

And, after one of the times that Acklin forced Hayden outside, he returned to the apartment and told her fiancé that Hayden had just performed oral sex on him (she had not). App.5a.

Throughout this abuse, the victims denied knowing anything about a warrant being filed against Wilson. App.5a. Rutherford and Hemphill admitted that a police report had been filed regarding the stolen phone, but they maintained that no one had sworn out a warrant. App.5a. Acklin and Wilson were not satisfied. Instead, their anger "rose to a dangerous crescendo." App.5a. Just before midnight, they made their victims hand over their identification cards. Corey Johnson tried to dissuade his companions from further violence by telling them that none of their victims would talk to police and that no one had to die, but Acklin and Wilson were undeterred. App.5a. The two men began shouting that someone should start the car. Acklin finally left Wilson inside with the victims while he started Wilson's car. App.6a. When Acklin returned, he was holding a Lorcin 9mm handgun. As Wilson continued questioning the seven, Acklin proclaimed, "Fuck it," then placed the gun to the back of Rutherford's head and fired. App.6a. As the other victims stared on in horror, Acklin proceeded to shoot Hemphill once in the head, Couch twice in the head, Beaudette once in the head and once in the upper leg, and Hayden in the side of her face, in her arm, and in her abdomen. App.6a. Wilson shot Carter six times in the neck and chest. Skirchak survived by escaping out the back door. App.6a.

Though Acklin shot him in the head, Rutherford survived. He laid in a pool of his own blood and pretended to be dead until he was sure Acklin, Wilson, and Johnson had fled. App.6a. After calling an

ambulance, Rutherford assisted his fiancée. App.6a-7a. Around 12:30 a.m., Madison County emergency medical technicians arrived and determined that Beaudette, Carter, and Couch were already dead. Hemphill died a few minutes later. Hayden, though critically wounded, survived. App.7a.

B. Rahmati's "Very Diligent" Representation of Acklin

Just days after the killings, Acklin retained Behrouz Rahmati as his counsel. App.18a. Rahmati was an experienced defense lawyer in Huntsville, Alabama, and by 1996, he had represented clients in at least four capital murder cases. R.167. Rahmati agreed to represent Acklin after meeting with Acklin's parents—Velma Acklin Evans ("Evans") and Theodis Acklin ("Theodis"). Evans signed an agreement with Rahmati providing for a $25,000 retainer and an hourly rate of $150 per hour. Another attorney, Kevin Gray, soon began assisting Rahmati on the case. App.18a. Acklin was aware of and consented to this fee arrangement. App.47a.

Despite their agreement, "from Day 1," it was "obvious" to Rahmati that Evans was in "financial distress" and that Rahmati and Gray were likely "never going to get paid." App.19a. Evans's conduct further confirmed Rahmati's assumption. Rahmati would send Evans a standard monthly letter listing the balance due, *see, e.g.*, C.4255-59, but she would return monthly payments of only about $100. Rahmati testified that when a client's parent makes monthly payments of only $100 to $200, "that's a very strong signal they can't afford paying." App.19a. Evans ultimately paid $1,900 towards her son's defense.

Theodis also "made three sporadic payments" to Rahmati. App.19a. Those payments of $700, $2,000,

and $200 occurred in March, September, and October 1998, respectively. App.19a. After Theodis began making payments, Rahmati also began sending him standard monthly letters regarding the balance due on Acklin's case. *See, e.g.*, C.4260; *see also* App.19a n.6. But Rahmati was never convinced that Theodis was as invested as Evans was in supporting their son's defense. App.19a. Rahmati made Acklin aware of these payments, and Acklin consented to Theodis's contributions. App.47a.

Though Rahmati and Gray knew they were going to lose money by representing Acklin, by 1998, "it wasn't necessarily about the money anymore." R.72. Acklin's case was "one of the most high-profile cases in the history of Madison County, Alabama." *See* C.2099; R.155. And, as Rahmati put it, "I gave my word, and I stuck it out and did the best I could do" for Acklin, doing "everything we absolutely, positively could do, and then some." R.160. Indeed, though Rahmati and Gray received only $5,025 of total payments over the more than two years they worked for Acklin, they poured over 400 hours of time into his defense. App.19a; C.4254. The court below thus found that Rahmati and Gray "were very diligent in preparing for Acklin's trial." C.4004.

Their preparation included work "from the very beginning" on a mitigation strategy for a potential sentencing phase of trial. R.92-93. Thus, Rahmati questioned both Acklin and Evans about Acklin's background, "including whether Acklin had suffered any type of abuse." App.34a. Neither Acklin nor Evans disclosed any history of abuse. App.34a-35a.

In October 1998, two days before Acklin's trial was to begin, Evans changed her story. App.21a. She divulged to Rahmati for the first time that Theodis had

abused her and their children when Acklin was 11 years old. App.21a, 43a-44a. The abuse began in 1981, after Evans admitted to Theodis that she had had an affair. App.21a. Over the following year, Theodis physically and verbally abused Evans and their children, at times using a gun to threaten them. App.22a. In one incident, while Evans and Theodis fought over a rifle, she fell from a second-floor window and was hospitalized. App.22a. Within a year after Evans had disclosed the affair, she and Theodis divorced, and Theodis was given custody of the couple's three sons. App.21a.

Rahmati "was very surprised that" no one had disclosed this abuse to him or Gray before. App.22a. But recognizing the potential value of this information for the sentencing phase, Rahmati met with Theodis to try to confirm the allegations and convince him to testify to his conduct. App.22a-23a. Rahmati told Theodis about Evans's allegations and "asked him if he would consider testifying" about his abusive conduct. App.23a. Theodis was upset that Evans had divulged this information and denied the allegations, but Rahmati believed Evans and implored Theodis to testify about the abuse: "I told him, 'Look, this is critical. You can help your son possibly, possibly. We've got a stacked deck against us." App.23a. Theodis grew angry, stating something to the effect of, "I can't believe they are doing this" or "they are going there." App.24a. He then exclaimed, "You tell Nick if he wants to go down this road, I'm done with him" and "done helping with this case." R.112, 118; App.24a. Even so, Rahmati continued to press Theodis. As Theodis walked out of Rahmati's office, Rahmati vowed to him, "I will do whatever I need to, to get you to this sentencing phase; I just want you to know that." App.24a.

Rahmati next visited Acklin in jail, to further confirm Evans's account and implore Acklin to introduce such evidence during a potential sentencing phase. App.24a-25a. Over the course of two hours, Rahmati told Acklin what he heard from Evans and Theodis. He explained that Acklin's parents and brothers could be called to testify about the abuse and that the jury could consider that evidence as a mitigating factor when deciding on a sentence. App.25a. "Acklin, however, steadfastly refused to permit Rahmati to introduce the evidence." App.25a. Rahmati "urged him that this was important" and that "certainly we would need to try to introduce" the evidence. App.26a. But Acklin had no appetite to expose some of his family's ugliest moments to the public. "[H]e didn't want to put his father … or to really put his family in that position." App.26a. According to Rahmati, Acklin stated that the abuse "'didn't cause me to be here. I don't want to ruin their lives or have anything like this to come out on them.'" App.26a. Thus, Acklin specifically required his counsel not to introduce evidence of abuse at trial. App.26a.

Because Rahmati "felt so strong about the need to try to introduce" this sensitive evidence, he also "felt the need to memorialize" Acklin's contrary instructions in writing. App.26a. He thus presented Acklin a typed statement that set forth how Rahmati and Gray had advised Acklin that evidence of his father's abusive conduct could be considered in mitigation of aggravating circumstances, and then documented that Acklin had "expressly forbidden them to mention or present such evidence or argue such evidence during any part of the trial proceeding, including either the guilt or penalty phase." App.27a-28a; C.4978.

C. Acklin's Trial and Sentencing

Acklin's case proceeded to trial. He was convicted of one count of capital murder for killing Hemphill, Beaudette, Couch, and Carter pursuant to one scheme or course of conduct, *see* Ala. Code §13A-5-40(a)(10), and two counts of attempted murder as to Rutherford and Hayden, *see id.* §§13A-4-2, 13A-6-2; App.2a.

At the sentencing phase, Rahmati followed his client's instructions and refrained from presenting evidence of Theodis's abuse. He instead sought to establish other mitigating circumstances. He showed that Acklin had no significant criminal record. App.10a. And Rahmati tried to present Acklin and his family in the best light he could consistent with the facts. Rahmati introduced the testimony of Acklin's parents, grandmother, and several other people. App.10a-11a, 43a.

Theodis testified briefly on behalf of his son. *See* T.R.964-70; App.40a. Theodis informed the jury that he was a reverend, and he recounted how his son's actions had "[t]raumatized" his own family. T.R.964-65. Theodis testified that Acklin's conduct was "[t]otally out of character for Nick," who had always been a "quiet child" who "kept to himself." T.R.965-66. When Rahmati asked Theodis if he had anything he wanted to say to the victims' families, Theodis expressed his sorrow for their loss, and stated that he had "ask[ed] God to help you to forgive my son." T.R.966-67. He then again stated that his son's actions were "totally out of character," and explained that "Nicholas was raised in a God-fearing home. His mother, Velma, and I took him to church, he sang in the youth choir, he ushered." *Id.* Theodis further offered that he was "a father who really, I guess overly protective, really [was] a father who loves his children" and "had a

relationship" with his son. T.R.967. Finally, he pleaded with the jury for mercy for his son. T.R.970. The jury, however, recommended by a vote of 10-2 that Acklin be sentenced to death. App.2a.

The trial court found that Acklin had established that "during his formative years, Acklin was a quiet, polite, and non-violent man." App.11a. The court also found that Acklin "has a common-law wife and two children," and that Acklin was active in church when he was younger. App.11a-12a. But based on Acklin's conduct at trial, the court did not credit Theodis's testimony that Acklin was remorseful for his crimes. App.12a-13a. And though "[t]he Court was impressed with the sincerity of the testimony by" Acklin's parents, finding them to be "good people" who "tried to do the right thing in raising him," the court did not credit that finding as a mitigating circumstance. App.12a. In the court's view, because most killers are the product of trying circumstances like "physical or sexual abuse," Acklin should not be given credit for coming from "a loving middle-class family" that had exposed him to positive values. App.12a. The court, however, did not treat Acklin's upbringing as an aggravating circumstance.

The trial court found that two aggravating circumstances had been proved beyond a reasonable doubt: (1) Acklin knowingly created a great risk of death to many persons, and (2) the capital offense was especially heinous, atrocious, or cruel compared to other capital offenses. App.7a. In addition to recounting the facts above, the court noted that "[t]his was an execution-style slaying. Acklin and Wilson killed or attempted to kill all of the victims in order to avoid later identification." App.8a. Such killings "evince[e] a

cold, calculated design to kill" and "fall into the category of heinous, atrocious or cruel." App.9a.

The court also considered the "fear experienced by the victim[s] before death," finding it nearly "impossible to contemplate the fear and indeed the stark terror experienced by all of these victims on the night of September 25, 1996." App.9a. When Acklin and Wilson began shouting about starting the car, the seven young people "knew that they were about to die. Finally, each of the victims watched their friends being methodically shot before it was their time to die." App.9a.

In sum, Acklin's actions "were conscienceless and pitiless. This was not just a murder, *it was a massacre in which the defendant engaged in a bloody orgy of death and destruction*." App.9a. And while "all capital offenses are heinous, atrocious and cruel to some extent," Acklin's "crime was extremely wicked and shockingly evil." App.9a-10a.

The trial court then weighed the aggravating and mitigating circumstances and found that Acklin's actions "substantially outweigh[ed]" the mitigating circumstances. App.13a. Indeed, while not required to do so, the court found "that *each* of the two aggravating circumstances, *even standing alone*, outweigh all the mitigating circumstances." App.13a. As the court recounted, "[t]he savage brutality of these murders is shocking," and Acklin's "actions led to a massacre." App.13a. His crimes were "so grievous an affront to humanity that the only adequate response [was] the penalty of death." App.13a-14a (quoting *Gregg v. Georgia*, 428 U.S. 153, 184 (1976)).

The Alabama Court of Criminal Appeals affirmed Acklin's conviction and sentences on direct appeal. *Acklin v. State*, 790 So. 2d 975 (Ala. Crim. App. 2000).

The Alabama Supreme Court declined review, *Ex parte Acklin* 790 So. 2d 1012 (Ala. 2001), as did this Court, 533 U.S. 936 (2001).

D. Collateral Review

On June 18, 2002, Acklin filed a Rule 32 petition for collateral review in Alabama state court raising over thirty issues. App.14a; C.24-152. His initial petition alleged that his trial counsel "had a clear conflict of interest" because they were not paid enough for their work on his case. C.106. Because it was clear "from the beginning" that "counsel was well aware that he would not be compensated for most of the work he did in this case, … any work performed on this case would reduce the amount of work counsel could do on a case which would actually generate income." *Id.* According to Acklin, this "created a classic conflict of interest that adversely affected" Acklin's representation. *Id.*

Acklin later amended his petition to add the claim he now presses before this Court. In addition to alleging that Rahmati was conflicted because he was paid so little by Acklin's parents, C.2102-05, Acklin alleged that Rahmati was conflicted precisely because he had received payments from Theodis, C.2105-07. Acklin asserted that Rahmati declined to present information of Theodis's abusive behavior because Theodis "had threatened to withdraw support if evidence of his abusive nature was introduced at trial." C.2106.

The circuit court held a four-day evidentiary hearing, which focused heavily on Rahmati's alleged conflicts. App.69a. Though Acklin called nine witnesses, neither Acklin nor Theodis ever testified. App.28a, 69a. As recounted above, *see supra* Part B, Rahmati gave unrebutted testimony that he knew early on that he was unlikely to be paid for his work on Acklin's

case, but that he nonetheless zealously represented his client. App.19a. And he testified that he had inquired with Evans and Acklin regarding possible child abuse, which everyone denied until Evans revealed Theodis's abuse shortly before trial. App.22a. Finally, Rahmati's uncontroverted testimony was that he implored Acklin to present this evidence to the jury as important mitigation evidence, and that the only reason Rahmati did not present that evidence is because Acklin adamantly and expressly forbade him from doing so. App.25a-26a.

Following this hearing, the circuit court denied Acklin's petition. The court rejected Acklin's assertion that his counsel were conflicted because they were underpaid, noting that counsel's testimony and records "convince[] this Court beyond any reasonable doubt that a lack of payment did not curtail their efforts to defend Acklin." App.77a. Rather, "counsel thoroughly investigated for the guilt phase and penalty phase of trial," *id.*

The court also rejected Acklin's argument that his counsel were conflicted because they had been paid by Theodis. App.77a-79a. The court noted that when Rahmati told Theodis that evidence of abuse could be presented at the penalty phase, Theodis responded, "You tell Nick if he wants to go down this road, I'm done with him." App.79a. The court did not interpret this statement as a threat to stop payments if Rahmati introduced such evidence, and there was no other evidence suggesting that Theodis had made such a threat. The court thus found that "Acklin presented no evidence that his father threatened to not pay trial counsel if they presented evidence that he was abusive during the penalty phase." App79a. The court also found that counsel "suspected strongly we were

never going to get paid from Day 1." App.79a. Accordingly, the Court found that counsel's "failure to present potential mitigating evidence regarding domestic abuse to the jury and trial judge was not because of a conflict of interest with Acklin's father—it was because Acklin made the conscious decision that he did not want this evidence presented at trial." App.79a.

The Alabama Court of Criminal Appeals affirmed. The appellate court reviewed the circuit court's detailed factual findings regarding Rahmati's diligent representation of Acklin, and the appellate court held that "Acklin has not demonstrated that these findings by the circuit court are erroneous." App.36a.

The appellate court also held that, even if "Theodis's comment he was 'done helping with this case' necessarily meant that Theodis would have stopped paying trial counsel," evidence still "support[ed] the circuit court's findings (1) that Rahmati and Gray did not expect to be paid the full retainer and (2) that the failure of the parents to pay the full retainer did not prejudice Acklin …." App.36a.

The appellate court noted other uncontested facts demonstrating that counsel were not conflicted and were not influenced in their actions, including Rahmati's vow to "Theodis that he would 'do whatever [he] need[ed] to, to get [Theodis] to this sentencing phase,'" and Rahmati's statements to Acklin about his interactions with Theodis and how "Theodis could be required to testify." App.36a-37a. Thus, Acklin failed to prove either a conflict or any adverse effect on his counsel's performance, as "[t]he evidence supports the circuit court's finding that the *sole reason* for trial counsel's failure to introduce evidence of the alleged

abuse was that Acklin expressly forbade them from doing so." App.37a (emphasis added).[2]

The Alabama Court of Criminal Appeals denied Acklin's petition for rehearing, App.113a, the Alabama Supreme Court denied Acklin's petition for a writ of certiorari, App.115a, and Acklin then filed a petition for a writ of certiorari with this Court.

REASONS FOR DENYING THE PETITION

"A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings," Sup. Ct. R. 10, but that is all Acklin's petition asserts. And because the circuit court's findings were not clearly erroneous, this case is a doubly poor candidate for this Court's review.

"The Sixth Amendment provides that a criminal defendant shall have the right to 'the Assistance of Counsel for his defence.'" *Mickens v. Taylor*, 535 U.S. 162, 166 (2002). While a defendant may be denied that right if his counsel operates under a conflict of interest, the mere "possibility of conflict is insufficient to impugn a criminal conviction." *Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980). Instead, a defendant must prove both (1) that his counsel had "an actual conflict of interest," and (2) that this conflict "adversely affected his lawyer's performance." *Id.*

Acklin proved neither. After hearing four days of testimony, the state circuit court found that Acklin's counsel did not have divided loyalties because there was "no evidence that [Acklin's] father threatened to not pay trial counsel if they presented evidence that

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[2] The court also found that "even if Acklin had permitted his trial counsel to present evidence of domestic abuse during the penalty phase, … there is no reasonable probability the outcome would have been different." App.84a.

he was abusive," App.35a-36. And the court found that this alleged conflict did not cause Acklin's counsel to withhold abuse evidence. Rather, the sole reason the evidence was not introduced "was because Acklin made the conscious decision that he did not want this evidence presented at trial." App.36a. The appellate court reviewed and affirmed these findings.

Acklin's petition thus depends on a story that "flies in the face of the state court's findings," *Winkler v. Keane*, 7 F.3d 304, 309 (2d Cir. 1993), and has been twice rejected. He invites the Court to "speculate about counsel's motives or about the plausibility of alternative litigation strategies," but the Court's "role is to defer to the District Court's factual findings unless [it] can conclude they are clearly erroneous." *Mickens*, 535 U.S. at 177 (Kennedy, J., concurring). The findings here are well supported by the record and should remain undisturbed.

Put simply, this is an error-correction case with no errors. Acklin's petition presents no split or novel question of law, but instead turns on whether the circuit court's findings were clearly erroneous. That is reason enough to deny review, and Acklin's failure to undermine those findings is reason more still. The petition should be denied.

I. The Trial Court Did Not Clearly Err When It Found That Acklin's Counsel Did Not Have An Actual Conflict Of Interest.

Acklin's conflict-of-interest claim fails first and foremost because he never proved the existence of a conflict. Acklin argues that a conflict arose when "Acklin's father made it clear that he would cease paying Acklin's legal fees if Acklin's lawyer put on evidence of the father's abuse of Acklin as a child …." Pet.10. *But Acklin failed to prove that Theodis issued*

such a threat. As the circuit court found, "Acklin presented no evidence that his father threatened to not pay trial counsel if they presented evidence that he was abusive during the penalty phase." App.79a. Because there was no such threat, there was no conflict, and the courts below properly rejected Acklin's claim.

Though that finding disposes of this case, neither Acklin nor amici *even mention it*, much less show that it is clearly wrong. And because that finding is not clearly erroneous, Acklin's case is a particularly poor vehicle for teeing up the question he purports to present. *See* Pet.ii (asking whether a defendant is deprived of conflict-free counsel when, *inter alia*, a third-party payor "threatens to withhold payment unless the lawyer conducts the defense in a manner that serves the third party's interests").

Acklin does cite Rahmati's testimony about how, when he confronted Theodis with allegations of abuse, Theodis responded angrily by saying something like, "You tell Nick if he wants to go down this road, I'm done with him," or "[I'm] done with Nick, [I'm] done with helping with this case." R.112, 118. But the circuit court considered this testimony and did not construe it as a threat to withhold payment. App.79a. And even if Theodis's "remarks *could* have been interpreted in this manner," an appellate court may not "substitute its reading of ambiguous language for that of the trial court," *United States v. Robinson*, 485 U.S. 25, 31 (1988).

Moreover, the state appellate court reviewed and affirmed the circuit court's finding that there was "no evidence" that Theodis threatened to withhold payment if Rahmati introduced evidence of abuse. App.35a-36a. "Where an intermediate court reviews,

and affirms, a trial court's factual findings, this Court will not 'lightly overturn' the concurrent findings of the two lower courts." *Glossip v. Gross*, 135 S. Ct. 2726, 2740 (2015) (quoting *Easley v. Cromartie*, 532 U.S. 234, 242 (2001)).

Overturning the lower courts' findings here would be particularly inappropriate because even if Theodis's remark to Rahmati could be read as a threat to withhold payment, that interpretation is not supported (much less compelled) by the record. Theodis never testified that he meant his statement to be such a threat, and neither Rahmati nor Acklin ever testified that they understood the comment in that manner. Rather, Rahmati's immediate response to Theodis was a vow to "do what I need to, to get you to this sentencing phase," R.112, followed by an attempt to convince Acklin to present this evidence. All this suggests either that Rahmati did not think Theodis had threatened to withhold funds or that the threat did not affect Rahmati's independent judgment. *See infra* Part II.

In sum, the circuit court's finding that Theodis did not threaten Rahmati and thus did not create a conflict was, at the very least, one of "two permissible views of the evidence." *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 574 (1985). And even if Acklin contests that premise, a one-off dispute over how to construe witness testimony does not merit this Court's review. Sup. Ct. R. 10.

II. The Trial Court Did Not Clearly Err When It Found That Rahmati's Purported Conflict Had No Adverse Effect On The Representation Acklin Received.

Even if the Court were inclined to toss aside the lower courts' determinations and find that Rahmati suffered from a conflict, Acklin's claim would still fail because he did not prove that Rahmati's purported conflict "actually affected the adequacy of his representation." *Sullivan*, 446 U.S. at 349. To prevail on a *Sullivan* claim, a defendant must prove not only the existence of a conflict, but that "counsel *was influenced in his basic strategic decisions* by" the conflict. *Mickens*, 535 U.S. at 172. Thus, if the strategic decision about which the defendant complains did not "result from" the purported conflict, the defendant was not denied his Sixth Amendment right. *Sullivan*, 446 U.S. at 349; *see also Winkler*, 7 F.3d at 310 (rejecting *Sullivan* challenge where "trial counsel did not pursue a plea bargain because [defendant] rejected this path, not because of trial counsel's monetary interest in the outcome").[3]

Acklin faults Rahmati for not presenting evidence of Theodis's abusive conduct, which would have been "potentially powerful mitigation at sentencing." Pet.10. In Acklin's telling, Rahmati "hid" this evidence based on his decision "to protect his own interest in remuneration." Pet.11. That would be a troubling tale if it were true. But after four days of

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[3] This Court has reserved the question whether defendants alleging a conflict based on an attorney's personal or financial interest need to prove prejudice under the traditional *Strickland* standard. *See Mickens*, 535 U.S. at 174-75. Acklin's claim fails under both the more forgiving *Sullivan* standard applied below as well as *Strickland*'s prejudice standard. *See* App.84a.

hearings, Acklin produced "no evidence that Rahmati's independent judgment was affected by" Theodis's three meager payments or his purported threat to withhold payments. App.47a.

Instead, the evidence showed that from the moment Rahmati heard about Theodis's abuse, Rahmati worked hard to ensure that the jury would hear it too. He implored Theodis, "Look, this is critical. You can help your son possibly." R.112. When Theodis angrily denied the allegations, Rahmati vowed, "I will do whatever I need to, to get you to this sentencing phase." App.36a-37a. And the evidence showed that Rahmati implored Acklin to present this evidence, explaining that Acklin's parents and brothers could testify about Theodis's abuse, which would be "important" mitigation evidence that "certainly we would need to try to introduce." App.25a-26a.

Most critically, the evidence showed "that the sole reason for trial counsel's failure to introduce evidence of the alleged abuse was that Acklin expressly forbade them from doing so." App.37a. Despite Rahmati's pleas, Acklin "steadfastly refused to permit Rahmati to introduce the evidence." App.25a. Rahmati "urged him that this was important" and that "certainly we would need to try to introduce" the evidence. App.26a. But Acklin chose instead to spare his family the further trauma of having to publicly disclose and relive this ugly chapter. As Acklin put it, the abuse "didn't cause me to be here," and "I don't want to ruin their lives or have something like this to come out on them." App.26a.

Because the sole reason the abuse evidence was not introduced was Acklin's "conscious decision that he did not want this evidence presented at trial," App.36a, the purported conflict did not "adversely

affect[] his counsel's performance." *Mickens*, 535 U.S. at 174. This Court reached a similar conclusion in *Dukes v. Warden*, 406 U.S. 250 (1972). There Dukes pleaded guilty on the advice of an attorney who represented Dukes's codefendants in an unrelated case. *Id.* at 251. Dukes later alleged that his lawyer was conflicted and his plea invalid because the attorney sought leniency for Dukes's codefendants on the ground that their cooperation led Dukes to plead guilty. *Id.* at 254. The Court rejected the argument because Dukes failed to show an adverse effect. He did not prove that his counsel "induced [him] to plead guilty in furtherance of a plan to obtain more favorable consideration from the court for other clients," nor could he show that he "received misleading advice … which led him to plead guilty." *Id.* at 256. The Court thus refused to vacate his plea.

Acklin's case is weaker still, for at least Dukes could allege that he regretted following his counsel's advice. Here, by contrast, Rahmati gave Acklin the advice that Acklin now wishes he had followed. He argues that conflict-free counsel would have advised him to introduce the abuse evidence because it was "the most compelling mitigation evidence available." Pet.11. But "uncontradicted" evidence shows that Rahmati gave Acklin this same advice. App.36a-37a; *see also Dukes*, 406 U.S. at 256 ("Neither does the finding in any way disclose, nor is it claimed, that (petitioner) received misleading advice from" counsel.). Acklin cannot show that his representation was adversely affected when his counsel made the same "basic strategic decisions" a conflict-free counsel would have made. *Mickens*, 535 U.S. at 170.

Acklin has two responses, neither of which are persuasive. First, Acklin devotes a footnote to half-

heartedly attacking the circuit court's finding that Rahmati "tried to convince Acklin that the abuse evidence should be presented." Pet.5 n.5. Though the circuit court credited Rahmati's uncontradicted testimony, App.37a, Acklin declares that testimony "impossible to reconcile" with Rahmati's decision "to prepare a typewritten waiver and have Acklin sign it so quickly given that the penalty phase was still four days away." Pet.5-6 n.5; *see also* Judges Amicus Br.12-13 (same). But Rahmati's decision to memorialize in writing his advice to present the abuse evidence and Acklin's command to withhold it was both reasonable and prescient. As Rahmati testified (again, uncontradicted), he knew the abuse evidence was important but also sensitive. App.26a. Thus, if Acklin did not want the evidence presented, Rahmati wanted to make clear to Acklin precisely what Acklin was demanding from his counsel. App.26a. And while Acklin may now regret his earlier command, he has never alleged that it was not what he desired at the time. The writing thus bolsters, rather than undermines, Rahmati's testimony. In any event, a signed statement that *agrees* with Rahmati's testimony is no ground for overturning the circuit court's decision to credit that testimony.

Acklin next argues that, even if Rahmati gave Acklin sound advice regarding the abuse evidence, there are four other things Rahmati should have done differently. *See* Pet.14-19. First, "Rahmati could have informed Acklin and the trial court of the conflict …." Pet.15. But once a defendant has shown that his counsel was conflicted, he must also show that "counsel was influenced in his *basic strategic decisions*." *Mickens*, 535 U.S. at 170 (emphasis added). A counsel's decision to inform a court or client about a potential conflict is not a "basic strategic decision" or "plausible

alternative defense strategy." *United States v. Infante*, 404 F.3d 376, 393 (5th Cir. 2005). *Sullivan*'s second prong deals with decisions like what evidence to present, which witnesses to call, or whether to accept a plea, not how the attorney-client relationship is managed. Moreover, it would be nonsensical to hold that *Sullivan*'s second prong is satisfied whenever a conflict is not disclosed. After all, the entire point of *Sullivan* is to remedy situations in which neither the court nor defendant were sufficiently apprised of the conflict. *See Mickens*, 535 U.S. at 168-69 (discussing *Sullivan*, 446 U.S. 335). And if such a showing were enough, the second prong of *Sullivan* would be meaningless, as any defendant who showed at prong one that an undisclosed or inadequately waived conflict existed would be relieved from showing that the conflict "adversely affected his counsel's performance." *Id.* at 174.

Second, Acklin argues that "Rahmati could have requested a continuance to investigate the abuse and to provide Acklin with a meaningful opportunity to consider his options." Pet.16. But Acklin presented no evidence showing that he would have changed his mind if only Rahmati had tried again to persuade him to present the abuse evidence. Moreover, there was no reason for Rahmati to seek a continuance to further investigate facts that his client had forbidden him from introducing. *See* App.37a-38a; *Adkins v. State*, 930 So. 2d 524, 539-40 (Ala. Crim. App. 2001).

Third, Acklin contends that Rahmati should not have called Theodis as a witness or refrained from asking him, "[D]id you ever see Nick to be disrespectful to anyone and if so, did you ever discipline him for anything?" T.R. 968-69; Pet.16. But when Acklin shut the door on the abuse evidence, Rahmati

reasonably pursued a mitigation strategy of portraying Acklin and his family in the best light possible. App.43a. And while Theodis was abusive during the last year of his marriage to Evans, that alone does not show that his general statements about other aspects of Acklin's upbringing were misleading. *See* App.43a-44a; *contra* Pet.16-19 and Judges Br.22-24.

Finally, Acklin asserts that "Rahmati could have objected when the trial judge stated that most killers are the product of abuse and dysfunction, but Nicholas was not." Pet.16. The judge's comments, however, were an accurate assessment of the evidence presented, and the "sole reason" Rahmati and Gray did not "introduce evidence of the alleged abuse was that Acklin expressly forbade them from doing so." App.37a. Indeed, had Rahmati objected on the ground that Theodis had abused Acklin, Rahmati would have contravened his client's clear command. *Cf. McCoy v. Louisiana*, 138 S. Ct. 1500, 1507-08 (2018) ("[T]he right to defend is personal, and a defendant's choice in exercising that right must be honored out of that respect for the individual which is the lifeblood of the law.") (quotations omitted).

The courts below thus faithfully applied this Court's precedents. Acklin contends otherwise by asserting that the appellate court "based its conclusion that Rahmati did not have an actual conflict of interest on the fact that Acklin signed a mitigation waiver," App.19a. But the court relied on Acklin's instructions to support its finding that Rahmati's purported conflict had no effect on Acklin's representation, not to ground its finding that there was no conflict at all. Put differently, the court found that Acklin's decision to withhold abuse evidence undermined his attempts to satisfy the *second* prong of *Sullivan*, not its first.

And overwhelming evidence supported the finding that abuse evidence was withheld solely "because Acklin made the conscious decision that he did not want this evidence presented at trial." App.36a.

Acklin is thus forced to argue in effect that he could never be responsible for his own trial strategy if his lawyer was conflicted, but none of the cases Acklin cites support that proposition. *See* Pet.21-25; *see also* Scholars Br.3 (asserting that Rahmati's purported "conflicts infected the defendant's decision"). For example, Acklin suggests that *Wood v. Georgia*, 450 U.S. 261 (1981), stands for the principle that if a defendant does not make "a knowing waiver of a conflict of interest," then "the conflict taints the client's choices and thus the proceeding itself." Pet.21. But the *Mickens* Court already rejected this reading of *Wood*. *See Mickens*, 535 U.S. at 170 (citing *Wood*, 450 U.S. at 273). Even an unwaived conflict does not warrant a new trial unless the defendant shows that "counsel was influenced in his basic strategic decisions by" the conflict. *Id.* (quoting *Wood*, 450 U.S. at 272).

The Third Circuit's decision in *United States v. Levy*, 557 F.2d 200 (1978), likewise lends little support, and not just because it precedes *Sullivan* and *Mickens*. In *Levy*, Verna was represented by Siegal who also represented Visceglia—Verna's co-defendant who had previously told DEA agents that Verna had not participated in the alleged conspiracy. *Id.* at 205. Siegal advised Verna not to call Visceglia to the stand, Verna agreed, and the witness was not called. *Id.* at 206. When Verna later challenged his conviction on the basis of this conflict, "the district court declined to explore the reasons why Verna acquiesced in Siegal's decision not to call Visceglia as a defense witness." *Id.* at 210. But the Third Circuit granted Verna relief

because it was clear that his decision was "*on the basis of advice* from" his conflicted attorney. *Id.* at 211 (emphasis added). The contrast with this case is stark. The circuit court held a four-day hearing to determine why Acklin made the decision not to present evidence of abuse. And Acklin's decision was not, in any relevant sense, "on the basis" of Rahmati's advice. Rather than "acquiesce" in Rahmati's decision to present that evidence, Acklin rejected it.

Acklin points to several decisions that address whether a defendant has knowingly and intelligently waived his right to conflict-free counsel. *See* Pet.23-24 (citing *United States v. Thompson*, 944 F.2d 1331, 1345 (7th Cir. 1991); *State v. Cisco*, 861 So. 2d 118 (La. 2003); *Barclay v. Wainwright*, 444 So. 2d 956 (Fla. 1984); *Massachusetts v. Michel*, 409 N.E.2d 1293 (Mass. 1980)). But those decisions are inapposite, as they apply only when the trial court has found a conflict before trial. *Sullivan* controls here, as it applies when a defendant "raised no objection at trial." *Sullivan*, 446 U.S. at 348. Moreover, applying Acklin's waiver decisions to this case makes no sense, for if a defendant knowingly and intelligently waives a conflict, he "cannot prevail" on a *Sullivan* claim. *Mannhalt v. Reed*, 847 F.2d 576, 580 (9th Cir. 1988).

Acklin cites a few decisions that apply *Sullivan*, but they do not establish any "conflict." Pet.23. Rather, each court applied the same rule the state courts applied here, and each court ruled for defendants because they—unlike Acklin—proved both actual conflicts and failures by counsel that were "linked" to those conflicts. *Rubin v. Gee*, 292 F.3d 396, 405 (4th Cir. 2002); *see also United States v. Tatum*, 943 F.2d 370, 377 (4th Cir. 1991) (counsel's multiple representations and possible involvement in his client's fraud

made it impossible for him to seek plea bargain or cross-examine government witness without "violat[ing] duties he owed to his other clients and … shift[ing] a potential for civil liability onto his firm and ultimately himself"); *Mannhalt*, 847 F.2d at 581 (attorney's alleged participation in his client's crime created a conflict that adversely affected his client's representation when lawyer could not testify about the allegations and he failed to fully explore the allegations or a potential plea bargain).

In contrast, the facts of this case render Acklin's claim virtually indistinguishable from others that were denied because a defendant failed to "show[] that it was [counsel]'s decision, rather than her own," that resulted in the trial strategy the defendant later regretted. *United States v. Flood*, 713 F.3d 1281, 1290 (10th Cir.), *cert. denied*, 571 U.S. 890 (2013). If Acklin's decision was the result of conflicted advice from his counsel, he was "in a position to make these assertions if they were true, but [he] failed to do so." *United States v. Stantini*, 85 F.3d 9, 17 (2d Cir.), *cert. denied*, 519 U.S. 1000 (1996). The state courts here thus did what any court would do—they rejected Acklin's claim about withholding the abuse evidence because he "offered no evidence whatsoever that this strategy was not undertaken for any reason other than his own desire not to" present that evidence. *Id.*; *see also Winkler v. Keane*, 7 F.3d 304, 309 (2d Cir. 1993), *cert. denied*, 511 U.S. 1022 (1994) (rejecting claim where "trial counsel did not pursue a plea bargain because [defendant] rejected this path, not because of trial counsel's monetary interest"). The decisions below thus faithfully applied settled law to facts that clearly favor the State. Acklin provides no "compelling reasons" to review those judgments. Sup. Ct. R. 10.

CONCLUSION

For the foregoing reasons, this Court should deny the petition.

Respectfully submitted,

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