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

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

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INTRODUCTION

The gravity of the Sixth Amendment violation that Petitioner Acklin asserts is obvious. Even Respondent acknowledges that a defendant facing the death penalty would suffer a grievous constitutional wrong if his lawyer labored under a conflict of interest of the kind set forth in the Petition. See Brief in Opposition (Opp.) at 18 (Acklin's claim "would be a troubling tale if it were true"). And Respondent nowhere denies that the question presented in the Petition would merit review in an appropriate case.

Respondent instead asserts that this case does not raise the question that Acklin presents because (i) there is no evidence that Acklin's father threatened to cease paying Acklin's legal fees if the lawyer pursued the sentencing strategy of putting on evidence of the father's abuse of Acklin as a child; and (ii) as a matter of law, Acklin's choice not to pursue this sentencing strategy cleansed the taint of any conflict and eliminated any possibility that Acklin was adversely affected. But these contentions are wrong.

As to the first, Respondent never contended in the courts below that the threat made by Acklin's father—"if he wants to go down this road" then I'm "done helping with this case" (R. 112, 118)—was anything other than a refusal to pay if evidence of the father's abuse was presented at trial. And the contention is facially implausible. The only way Acklin's father had been "helping" was by paying the legal fees, and a threat to cut off all help is necessarily a threat to cut off financial support. That is doubtless why the Alabama Court of Criminal Appeals reached and decided Acklin's Sixth Amendment Claim on the as-

sumption that Acklin's father had made such a threat.

As to the second, Respondent's argument simply repeats the fundamental legal error that requires review in this case. Because Acklin's lawyer never disclosed his conflict, Acklin's "choice" to forego presentation of the abuse evidence was the *product* of the conflict, not its cure. The gist of Respondent's argument is that the lawyer's conflict of interest could not have harmed Acklin because the lawyer gave Acklin the same advice he would have given even absent the conflict. But the very reason lawyers must disclose conflicts to their clients (and, in circumstances like these, to the court) is because a conflict can warp the attorney's advice about "options, tactics, and decisions" in both obvious and subtle ways, thereby prejudicing the client's ability to make an informed choice about how best to defend himself. *Holloway* v. *Arkansas*, 435 U.S. 475, 485-86, 489-91 (1978); see also Brief Amici Curiae of Ethics Scholars, at 16-17 ("[T]he attorney's advice is likely to be influenced, even subconsciously, by the attorney's own interests."). Respondent has identified no case in which a court has dismissed as inconsequential a conflict like the one present here, which resulted in a lawyer preserving his ability to get paid, but foregoing presentation of the most powerful mitigation case available and instead putting on a case at sentencing that the lawyer knew to be false and virtually certain to fail.

This is, in sum, a textbook example of "an actual conflict of interest [that] adversely affected [a defendant's] lawyer's performance." *Cuyler* v. *Sullivan*, 446 U.S. 335, 348 (1980). The decision of the Alabama

Court of Criminal Appeals conflicts at the most basic level of principle with this Court's Sixth Amendment precedents and those of federal courts of appeals and state courts. And it raises fundamental questions about the professional obligations of lawyers in capital cases and about the integrity of the legal profession. This Court's review is manifestly warranted.

ARGUMENT

I. Theodis's Threat to Rahmati Created a Clear Conflict of Interest.

"You tell Nick if he wants to go down this road, I'm done with him" and "done with helping with this case."

– Theodis Acklin to Nicholas Acklin's attorney. R. 112, 118.

Respondent's principal argument in opposing review is that no conflict of interest occurred in this case because the statement quoted above was not a threat by Acklin's father to cut off financial support. That is simply implausible. There is nothing ambiguous about that statement. When Theodis made it, the *only* way in which he was "helping with this case" was by paying Acklin's attorney. And Theodis could not have been more serious. He "took a very aggressive posture with [Rahmati]," R. 111, and was "visibly . . . angry," R. 112. He then stormed out of Rahmati's office. R. 112.

Respondent now asserts that the decision below rests on a factual finding that no conflict ever arose because, despite the unambiguous statement quoted

above, the Alabama Circuit Court found that Acklin's father never threatened to cease payments and the Court of Criminal Appeals upheld the ruling on that basis. Opp. at 16. Respondent never made that argument before the state courts. *See* State's Brief to Alabama Court of Criminal Appeals, 15-36 (Jan. 29, 2016); C. 3506-10 (State's post-hearing brief in Alabama Circuit Court). And in rejecting Acklin's Sixth Amendment claim, the Court of Criminal Appeals treated Theodis's statement as the threat that it was. App. 36a-38a. The court concluded that the threat did not give rise to a conflict because the lawyer did not expect to be paid the full retainer; the threat did not prejudice Acklin because his counsel continued to work hard on his behalf and tried to convince Theodis to testify; and "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. In other words, the court below rejected Acklin's Sixth Amendment claim for precisely the reasons described in the Petition for Certiorari.

To be sure, the Court of Criminal Appeals quoted an extended excerpt of the Circuit Court's analysis rejecting Acklin's claim, and among the many statements in that excerpt is an assertion that Acklin presented "no evidence" that Acklin's father threatened not to pay trial counsel if he presented evidence of abuse at sentencing. App. 35a.[1] But the

[1] Despite failing to argue to the circuit court that there was no evidence that Theodis issued a threat, Respondent submitted a proposed order that included the statement that there was no threat, C. 3567-68, and the circuit court then adopted that section of the proposed order verbatim, C. 4007. For the reasons set forth above, there is no basis to treat this statement as a

Court of Criminal Appeals declined to treat that statement as a dispositive finding for good reason: it lacks any basis in the record and is irreconcilable with the undisputed evidence of what Acklin's father actually threatened. The question in the Petition is thus squarely presented and there is no factual impediment to reaching it.

II. Acklin's "Decision" To Waive Mitigation Could Not Possibly Cure the Conflict Because the Decision Was Tainted by the Conflict.

Respondent also contends that review should be denied because the court below was correct in concluding that Theodis's threat did not affect the nature or quality of the representation Acklin received. Specifically, Respondent asserts no conflict of interest occurred in this case because Acklin's counsel diligently sought to develop abuse evidence and failed to introduce that evidence solely because Acklin forbade it. Opp. at 18-20. That argument fails to come to grips with the nature of the constitutional violation Acklin alleges, and thus provides no reason to deny review.

The very point of guaranteeing a criminal defendant the right to the assistance of counsel who does not have an "actual conflict of interest" is to ensure that counsel's advice and actions serve the client's best interests, not someone else's. *Mickens* v.

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dispositive factual finding. But it is in all events clearly erroneous, and thus no bar to this Court reaching the question presented in the Petition.

Taylor, 535 U.S. 162, 171 (2002). Here the decision to which Respondent points as the "sole" cause of the prejudice Acklin suffered occurred after a conversation in which Acklin's lawyer (who came armed with a prepared typewritten waiver form) provided advice without ever disclosing the existence of the conflict or informing his client of his right to conflict-free advice. The decision was thus the product of the conflict, and cannot serve as the basis for denying the conflict's existence—which is precisely what the Alabama Court of Criminal Appeals did.

Respondent misconstrues Acklin as suggesting that a client "could *never* be responsible for his own trial strategy if his lawyer was conflicted," Opp. at 24 (emphasis added), and that "*Sullivan*'s second prong is satisfied whenever a conflict is not disclosed," *id*. at 22. The point is rather that if an undisclosed conflict exists, the client's decisions cannot be separated from the conflict. That is particularly so when, as here, the client's "decision" (not to present the evidence of abuse) is *directly related* to the nature of the conflict (the father threatening to stop paying if the evidence of abuse was presented). *Cf. Wood* v. *Georgia*, 450 U.S. 261, 268-69, 270 n.17 (1981) (describing that an inherent danger of a third-party payer arrangement is that a payer will pressure an attorney to take a course of action that benefits the payer but harms the defendant). The court below erred in holding that Acklin's choice extinguished the conflict (i.e., that Acklin had not satisfied *Sullivan*'s first prong). *See, e.g.*, 33a-38a (discussion of actual conflict); *id.* at 37a. Once an actual conflict is established, a client's "choice" to proceed in the manner that advances the conflicted lawyer's own interests must be evaluated

as the product of the conflict.

This Court and others have thus consistently evaluated a client's decisions and the proceedings *in light of* the undisclosed conflict—rather than assuming that the client's decision extinguishes the conflict. *See, e.g.*, *Wood*, 450 U.S. at 267-68 (pointing to the defendants' decisions not to protest the size of certain fines or to pay them as *evidence* of a conflict); *see also* Pet. at 22-24. And the effect of the error is especially acute here because the appellate court relied on the mitigation waiver *throughout* its analysis of the conflict claim, including in analyzing the presence of a conflict, separately from adverse effect.

Respondent nevertheless argues that Acklin cannot show an actual conflict because Rahmati "worked hard" to convince Acklin to pursue the abuse evidence, Opp. at 19, and Acklin nevertheless "rejected" that advice, *see id.* at 20, 25; *id.* at 24-25 (attempting to distinguish *United States* v. *Levy*, 577 F.2d 200 (3d Cir. 1978)). That argument ignores the nature of conflicts. Attorneys are required to disclose conflicts immediately to ensure that clients do not unknowingly make decisions based on the advice of conflicted counsel. *See* Scholars' Amicus Br. at 16 ("[A] conflicted attorney's advice regarding . . . decisions is likely to provide a conduit for influence by the attorney's outside interests."); *Holloway* v. *Arkansas*, 435 U.S. 475, 485-86, 489-91 (1978).

That Rahmati *said* that the conflict did not affect his interaction with Acklin is irrelevant. Opp. at 18-21. Conflicts affect attorneys in "subtle, even unconscious" ways. *Castillo* v. *Estelle*, 504 F.2d 1243,

1245 (5th Cir. 1974). "The attorney's advice is likely to be influenced, even subconsciously, by the attorney's own interests." Scholars' Amicus Br. at 16-17. Even if a conflicted attorney gives advice that appears sound, the way in which the attorney frames and delivers such advice can skew the client's judgment. *See id.* at 17 n.6. Rahmati's belief that the conflict did not affect the advice he provided is thus beside the point. *See Wood*, 450 U.S. 261 (remanding due to concerns about a conflict that the attorney had not recognized). It is telling that in the very first post-conviction petition that Acklin filed—that is, the first time he could present evidence with conflict-free counsel—he raised a claim regarding the evidence of abuse. C. 115-24.

This Court's decision in *Dukes* v. *Warden, Connecticut State Prison*, 406 U.S. 250 (1972), is not to the contrary. The defendant in that case had obtained new, conflict-free counsel prior to sentencing, and he did not seek to withdraw his plea based on the conflict, which undermined his claim that the conflict affected his plea.[2] By contrast, Acklin's first opportunity to address the conflict came when his case reached post-conviction proceedings, at which point he raised the issue immediately and presented extensive evidence concerning both the conflict and the abuse. The Courts of Appeals cases that Respondent cites are likewise inapposite in that there was either no direct relationship between the conflict and the alternative path that would have benefited the client, *United States* v. *Stantini*, 85

[2] The defendant in *Dukes* sought to withdraw his plea once he had obtained new counsel, but in doing so he relied on reasons unrelated to any conflict.

F.3d 9, 17 (2d Cir. 1996), or the courts emphasized factors in the analysis that are not present here, *United States* v. *Flood*, 713 F.3d 1281, 1290 (10th Cir. 2013).

In short, the decision of the court below not only conflicts with the way this Court and other courts have addressed Sixth Amendment conflict-of-interest issues, but it also threatens to undermine the right to conflict-free counsel in precisely the cases where the conflict has manifested itself in the way one would expect.

III. The Conflict Adversely Affected the Representation Because Rahmati Presented Misleading Evidence That Led Directly to a Death Sentence.

Respondent argues that Acklin has failed to show that Rahmati's conflict adversely affected the representation. But it would be difficult to imagine a clearer example of an adverse effect: Rahmati presented affirmatively misleading evidence that benefited his financial interest but harmed his client and served as the basis for the trial court's decision to impose a death sentence.

It is untenable to suggest that Acklin's lawyer had no choice but to pursue the course that he did. When he learned of the abuse, he could have informed the court, and he could have requested a continuance to investigate further. Instead, he immediately obtained a waiver from Acklin and then called Acklin's father as a witness to provide a false picture of Acklin's childhood. The trial court relied directly on that evidence as a reason to impose death, and yet

Rahmati stood silent. Notably, when Rahmati was asked during the post-conviction hearing whether he agreed with the trial court's finding that Acklin was raised in a loving, middle-class family and was not the product of an abusive upbringing, he replied: "I would disagree with Judge Smith, respectfully. To some extent, I really couldn't [agree], based on what I knew . . . ." R. 151. There is simply no way to reconcile the evidence presented at sentencing and the reality of Acklin's childhood.

Respondent seeks to minimize the consequence of Rahmati's conflict-tainted strategy—describing it as a reasonable effort to portray "Acklin and his family in the best light possible"—and to downplay the severity and duration of Theodis's abusive conduct. Opp. at 23. But the evidence Rahmati presented (that Acklin was raised in a loving home with an overprotective father) had no prospect of persuading a jury not to impose death—particularly given the severity of the crime. And the true facts would have established a powerful mitigation case. As the post-conviction evidence established, Acklin's home life was defined by violence and abuse at the hands of his father. Testimony and corroborating records presented at the post-conviction hearing established that Theodis's abuse spanned at least 1982 through 1990, which was Acklin's entire adolescence. The last year of Velma Evans's marriage to Theodis, which Respondent suggests was the one "year" of abuse, *see* Opp. at 23, was 1982. That was the year in which Evans was thrown from a second-floor window during a fight with Theodis over a rifle as Acklin and his brothers watched. It also was the year in which Theodis repeatedly shoved a gun into Evans's mouth while Acklin and his brothers

"would be screaming, telling their dad not to hurt their mom." R. 219-20. In 1990, nearly a decade later, the Alabama Department of Human Resources documented an incident in which Theodis pointed a gun at Steve Acklin, Nicholas Acklin's brother, and threatened to kill him. C. 4692-98. The report states that Theodis admitted that the incident occurred. C. 4695. Steve Acklin also testified that incidents of this kind were common, as Theodis beat and abused his sons routinely. R. 511-17. Respondent's suggestion that the abuse was limited to 1982 is baseless.

In short, Rahmati's actions led directly to the presentation of false evidence related to his conflict to the judge and jury. The jury recommended that Acklin be sentenced to death by a vote of 10-2 (the minimum required in Alabama), and the judge imposed death after relying explicitly on the false evidence.[3] The approach the Alabama courts took in approving such a result is contrary to the principles set forth by this Court and other federal and state courts, and it would eviscerate the protections of the Sixth Amendment and the integrity of the judicial process.

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[3] Respondent notes that "[t]his 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." Opp. at 18 n.3. This type of conflict should not be treated any differently than the conflict at issue in *Cuyler* v. *Sullivan*, 446 U.S. 335 (1980), where prejudice is presumed if an actual conflict of interest adversely affected the representation. However, this case would meet either standard given the judge's reliance on the false evidence and the closeness of the jury vote.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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