No. 18-640

In The
Supreme Court of the United States

NICHOLAS BERNARD ACKLIN,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

On Petition For A Writ Of Certiorari To The Alabama Court Of Criminal Appeals

BRIEF OF *AMICI CURIAE* ALABAMA APPELLATE COURT JUSTICES AND BAR PRESIDENTS IN SUPPORT OF PETITIONER

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STATEMENT REGARDING INTEREST OF *AMICI CURIAE*[1]

The *amici* are former members of the Alabama Supreme Court and Alabama Court of Criminal Appeals, as well as former Presidents of the Alabama State Bar. Ernest Hornsby is a former Chief Justice of the Alabama Supreme Court and a former President of the Alabama State Bar. Ralph Cook is a former Justice of the Alabama Supreme Court. William Bowen is a former Presiding Judge of the Alabama Court of Criminal Appeals. William Clark and Robert Segall have previously served as Presidents of the Alabama State Bar. In the positions in which they served, each has had an exceptional opportunity to observe, participate in, and be affected by, Alabama's capital litigation process. The *amici* are perhaps better situated than any party in this litigation to inform this Court concerning the system of imposing the death penalty in Alabama, and how the unique difficulties associated with that system, in combination with the ethical concerns presented here, contributed to the violation of the petitioner's constitutional rights. Perspectives offered by these *amici* were deemed helpful by the Justices in

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[1] Pursuant to Rule 37.2(a), Sup. Ct. R., all parties were timely notified and have granted written consent for the filing of this Brief. Letters of consent are being submitted to the Clerk of Court contemporaneously herewith. Pursuant to Rule 37.6, Sup. Ct. R., the *amici* state that no person or entity, other than themselves and their counsel, authored any portion of this brief. The *amici* further state that no person or entity, other than themselves and their counsel, made any financial contribution toward the preparation and filing of this brief.

reaching their decision in a prior death penalty case.[2] *Amici* continue to have a compelling interest in urging the Court to grant relief required to bring some measure of fairness to this process.

STATEMENT OF THE FACTS

Nicholas Acklin's counsel contracted with Acklin's mother, Velma, to represent Acklin in his capital murder case for a $25,000 retainer and $150 per hour. Neither Acklin nor his father, Theodis (from whom Velma was divorced), signed the contract. (C. 4235-36; R. 20.) Over the next eighteen months, Velma made only a handful of small payments totaling $1,550. (C. 4240, 56, 58, 59.) In March 1998, counsel sought help from Theodis, who promptly paid $700. (C. 4260; R. 55-57.) In September 1998, a month before trial, Theodis made additional payments totaling $2,200. (C. 4270.)

Counsel had not engaged any mitigation specialist. (R. 106-07.) He understood Acklin was indigent, and that if appointed to represent Acklin, he could seek fees for experts. Counsel sought appointment in June 1998, but withdrew that request a few days later. (R. 62-67.) He was ultimately paid about $5,000 for representing Acklin, mostly by Theodis. (C. 4240, 4256,

[2] See Brief of *Amici* Alabama Appellate Court Justices and Bar Presidents in Support of Petitioner's Petition for Writ of Certiorari, No. 10-63 (August 11, 2010); Brief of *Amici Curiae* Alabama Appellate Court Justices and Bar Presidents in Support of Petitioner, No. 10-63 (May 25, 2011) ("Justices' Brief"); *Maples v. Thomas*, 132 S.Ct. 912, 917-19 (2012) (citing Justices' Brief).

4258-60, 4270; R. 32-40.) Had he been appointed, fees would have been capped at $2,000. Ala. Code § 15-12-21(d) (1996).

On October 17, 1998, two days before trial, counsel discussed mitigation with Velma alone. (C. 4253; R. 182-84.) Velma revealed for the first time that Theodis had abused her, Acklin, and Acklin's brothers during Acklin's childhood, including physical violence, being held at gunpoint, and being threatened with death. (R. 113-16.) Counsel believed what Velma told him and understood it would be important mitigation evidence. (R. 117-20.)

Counsel immediately contacted Theodis, who was paying him. He informed Theodis of what Velma had said and asked if Theodis would testify about it. Theodis responded, "You tell Nick if he wants to go down this road, I'm done with him, [and] *done helping with this case*." (R. 109-12, 117-18.) (Emphasis supplied.)

Within thirty-six hours of this conversation with Theodis, literally on the eve of trial, counsel met with Acklin. (R. 181-84.) Despite counsel's knowledge that the abuse was important mitigation evidence, he quickly presented Acklin with a typewritten statement that Acklin did not want to use that evidence. (R. 181-84.) While he told Acklin what Theodis had said (R. 164), he did not explain or even disclose the conflict of interest it created, nor take any steps to remedy that conflict. Instead, he obtained Acklin's signature on the document purporting to instruct that the mitigating evidence not be presented.

Counsel did not seek a continuance or make any additional efforts to investigate the abuse. He did not inform the court of his discovery of the abuse just two days before trial, his financial arrangement with the abuser, or the written waiver of mitigation evidence obtained from his client. He did not seek to withdraw from the representation, nor to sever his financial relationship with Theodis, which was the real obstacle to presenting the abuse evidence.

After Acklin was convicted, counsel called both Velma and Theodis to testify in the penalty phase. Theodis testified Acklin was raised in a "Christian home" with "good values." (R. 964-70; T.R. 1026.) According to Theodis, Acklin's childhood was unremarkable. In contrast, Velma was asked *no* questions about Acklin's upbringing. (R. 973-75.) She expressed sympathy for the victims' families and asked that her son's life be spared. (*Id.*) The only other witnesses were acquaintances who briefly opined that Acklin was a nice, nonviolent person. (T.R. 953-54, 971-75.) The jury voted ten to two to recommend Acklin be sentenced to death. (T.R. 1023.)

At sentencing, counsel invited Theodis to address the trial court, reiterating his earlier testimony. (T.R. 1025-28.) The trial court expressly referred to Theodis' testimony in finding Acklin deserved to die. While noting that "most killers" are products of abusive childhoods, the trial court observed that Acklin was raised in a family with good values he chose to reject. (T.R. 1044; T.C. 294.) Although counsel knew Theodis' testimony was false, he remained silent.

Counsel continued to seek payments from Theodis. Beginning just ten days after trial, counsel contacted Theodis seven more times asking for money toward his fee. (C. 4280-86.)

SUMMARY OF THE ARGUMENT

The duty of loyalty provides the most basic foundation for many ethical rules that govern the conduct of attorneys, including those addressing conflicts of interest, and requiring competent and diligent representation, which are implicated here (as is the duty of candor). The obligation of loyalty is at its most acute in a death penalty case, where its disregard may cost one's client his life.

Acklin was denied his Sixth Amendment right to effective assistance of counsel amidst a perfect storm of violations of the Rules of Professional Conduct. The conflict between counsel's duty to Acklin and his interest in being paid by Acklin's father lies in the eye of the storm, but the confluence of this conflict, failure to represent Acklin competently from the outset, and failure to uphold the duty of candor, resulted in counsel's utter abandonment of his client's interests.

A conflict of interest plainly existed. Loyalty to a client is impaired when a lawyer's consideration, recommendation or carrying out of an appropriate course of action is impeded by the lawyer's other responsibilities or interests. The conflict arose when counsel belatedly learned of his client's childhood abuse only after

the abuser had begun paying counsel's fees. Counsel's loyalties were divided between the interests of his client, Theodis' interest in not having his abusive conduct revealed in open court, and his own interest in continuing to be paid. The latter interests won. Counsel's duty was to withdraw from the representation once the conflict arose, unless it could be resolved in a way that was not adverse to his client's interests. Counsel abandoned his duty by proceeding to trial under the cloud of his unresolved conflict, failing to introduce or even competently pursue the mitigating evidence, and knowingly presenting false and misleading evidence in order to preserve his relationship with the abuser. Having done the bidding of the abuser, counsel continued to seek payment from the abuser even after his client was sentenced to die.

Counsel also has a duty of competence. Well-known standards existing at the time of trial provided guidance concerning conduct of the guilt and penalty phases of a capital murder defense. Any reasonable mitigation investigation would have revealed childhood abuse by Acklin's father months before trial, instead of just a few days before, when counsel learned of it inadvertently. Had this information been uncovered from the outset, counsel could have avoided the conflict by not becoming financially beholden to Acklin's abuser. Instead, driven by his conflict, he failed to competently address it by investigating further and seeking a continuance to permit complete investigation and development of the mitigation case. Counsel also violated the duty of candor by knowingly

presenting false and misleading testimony. As a result, the trial court expressly relied upon false and misleading evidence in sentencing Acklin to death, while counsel stood silent. Thus, there is injury here not only to Acklin, though his injury could not be more dire. If Acklin's death sentence is permitted to stand under these circumstances, our system of justice itself is also damaged.

ARGUMENT

The duty of loyalty to a client is among the paramount obligations of an attorney, and provides the most basic foundation for many ethical rules that govern the conduct of an attorney, including those addressing conflicts of interest and requiring competent representation, which are implicated here (as is the duty of candor). While the obligation of loyalty may not be gainsaid in any case, it is undoubtedly at its most acute in a death penalty case, where disregard of that obligation may cost one's client his life.

Acklin was denied his Sixth Amendment right to effective assistance of counsel in the midst of a perfect storm of violations of the Rules of Professional Responsibility. The conflict of interest between counsel's duty to Acklin and his interest in being paid by Acklin's father lies in the eye of the storm.[3] The confluence of this

[3] The conflict of interest here, standing alone, denied Acklin the effective assistance of counsel. That conflict and the resulting

conflict, counsel's failure to provide competent representation from the outset, and his failure to uphold the duty of candor, inflicted on Acklin an utter abandonment of his interests. Counsel's presentation of misleading and false evidence, which the trial court credited and upon which it expressly relied, also created an unacceptable injury to an already impaired system of capital punishment. Both are wounds that, in our view, justice cannot abide.

I. CONFLICT OF INTEREST.

"Loyalty to a client is . . . impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests." Ala. R. Prof'l Conduct 1.7 cmt. In these situations, "[t]he conflict in effect forecloses alternatives that would otherwise be available to the client." *Id.*; *accord United States v. Stantini*, 85 F.3d 9, 16 (2d Cir. 1996) (holding an attorney's performance adversely affected when "some plausible alternative defense strategy or tactic might have been pursued but was not . . . undertaken due to the attorney's other loyalties or interests.") (internal quotation marks and citations omitted); *Woods v. State*, 573 S.E.2d 394, 397 (Ga. 2002) (to prevail on a claim of ineffective assistance due to conflict of interest, defendant must show "'his lawyer would have done something differently if there was no conflict'") (*quoting*

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prejudice were, however, exacerbated by counsel's other, related ethical lapses.

Cates v. Superintendent, Indiana Youth Center, 981 F.2d 949, 955 (7th Cir. 1992)). In Acklin's case, only counsel's financial interest stood between him and the presentation of powerful and available mitigation evidence during the penalty phase.

The comments to Rule 1.7 also expressly warn that a lawyer's need for income can lead to ethical violations:

> The lawyer's own interests should not be permitted to have adverse effect on representation of a client. . . . If the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice.

Ala. R. Prof'l Conduct 1.7 cmt. (internal citations omitted).

A lawyer may only be paid by a third party "if the client is informed of that fact and consents *and* the arrangement does not compromise the lawyer's duty of loyalty to the client." *Id.* (emphasis added). Similarly, Rule 1.8 provides that "[a] lawyer shall not accept compensation for representing a client from one other than the client unless," among other things, "the client consents after consultation" *and* "there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship." Ala. R. Prof'l Conduct 1.8(f); *see also United States v. Duran-Benitez*, 110 F. Supp. 2d 133, 151-52 (E.D.N.Y. 2000) ("By their very nature, third-party fee arrangements

create numerous ethical pitfalls into which even the most wary criminal defense attorney may stumble.").

That a conflict of interest existed here is simply beyond reasoned debate. As Acklin's Petition for Writ of Certiorari points out, the inexplicable finding by the Alabama Court of Criminal Appeals that there was no conflict ignores long established jurisprudence of this Court and many others. (Pet. at 20.) Moreover, it flies in the face of the Alabama Court of Criminal Appeals' own analysis of comparable conflicts. In its 2015 decision in *Ervin v. State*, 184 So.3d 1073 (Ala. Crim. App. 2015), that court reiterated the longstanding conclusion of the Fifth Circuit that "'[an] actual conflict of interest occurs when a defense attorney places himself in a situation 'inherently conducive to divided loyalties.'" *Id.* at 1081, *quoting Zuck v. Alabama*, 588 F.2d 436, 439 (5th Cir. 1979). In *Ervin*, defense counsel represented both co-defendants in a robbery case, and Ervin had been implicated by the other defendant's statement. The Alabama Court of Criminal Appeals found the inherent conflict there tainted defense counsel's representation of Ervin in negotiating a plea agreement. In so doing, it also reiterated its own prior jurisprudence, quoting extensively from *Schultz v. State*, 481 So.2d 456 (Ala. Crim. App. 1985), in which it held that:

> If an attorney owes duties to a party whose interests are adverse to those of [the] defendant, an actual conflict exists and the interests of the other [party] and the defendant are sufficiently adverse if it is shown that the

> attorney owes a duty . . . to take some action that could be detrimental to his [] client.

Id. at 1082 (internal citations and quotations omitted).

Acklin's counsel certainly found himself in a situation inherently conducive to divided loyalties – one in which he served conflicting interests of not just two, but three parties: his client's, Theodis', and his own. Once such a conflict arises, the only proper courses of action are to remedy the conflict, or withdraw from the representation. *Ervin, supra* at 1085, citing Ala. R. Prof'l Conduct 1.7 and 1.16. Here, counsel did neither.

The tension between Acklin's interest in pursuing mitigating evidence of abuse, his father's interest in keeping that abuse from being revealed in open court, and counsel's interest in preserving his stream of revenue is abundantly clear. It is in some ways reminiscent of the situation in *Stitt v. United States*, 369 F. Supp. 2d 679 (E.D. Va. 2005), *aff'd*, 552 F.3d 345 (4th Cir. 2008). Stitt alleged that his counsel performed deficiently because counsel wanted "to ensure that he received the maximum amount of fees and to hide the nature of the payments he was receiving." *Id.* at 691. The government had argued at trial that petitioner's counsel was paid in drug money. *Id.*

On federal habeas review, Stitt argued that, due to a financial conflict of interest, his trial counsel failed to ask the court to appoint experts to testify during the sentencing phase. *Id.* at 692-93. Counsel testified at the evidentiary hearing that he knew petitioner did not have the resources to pay for experts, and was

entitled to seek court-appointed experts. *Id.* at 693. Counsel admitted he did not seek court appointment of such experts because he wanted to avoid the "problems" that would accompany such a request – namely, inquiries into the source of payments made to counsel. *Id.* at 694. The district court held it was "obvious that [trial counsel] labored under an actual conflict of interest," and that counsel's focus on his own self-interest had an adverse effect on counsel's performance. *Id.* "The failure of counsel to undertake some professional duty on behalf of his client because of the conflict of interest amounts to an adverse effect." *Id.* Similarly, Acklin's counsel failed to take necessary steps to pursue mitigation evidence, where doing so would conflict with his own pecuniary interests.

The conflict was *not* remedied by a waiver. Acklin was not asked to, and did not, give informed consent to waive his counsel's conflict, nor could he have done so under the circumstances. The only "waiver" counsel presented to Acklin does not even purport to address his conflict. Rather, it states that Acklin instructs his counsel not to present certain mitigation evidence, with no reference to any conflict.[4] Even so, it was the duty of the attorney to ensure that the client fully understood the import of his consent on such a vital matter. Counsel testified he attempted to convince Acklin to allow the mitigation testimony, but the notion of any

[4] We note that the absence from this document of any hint of the conflict is entirely consistent with the lack of any other evidence that counsel disclosed, or explained the import of, his conflict.

adequate effort is belied by the fact that counsel was so quick to place a typed waiver of its presentation in front of his client to sign.

The brevity of counsel's purported efforts to persuade his client, alone, shows such efforts were insufficient to support a knowing waiver. It is well known that information about childhood abuse is exceedingly difficult to elicit from capital defendants and their families, and denial and avoidance of such facts tend to persist long after the existence of the abuse has been uncovered. Once counsel became aware of the history of abuse, he simply could not have adequately addressed it with his client and counseled him about its vital importance in the mere hours remaining before trial. Rather than seek a continuance in order to properly address such a crucial development, counsel had Acklin sign the evidence away on the strength of rushed advice. His haste to obtain Acklin's signature on a waiver and proceed to trial was tantamount to a rush to a sentence of death.

Second, the record contains nothing to indicate Acklin understood his counsel's own interest in being paid presented an impediment to presenting the evidence. Counsel did not disclose to Acklin the conflict under which he was acting when he obtained Acklin's signature waiving the presentation of evidence that likely would have saved his life. Counsel also failed to inform the court of the belated discovery, counsel's financial arrangement with the abuser, or Acklin's purported waiver of mitigation evidence, depriving the trial court of the opportunity to determine whether

Acklin's purported waiver was knowing, intelligent, and voluntary.

Even if counsel had properly disclosed his conflict to Acklin, it would have been wholly improper to seek a waiver. The requirement that the conflict not compromise the lawyer's duty of loyalty to the client is independent of the client's consent. Moreover, a lawyer has a separate duty to determine whether waiver is in the client's best interests, and cannot ethically request a waiver unless he reasonably believes the representation will not be adversely affected. *Cf.* Ala. R. Prof'l Conduct 1.7(b)(1). The comments offer this test of reasonableness: "when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent." No rational, disinterested attorney could conclude that Acklin should waive his right to critical mitigation evidence and proceed to trial under the circumstances here. There was nothing to be gained (other than a fee) – and no rational strategy to be advanced[5] – by *not* presenting powerful, available mitigation evidence. There was certainly nothing about permitting the abuser to falsely testify about Acklin's upbringing, and allowing the court to be persuaded by that false testimony, that was in Acklin's interest.

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[5] There is no contention that counsel's failure to present the mitigation was the product of a strategic decision (which, rather obviously, would not have been a rational one). Counsel knew its vital importance.

Acklin's interest in presenting comprehensive mitigation evidence inherently ran counter to his father's expressed insistence on concealing the true facts of Acklin's childhood. Given the financial stake involved, there was simply no means by which counsel could both represent Acklin's interests, as was his duty, and follow the father's dictates. Counsel's conflict could not be cured by a waiver, even had one been given. *Cf. Roberts v. State*, 141 So. 3d 1139, 1142 (Ala. Crim. App. 2013). The evidence Acklin's counsel failed to elicit was inarguably the most consequential evidence in defense of his client's life.

II. THE DUTY OF COMPETENCE.

Counsel has a duty of competence:

> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. . . .

Ala. R. Prof'l Conduct 1.1.

The need for counsel who both possesses and exercises the knowledge, skill, thoroughness and preparation "reasonably necessary for the representation" is most critical in a trial for the client's life. All of these characteristics appear to have been entirely absent here, and the failure of competent representation both set the stage for and exacerbated the damning impact of counsel's conflict.

The American Bar Association's *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*[6] (hereinafter "ABA Guidelines"), promulgated in 1989 (years before Acklin's trial), are recognized "'guides to determining what is reasonable.'" *Wiggins v. Smith*, 539 U.S. 510, 522 (2003) (citing *Strickland v. Washington*, 466 U.S. 668, 688 (1984)); *see also Williams v. Taylor*, 529 U.S. 362, 396 (2000). Alabama courts have acknowledged that these Guidelines provide the appropriate standards for evaluating effectiveness of capital representation. *E.g. State v. Gamble*, 63 So. 3d 707, 716-17 (Ala. Crim. App. 2010) (applying the ABA Guidelines in finding ineffective assistance where petitioner's counsel had "no mitigation plan, an inconsequential mitigation investigation, [and] no mitigation investigator or specialist. . . ."). While it is perhaps possible to render ineffective assistance, as that phrase is understood in the capital litigation context, but nevertheless be deemed competent under Rule 1.1, the distinction is merely a matter of degree. In Acklin's case, counsel failed so completely, at least with regard to the mitigation case, to bring the necessary knowledge, skill, thoroughness and preparation, that counsel was both ineffective and incompetent under any standard. Although Acklin's counsel was engaged rather than appointed – by counsel's own choice[7] – the

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[6] Available at http://www.americanbar.org/groups/committees/death_penalty_representation/resources/aba_guidelines.html

[7] It was clear well before trial that Acklin was indigent, and that his mother, who contracted to engage counsel, was unable to pay. Counsel testified "it was obvious from Day 1" that Acklin's parents could not afford to pay him. (R. 56.) Counsel sought appointment

Guidelines are nevertheless an important reference with respect to the requirements of competent representation for the accused.

Counsel's investigation of mitigation evidence "should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor," *Guidelines* ¶ 11.4.1(C), p. 93. Also available in 1998 were other resources outlining effective representation, including *The Alabama Capital Defense Trial Manual* (2nd ed. 1992) and *Defending a Capital Case in Alabama* (1988). These references confirmed pretrial investigation and preparation in capital cases must be far more extensive and cover areas not normally considered in other cases. "The life and background of the client is *a critical component of effective preparation* for a capital trial. . . ." *Defending a Capital Case in Alabama*, at 336 (emphasis added). Mitigation investigation "cannot be done in a few

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by letter to the trial court on June 1, 1998, but withdrew that request a few days later. (R. 62-67.) He did so, at least in part, because the attorney he had chosen to be his co-counsel had only two years' experience and would not have been considered qualified for appointment. (R. 68-70.) Appointed counsel could have sought fees for badly needed experts and investigators, which Acklin's counsel testified he understood. However, as he acknowledged, fee caps in place at that time would have meant counsel could not have been paid more than $2,000 if appointed. Instead, counsel withdrew his request for appointment, did inadequate work in exchange for payments he was receiving from Acklin's parents, and hoped for more. In our view, the duties of competence and loyalty obligated Acklin's attorney to inform the trial court that appointed counsel was needed.

weeks before trial. It will take several months. . . . An investigation will include in-depth interviews with the client and all the people in his or her life." *Id.* Even if counsel had made an effort (which he did not) to investigate the abuse once he learned of it, it simply would not have been possible to competently do so in the relatively few hours remaining before trial.

The vital importance of competent representation, already immensely heightened in any capital case, is at its zenith in Alabama, where the machinery of death rarely sleeps. In 2005, Alabama sentenced more people to death than Georgia, Mississippi, Louisiana and Tennessee combined.[8] Between 1977 and 2008, Alabama managed to rack up the highest per capita death sentencing rate in the nation and by far the largest per capita death row population.[9]

"The defense team should consist of no fewer than two attorneys qualified in accordance with Guideline 5.1,[10] an investigator, and a mitigation specialist."[11]

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[8] Thomas Spencer, *EU Ambassador Hails Alabama's Evolving Image*, BIRMINGHAM NEWS, April 26, 2007.

[9] Equal Justice Initiative, *The Death Penalty in Alabama: Fact Sheet* (January 2011), available at http://www.eji.org/files/02.03.11%20Death%20Penalty%20in%20Alabama%20Fact%20Sheet.pdf; Equal Justice Initiative, *Alabama's Disproportionately High Rate of Death Sentencing* (December 2009), available at http://www.eji.org/files/02.02.10%20DP%20in%20Ala%20Chart%20One-Pager%203.pdf.

[10] The ABA Guidelines indicate attorneys appointed in a capital case should have substantial training in capital representation.

[11] ABA, *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (2003) at 40, available at

Judge Bowen, from his perspective as both former presiding judge of the Alabama Court of Criminal Appeals and a criminal defense attorney, has observed:

> The very strong political pressure to impose and affirm death sentences in Alabama imposes an extra-heavy duty on the defense team to conduct a thorough investigation so that the judge and jury can recognize that the capital defendant is a human being and not just a monster. . . .
>
> It is our obligation as defense counsel at the trial level to avoid the death penalty by giving the judge a good mitigation case that includes valid reasons why the defendant should not be put to death. In fact, every lawyer in Alabama must understand that the politics of capital punishment are such that in most cases the only way to avoid the death penalty is by thoroughly investigating the client's life story, and presenting the judge and the jury with an affirmative case for a life sentence.

A Former Alabama Appellate Judge's Perspective On The Mitigation Function In Capital Cases, 36 Hofstra L. Rev. 805, 807-09 (2008) (footnotes omitted). Based on his experiences before and on the bench, Judge Bowen observed "a mitigation specialist is an absolutely critical member of the capital defense team, and

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http://www.americanbar.org/groups/committees/death_penalty_representation/resources/aba_guidelines.html. Although the 2003 Guidelines were promulgated after Acklin's trial, they remain relevant to the issues presented in this case because they are based on and cite case law preceding the Acklin trial.

that the mitigation function should be conducted in accordance with" the Guidelines. *Id.* at 805-06.

Given the many factors tilting the scales toward death in Alabama, the defendant who lacks competent representation is a dead man walking. "[D]efense counsel competency is perhaps the most critical factor determining whether a capital offender/defendant will receive the death penalty." American Bar Association, *Evaluating Fairness and Accuracy in State Death Penalty Systems: the Alabama Death Penalty Assessment Report* at 97.[12] This was certainly born out in Acklin's case, where failure of competent representation led inexorably to death row.

Acklin's counsel did not engage a mitigation specialist. Any reasonable investigation of Acklin's life history should have revealed the childhood abuse many months before trial, instead of just a few days before trial when it finally came to counsel's attention inadvertently.[13] Had counsel engaged a mitigation

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[12] Available at http://www.americanbar.org/content/dam/aba/migrated/moratorium/assessmentproject/alabama/report.authcheckdam.pdf.

[13] The blame for counsel's failure to uncover the abuse until the eleventh hour cannot be laid at Acklin's feet. Courts considering death penalty cases, including Alabama courts, recognize that a defendant who has been the victim of abuse may have difficulty revealing the facts of the abuse or may actively deny it. These courts also recognize that this is among the psychological effects of the abuse suffered by the defendant, and not any willful dishonesty or lack of cooperativeness on the defendant's part. *E.g.*, *Harris v. State*, 947 So. 2d 1079 (Ala. Crim. App. 2004). It can hardly be considered surprising that Acklin's father did not reveal his abuse of his wife and children. The fact that child abusers

specialist, this information would have been uncovered much earlier, and there would have been ample time to both fully develop the facts and to ensure that Acklin understood the vital and life-saving importance of those facts to his defense.[14] Counsel could have avoided the conflict by not becoming beholden to Acklin's father. Once counsel finally learned of the abuse, he did not perform even a perfunctory investigation. By then, his decisions were constrained by his conflict, and he failed to competently address the abuse by investigating further and seeking a continuance to permit complete investigation and development of the mitigation case.

Lacking presentation of substantial available evidence, the penalty phase was exceedingly brief. Acklin's father, who knew all too well the truth about Acklin's childhood, presented a misleadingly bland,

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attempt to keep their despicable behavior secret has been well known for a very long time. A July 1962 *Time* magazine article, reporting on a then-recent American Medical Association report on "battered child syndrome," noted "parents deny any responsibility" when children are brought to the emergency room for treatment of an abuse-inflicted injury, and doctors themselves were often reluctant to attribute injuries to parental abuse. *Medicine: Battered-Child Syndrome*, TIME, July 20, 1962.

[14] A mitigation specialist would have conducted thorough, searching interviews with every available member of Acklin's family, as well as a painstaking search for medical and other records that would have led to discovery of the abuse. That counsel may have investigated other matters, such as Acklin's substance abuse, in no way excuses his failure to take basic steps necessary to investigate life history and uncover childhood abuse, and certainly does nothing to ameliorate his failure to investigate further once he stumbled upon it.

and false, depiction of his son's youth as unremarkable. Acklin's mother was not even asked to contradict that false picture. She simply expressed sorrow and asked that the jury spare Acklin's life. The only other witnesses, several of Acklin's contacts, briefly opined that he was a nice, non-violent person. Counsel knew the abuse had happened, but allowed Theodis to testify falsely, robbing Acklin of the only thing that could save his life.

III. CANDOR TOWARD THE TRIBUNAL.

The combined failures of Acklin's counsel to provide competent representation, to avoid a blatant conflict, and to uphold the duty of loyalty led counsel to commit an additional breach of his ethical obligations – the duty of candor:

> A lawyer shall not knowingly . . . [o]ffer evidence the lawyer knows to be false.
>
> . . .
>
> A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

Ala. R. Prof'l Conduct 3.3.

"The advocate's task is to present the client's case with persuasive force," while upholding the duty of candor. *See* Ala. R. Prof'l Conduct 3.3 cmt. Counsel did neither. His unconscionable response to the situation did not end with failure to pursue and present the evidence of abuse, or even with obtaining from Acklin a tragically ill-advised waiver of its presentation.

Counsel went further. Armed with knowledge of the abuse, he called Theodis to testify to entirely different facts – which counsel himself knew to be at best misleading and at least in part untrue – and avoided asking Acklin's mother about his childhood during her testimony.

The failure of candor during the testimony of Acklin's parents (and repeated with Theodis' statement at sentencing) was compounded when it was that very testimony to which the trial court pointed in imposing the death penalty. At sentencing, the trial court expressly relied on the false picture of Acklin's supposed idyllic upbringing "in a good home by loving parents." (R. 294.):

> Most killers are typically the products of poverty, a dysfunctional family, physical or sexual abuse and other forms of social deprivation. Mr. Acklin was the product of a loving, middle-class family. Mr. Acklin was exposed to all the values that are central to an ordered society; however, he chose to reject them. Acklin made a conscious decision to become a killer. He was certainly not born to it.
>
> . . .
>
> Because he has chosen to "become death" and to destroy so many worlds, it is to death he shall return.

(R. 294-96.) In fact, Acklin was the product of dysfunction, and of physical and psychological abuse. Yet counsel stood mute while the trial court relied upon false

and misleading evidence in sentencing Acklin to die. In response to the trial court's inquiry, counsel said there was nothing further and went home, while his client went to await execution. Counsel continued to seek payments from his client's tormenter.

In the end, counsel's failure to uphold the duty of candor was both a violation of the duty of loyalty and an abdication of counsel's vital role in the death penalty system. Counsel knew, or at the very least reasonably believed, the testimony he presented during the sentencing phase was false, and that it was a key factor in the trial court's decision to sentence Acklin to death. Still, he chose the lucre he had received, and hoped to continue receiving, from Theodis over both his ethical obligations and his client's life. Acklin, and justice itself, suffer the consequences.

CONCLUSION

Counsel's multiple and cascading violations of the Alabama Rules of Professional Conduct violated Acklin's Sixth Amendment right to effective counsel, and require reversal of his sentence of death. The conflict created by counsel's fees being paid by Acklin's abusive father, who successfully demanded that his abuse not be presented as mitigation, was profound. Counsel did not, and could not, receive a knowing waiver of that conflict from Acklin. Counsel also failed to take any steps to remedy the conflict, instead allowing it to thwart presentation of the only available

evidence that could (and likely would) have saved Acklin's life.

This is not simply a case where defense counsel failed to uncover evidence of abuse. Rather, he knew of the evidence of abuse and deliberately suppressed it. The Constitution demands that a defendant facing the possibility of a death sentence be represented by counsel who is loyal to his interests, not one whose primary loyalty is to counsel's own coffers. It also demands a process in which, at the very least, death is not imposed on the basis of false evidence introduced by one's own attorney. We respectfully urge the Court to reverse the sentence of death and remand the case for a new penalty phase proceeding.

Respectfully submitted,

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