No. _____

In the
Supreme Court of the United States

TONY BARKSDALE,

Petitioner,

v.

JEFFERSON S. DUNN,
Commissioner,
Alabama Department of
Corrections,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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*****THIS IS A CAPITAL CASE*****

QUESTIONS PRESENTED

1. Did the Eleventh Circuit misconstrue this Court's guidance in, *inter alia*, *Buck v. Davis*, 580 U.S. ___, 137 S. Ct. 759 (2017), when it denied Petitioner a Certificate of Appealability on the basis that a reasonable jurist might **agree** with the resolution of his constitutional claims in the court below, when the applicable test for "debatability" is whether any such judge could sensibly **disagree** with it?

2. Do the failures of defense counsel in a capital trial to perform any meaningful investigation, or to develop a defense case for reduced culpability or mitigation of sentence, satisfy this Court's tests for effective assistance of counsel as articulated in *Andrus v. Texas*, 590 U.S. ___, 140 S. Ct. 1875 (2020); *Rompilla v. Beard*, 545 U.S. 374 (2005); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Williams v. Taylor*, 529 U.S. 362 (2000); and *Strickland v. Washington*, 466 U.S. 668 (1984)?

3. Did the verbatim adoption by the State court judge of the prosecution's proposed findings of fact and conclusions of law in Petitioner's capital habeas corpus proceedings violate due process of law as guaranteed by the Fifth and Fourteenth Amendments?

4. Is a State court's imposition of a capital sentence following the recommendation of a non-unanimous jury, and relying on the trial judge's independent assessment of aggravating and mitigating factors, consistent with this Court's teachings in *Ramos v. Louisiana*, 590 U.S. ___, 140 S. Ct. 1390 (2020), and *Hurst v. Florida*, 577 U.S. ___, 136 S. Ct. 616 (2016)?

LIST OF PARTIES BEFORE THE CASE BELOW

1. Tony Barksdale, Petitioner before this Court.
2. Jefferson Dunn, Commissioner of the Alabama Department of Corrections, Respondent before this Court.
3. The Attorney General, State of Alabama, and the Warden, Holman Correctional Facility, were identified as additional appellees in the decision of the Eleventh Circuit Court of Appeals.

LIST OF RELATED PROCEEDINGS

State:

Barksdale v. State, 788 So.2d 898 (Ala. CCA 2000), *cert. den. sub nom. Ex parte Tony Barksdale*, 788 So. 2d 915 (Ala. 2000), *cert. den.*, 532 U.S. 1055 (2001).

Federal:

Barksdale v. Dunn, No. 3:08-CV-327, 2018 WL 6731175 (M.D. Ala. 2018), *recons. den.*, 2020 WL 698278 (M.D. Ala. 2020).

Barksdale v. Attorney General, State of Alabama, et al., No. 20-10993-P (11th Cir. 2020) (E. Carnes, J.).

TABLE OF CONTENTS

INDEX OF APPENDICES

TABLE OF AUTHORITIES

CASES

FEDERAL STATUTES

STATE STATUTES

FEDERAL RULES

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Petitioner Tony Barksdale, an inmate at Holman Correctional Facility in Atmore, Alabama, currently under sentence of death, respectfully petitions this Court for a writ of certiorari to review a judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The order of the United States District Court for the Middle District of Alabama, dated December 21, 2018, denying Mr. Barksdale's petition for a writ of habeas corpus is attached as Appendix 1. It is unpublished, but may be found at 2018 WL 6731175.

The District Court's unpublished denial of the motion to reconsider, and/or for amendment to include a certificate of appealability ("COA"), was issued on February 11, 2020, and is attached as Appendix 2. It may be found at 2020 WL 698278.

The denial of a COA by the Eleventh Circuit, *sub nom. Barksdale v. Attorney General, State of Alabama*, et al. (E. Carnes, J.), was issued on June 29, 2020, and is unpublished. It is attached as Appendix 3.

JURISDICTIONAL STATEMENT

This Petition for a Writ of Certiorari, seeking review of the disposition of this case before the Eleventh Circuit, is timely filed within 150 days of the decision below (June 29, 2020), according to the Rules of this Court as amended in light of the COVID-19 pandemic. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

No petition for rehearing was filed in the Eleventh Circuit. According to that Court's Rule 22-1(c), denial of a COA by a single judge may not be the subject of a

petition for panel rehearing or a petition for rehearing *en banc*. However, Petitioner did timely file a motion for reconsideration under Rule 27-2 of the Circuit Court's Rules, on July 20, 2020. That motion is pending as of the date of this Petition.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides, in relevant part, that "No person shall be … deprived of life, liberty, or property, without due process of law." The Sixth Amendment states that "In all criminal prosecutions, the accused shall enjoy the right … to have the assistance of counsel for his defense." The Eighth Amendment provides that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." And the Fourteenth Amendment, section 1, provides *inter alia* that "No state shall … deprive any person of life, liberty, or property without due process of law."

STATEMENT OF THE CASE

A. The Facts

There is no doubt that on December 1, 1995, Petitioner Tony Barksdale and two other young men stole a car and a gun in Guntersville, Alabama. They drove the car to Alexander City, where Petitioner had previously resided, and spent the day there. As they had wrecked the stolen car on their way to Alexander City, they had no way of returning to Guntersville. They tried to persuade friends, acquaintances, and finally strangers to give them a lift. One of those strangers was 19-year-old Julia Katherine Rhodes.

The three persuaded Ms. Rhodes to drive them part-way to a place where they believed they might be able to spend the night. And there is no doubt that, as she dropped them off, Petitioner took the stolen pistol from his pocket. Two shots were fired, and Ms. Rhodes was left wounded by the side of the road. Ms. Rhodes later died of her injuries. The three teenagers took possession of her car and drove it back to Guntersville, where all three were arrested and charged with her murder a few days later.

Those are the basic facts of the crime, and Petitioner does not contest them.

B. Petitioner's Trial.

Mr. Barksdale and one of the other young men, Jonathan David Garrison, were charged with capital murder.[1] Mr. Barksdale and Mr. Garrison were both provided with appointed defense counsel: Thomas Goggans, Esq., for Mr. Barksdale, and David Luker, Esq., for Mr. Garrison. Trial was scheduled for November, 1996, in the Circuit Court for Tallapoosa County, Alabama (Alexander City Division, Lewis H. Hamner, Jr., J.), Docket No. CC-96-03. A few days before trial, Mr. Garrison pleaded guilty to murder in the first degree, and accepted a sentence of life with the possibility of parole in exchange for his testimony against Mr. Barksdale. As there were no other witnesses to the homicide,[2] Mr. Garrison's testimony was the linchpin of the State's case.

[1] The third young man, Kevin Hilburn, was killed by another detainee inside the Tallapoosa County Jail in Dadeville, Alabama, shortly after their arrest.

[2] Garrison was not actually in the car when the fatal shots were fired. He and Hilburn had fled when they saw the gun, and ran behind a garden shed by the side of the road. Exactly what they were able to see and hear is unclear. The cross-examination of Garrison did not explore this critical issue.

Mr. Barksdale's defense was that the shooting was unintentional: that he was attempting to unload the gun and not to fire it. A forensic expert was hired to examine the gun, and he reported that it was defective in a way consistent with Mr. Barksdale's explanation: it was susceptible to jamming as the magazine was removed from the handle, leaving a live round in the chamber even as the weapon was being disassembled.

There is also no dispute about what Petitioner's defense counsel did before and at trial, and what he did not do.[3] He never conducted or commissioned any kind of investigation of the crime or of his client. He did not seek leave to retain professional assistance (except for the gun expert already mentioned): there was no investigator, no psychologist, and no mitigation specialist. He did not investigate his client's history, background, or defenses. He called two witnesses at the guilt stage of the trial – the previous owner of the stolen weapon, and the forensic expert – to the State's 73, and none at all after conviction. More significantly, he did not make the slightest attempt either to identify or to develop mitigating evidence, or to mount a challenge to the aggravating factors on which he knew the State would rely.

Mr. Goggans's time records, which he attested were accurate, show that he did not interview a single potential witness other than the two he called to the stand. He spent a total of no more than three-tenths of an hour – 18 minutes – on the telephone

[3] The statements of fact in this and the following paragraphs are uncontestably part of the record of proceedings below. While there may be disputes over why defense counsel behaved as he did, or why he did not pursue avenues of investigation that might or might not have helped his client, the time records and testimony of Mr. Goggans, elicited at the Rule 32 (State habeas) evidentiary hearing and referenced here, are unequivocal and not in doubt.

with Petitioner's father, and another .2 hours – 12 minutes – with his mother, before concluding that they would be unreliable or unhelpful witnesses.[4] The total time Mr. Goggans spent with his client, from the date of appointment until the first day of trial, was no more than five hours. He did not do anything – not even a phone call to the court housing the relevant records – to discover the facts of Petitioner's previous conviction for involvement in an armed robbery, at age 15, even though he knew that the State intended to use that conviction as a statutory aggravator in seeking the death penalty. He did not make any further attempt to find or to interview people who might have known Mr. Barksdale: friends, teachers, family members, neighbors – who could have shed light on how this deeply troubled 18-year-old from Virginia came to find himself charged with taking the life of a total stranger some 800 miles from where he was raised.[5]

At trial, counsel conducted perfunctory cross-examinations (or none at all) of the State's witnesses[6]. He did not question Mr. Garrison about the most damning elements of his testimony: the recounting of exchanges between Petitioner and Ms. Rhodes that, according to his own statements, took place in a closed car some 100

[4] The fact that the parents were so uncooperative might well have been a reason for conducting more, not less, investigation. What kind of home life might his client have had, counsel might well have wondered, if his own father expresses no concern about whether his teenage son is executed? What prospects does a young man have of functioning lawfully in society when his own mother shows no interest in helping him? What kind of dysfunctional family includes parents so apparently unconcerned about the outcome of capital murder charges brought against him?

[5] At the Rule 32 hearing, Petitioner's mother testified that she recalled two telephone calls from Petitioner's trial counsel, who informed her that her son was likely to be convicted of capital murder and electrocuted. She stated under oath that Mr. Goggans never asked her about Petitioner's background, childhood, school years, or health history, or any information about violence, drug use, or mental illness in the home on the part of either of Petitioner's parents.

[6] Of the 73 witnesses presented by the State, Mr. Goggans waived cross-examination of 41. There were no more than six witnesses of the other 32 of whom cross-examination was reported in more than a single page of the transcript.

yards away from where he and Hilburn had hidden after they saw the gun, as well as precisely what Mr. Garrison claimed to have seen and heard when the weapon was fired.[7] He did not elicit testimony from the retained expert concerning whether the gun might have discharged as it was being unloaded, as his client had maintained. And he did not challenge testimony from State witnesses – acquaintances of Petitioner's from his few weeks living in Alexander City earlier in 1995 – which was used by the prosecution to paint a dark and violent picture of his client.

Petitioner was convicted of capital murder, and the trial passed to the penalty phase. The State relied on the evidence that it had presented during the guilt stage[8], and it was the turn of the defense to offer evidence and argument as to why Tony Barksdale should not be put to death. Yet because he had conducted no investigation, had interacted little with his client and barely at all with his client's parents, and knew nothing about his background or history, defense counsel rested less than 60 seconds after he was called upon to make his case. He stipulated to facts concerning the earlier conviction – falsely implying that Mr. Barksdale had been armed during a holdup staged and conducted by his older brother – because he did not know the truth (which was that Petitioner was used as a "decoy," never had a weapon, never harmed or threatened to harm anyone, and may well not even have known that a gun was to be displayed during the robbery).

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[7] Admissible impeachment evidence was available, in the form of statements given to the police after their arrest by both Garrison and Hilburn. Both were at significance variance from Garrison's sworn trial testimony. Neither was used.

[8] The State also submitted into evidence records of Petitioner's prior conviction, which defense counsel had never seen before, inviting the jury to draw the false conclusion that Petitioner had been armed in that incident.

Lest it be thought that the reference to a penalty phase of less than one minute is an exaggeration or a rhetorical flourish, we reproduce here in its entirety the defense presentation at the punishment phase of a capital trial, with his client's life literally at stake:

> "THE COURT. All right. The Defendant may offer evidence.
>
> [A document – Petitioner's birth certificate – is marked by the Clerk.]
>
> [DEFENSE COUNSEL]. Defense offers Exhibit No. 11, a certified copy of Tony Barksdale's birth certificate from the State of North Carolina.
>
> THE COURT. It will be admitted.
>
> [The document is admitted.]
>
> [DEFENSE COUNSEL]. Defense rests."[9]

This was followed by a five-minute closing argument, which made little reference to the crime, and none at all to any personal characteristics of Petitioner, except his age. Nothing was presented to the jury on the basis of which it could have seen a spark of humanity in the man whose life was in their hands: the entire theme of the closing argument – if it can be said to have had a theme – is that age is "not an excuse," but is still something that should be taken into account, because we all exercised bad judgment when we were 18, and besides, an 18-year-old sentenced to life in prison without parole would have many decades in which to confront his wrongdoing.[10]

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[9] Transcript of proceedings, November 24, 1996, pp. 1422-23. In the whole of the case for the defense against a possible death sentence, defense counsel spoke a total of 21 words.

[10] The apparent effort to generate compassion for Barksdale because he was 18 at the time of the crime

The jury returned a recommendation of death by a vote of 11-1. At the sentencing hearing that followed, Judge Hamner was unambiguous – indeed, he was emphatic – in announcing that he did not take the jury's recommendation into account at all in making the ultimate sentencing decision. He said: "The Court has considered the recommendation of the jury, but has not given it great weight. … This Court is not the least concerned with … what a jury might determine without the … various factors which this Court must consider in sentencing, including the matters which the jury did not hear …" Observing – with some apparent surprise – that the defense had offered no mitigating considerations other than age, the trial court sentenced Mr. Barksdale to death on January 14, 1997.

There followed a direct appeal to the Court of Criminal Appeals, which affirmed the conviction and sentence, and unsuccessful petitions for certiorari to the Alabama Supreme Court and to this Court.[11]

C. The State Habeas Corpus (Rule 32) Proceedings and Subsequent Review

On May 22, 2002, Mr. Barksdale began the process of seeking a writ of habeas corpus from the State court in which he was originally tried. After some motions practice, and very little discovery, a two-day evidentiary hearing was conducted in Alexander City, Alabama, in June 2005.

During the entire period from May 2002 through June 2005, Judge Tom Young (replacing Judge Hamner, who had retired from the Bench), signed every single paper

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was especially inopportune. It backfired badly when the District Attorney reminded the jury that Ms. Rhodes was 19 when her life was brutally ended.

[11] *Barksdale v. State*, 788 So.2d 898 (Ala. CCA 2000), *cert. den. sub nom. Ex parte Tony Barksdale*, 788 So. 2d 915 (Ala. 2000), *cert. den.*, 532 U.S. 1055 (2001).

put in front of him by the prosecution, without change and without even retyping, regarding limitations on the scope of the Rule 32 petition, document production procedures, and the like. On two occasions, the Attorney General placed before the Judge proposed orders bearing the captions of entirely different cases with different parties, but Judge Young signed them anyway. When a dispute arose over Petitioner's right of access to his co-defendants' arrest records, the Judge asked for oral argument, and in open court granted Mr. Barksdale's request to see those files (which bore on at least one of the aggravators relied upon the State for the capital sentence). But when the State thereafter submitted its proposed order to the court, denying the motion that the judge had just agreed to, the judge signed it, again without alteration. Petitioner was required to seek reconsideration, following which the Circuit Court for the first and only time in the entire proceedings issued a ruling (allowing counsel access to the requested records) of which every word was not written by the prosecution.

At the evidentiary hearing in 2005, Petitioner put on the stand his mother, Mary Archey; Maxwell Johnson (a retired Lieutenant Colonel in the U.S. Marine Corps), who had acted as a father figure to Mr. Barksdale during his junior high school years; Mr. Goggans (trial counsel); and an expert witness on the standard of care applicable to assess the performance of capital defense attorneys. The State called no witnesses. Nearly all of the exhibits submitted on behalf of Petitioner were ruled inadmissible (although the court permitted documents to be introduced on proffer): virtually all of the prosecution's objections to the introduction of evidence

and the presentation of arguments by Petitioner's counsel were sustained.[12]

Ms. Archey testified about her own incapacitating addiction to crack cocaine, which made her entirely non-functional for substantial periods of time, and which she could not control even while she was pregnant with Petitioner. She had nervous breakdowns, and Petitioner and his brother witnessed her being taken away by ambulance to be hospitalized.

Ms. Archey also told the Rule 32 court about the horrific circumstances of her son's childhood, featuring his father's volatile and violent temper. When Tony was a child, he was in the house during a number of violent outbursts by his father, including one attempt to rape Ms. Archey with a broom handle. According to her testimony, the domestic situation deteriorated to the point that when young Tony effectively disappeared for some months when he was in eighth grade, and lived with Colonel Johnson and his family, neither of his parents appears even to have noticed (much less cared) that he was gone.

Colonel Johnson testified that he had come to feel quite protective of young Tony Barksdale, believed in him, and treated him almost like his own son. He spoke of his years in the Marine Corps, with many young men under his command, and he testified that he believed that like them, Petitioner, with proper guidance, could have led a productive and constructive life. These witnesses, in other words, provided the

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[12] The principal grounds for preventing Petitioner from making his case were that the original Rule 32 petition alleged ineffective assistance of counsel for the failure to develop and present mitigators, while at the evidentiary hearing there was an effort to explore defense counsel's concomitant omission of any challenge to the State's aggravators. But, of course, this is a semantic difference only: "mitigation" necessarily includes the absence of "aggravators," as this Court made clear in *Andrus v. Texas*, 590 U.S. ___, 140 S. Ct. 1875 (2020) (*per curiam*). As that decision demonstrates, aggravators and mitigators are two sides of the identical evidentiary coin.

kind of testimony that could and should have been presented at the penalty phase of the 1996 trial. But Ms. Archey testified that Mr. Goggans had never even suggested that she come to court, and Mr. Goggans conceded that he did not contact Colonel Johnson because he did not know that such a person existed.

Judge Young asked the parties to submit proposed findings of fact and conclusions of law following the hearing, and those were filed and exchanged by the deadline of September 6, 2005. In early October, undersigned counsel received in the mail a second copy of the State's submission, from the Circuit Court for Tallapoosa County. The document was identical to the one mailed by the Attorney General's Office a month earlier. Not a word of what apparently was the court's "order" had been written by Judge Young. Although the Judge had concluded the hearing by saying that the parties had given him "a lot to think about," his thoughts apparently were that every word, every characterization, every credibility determination that the State tendered to him (including every typographical error) comported perfectly with his own assessments of the facts, the evidence, and the law.

Given that this was part of a pattern that characterized the entire Rule 32 proceedings in State court, there is no basis to infer that the judge even read, much less considered, the findings of fact and conclusions of law presented by the Attorney General, and then transformed into a court order. Yet on appeal, the Court of Criminal Appeals, on August 27, 2007 (Docket No. CR-05-0341), issued an unpublished decision affirming the disposition below, simply adopting the lower court "opinion" – which is to say, the prosecution's brief – again verbatim, at least as to the

issues of greatest import, such as the claim of ineffective assistance of counsel. A motion for reconsideration was denied, and the Alabama Supreme Court denied discretionary review in an unpublished order on April 26, 2008.

It is to the State appellate tribunal's disposition of the case, written in substantial part not by a judge but by one party, to which the U.S. District Court has purported to defer, and that the Eleventh Circuit has suggested is all of the legal process that is due to be extended to Tony Barksdale.

D. The Federal Courts' Review

A petition for a writ of habeas corpus was filed in the U.S. District Court for the Middle District of Alabama on May 1, 2008. The district court (Hon. W. Keith Watkins, J.) denied the petition on the briefs and without argument on December 21, 2018, more than ten years later, and also denied Petitioner a Certificate of Appealability ("COA"), in an unpublished opinion, Docket No. 3:08-CV-327; 2018 WL 6731175 (Appendix 1 hereto).

Judge Watkins denied a request for reconsideration of the December 21 order, and/or its amendment to include a COA, in an unpublished opinion on February 11, 2020; 2020 WL 698278 (Appendix 2). Petitioner then applied for a COA in the U.S. Court of Appeals for the Eleventh Circuit on April 20, 2020, Docket No. 20-10993-P. That application was denied by a single judge (Hon. Ed Carnes, J.), in an unpublished opinion, on June 29, 2020 (Appendix 3).

Mr. Barksdale timely petitioned the Court of Appeals for the Eleventh Circuit on July 20, 2020, under its Local Rule 27-2, to reconsider the denial of the COA. That

request is pending as of the date of this Petition. Local Rule 22-1(c), expressly precluding the filing of a motion for rehearing (which would toll the time for a petition for certiorari, under Supreme Court Rule 13.3, until the motion is resolved), rather than reconsideration, appears to be unique among the Circuit Courts.

REASONS FOR GRANTING THE WRIT

I. The Denial of a Certificate of Appealability by the Court Below Was Inconsistent with This Court's Binding Precedents, and Imposed a Burden That No COA Applicant Could Ever Meet.

The law requires a death-sentenced petitioner for a writ of habeas corpus to obtain a Certificate of Appealability before he may seek to overturn a denial of habeas relief by a district court. 28 U.S.C. § 2253(c)(2). This Court has articulated in very clear terms what an applicant for a Certificate of Appealability must show.

In *Buck v. Davis*, 580 U.S. ___, 137 S. Ct. 759 (2017), the Court explained the proper standard of review for COA applications:

> The COA inquiry, we have emphasized, is not coextensive with a merits analysis. At the COA stage, the **only** question is whether the applicant has shown that 'jurists of reason could **disagree** with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.' [*Miller-El v. Cockrell*, 537 U. S. 322, 327 (2003)]. This threshold question should be decided **without** 'full consideration of the factual or legal bases adduced in support of the claims.' *Id*. at 336.
>
> *****
>
> The statute sets forth a two-step process: an initial determination whether a claim is **reasonably debatable**, and then – if it is – an appeal in the normal course. We do not mean to specify what procedures may be appropriate in every case. But whatever procedures are employed at the COA stage should be consonant with **the limited nature of the inquiry.**

137 S. Ct. at 773, 774 (emphasis added). The question before the Court of Appeals, therefore, was not whether Petitioner had demonstrated that the assistance of his defense counsel was constitutionally ineffective. Rather, it was whether his claims raised in the district and appellate courts, and outlined in this Petition, to the effect that he was denied his constitutionally-protected right to a fair trial and the due process of law, are "reasonably debatable." *Id*. at 774. Moreover, "a claim can be **debatable** even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Miller-El*, 537 U.S. at 338 (emphasis added).

To sum up, to justify a COA, a petitioner's claim must only be **debatable**.[13] A claim is debatable if "jurists of reason could **disagree**" with the decision of the court denying that claim. *Buck*, 137 S. Ct. at 773, quoting *Miller-El*, 537 U. S. at 327 (emphasis added). An applicant need not attempt to show that not a single judge might be found who would **agree** with that decision.

Judge Watkins, in the Middle District of Alabama, dispatched Petitioner's request for permission to appeal the denial of the writ in less than three pages of his lengthy opinion. *See* App. 1, at 313-16. He concluded, without any additional analysis, discussion, or citation to authority, simply that: "Reasonable minds could not disagree with the conclusions that . . . during the course of Petitioner's Rule 32 proceeding the state courts reasonably rejected **on the merits** all of Petitioner's conclusory complaints about the performance of his trial counsel …" App. 1, at 317 (emphasis

[13] According to Merriam-Webster's Online Dictionary, "debatable" means "open to dispute," And a "dispute" is a controversy. All of these terms suggest the existence of opposing viewpoints.

added). Nor did the district court engage in any more detailed discussion of the COA issue in rejecting Petitioner's motion to amend the judgment. Instead, it merely reiterated its conclusion that Petitioner failed on the merits of his claims. Without addressing the standards in *Buck*, the district court simply concluded that "Barksdale's Rule 59(e) motion does not establish any reason why he is entitled to a COA on any issue raised in his habeas petition." App. 2, at 14.

The District Court for the Middle District of Alabama thus failed to follow the guidance provided by this Court in *Buck*. It did not address whether the claims raised by Petitioner were **debatable**; it opined that they were **wrong**. The Circuit Court endorsed this analysis, and its conclusion. This is **precisely** what this Court in *Buck* admonished lower court judges **not** to do:

> At the COA stage, the … threshold question should be decided **without** 'full consideration of the factual or legal bases adduced in support of the claims.' 'When a court of appeals sidesteps [the COA] process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction.'

Buck, at 137 S. Ct. at 773, citing *Miller-El*, 537 U.S. at 336 (emphasis added).

Ignoring *Buck* entirely,[14] the Circuit Court in its own denial of a COA relied instead on this Court's earlier decision in *Slack v. McDaniel*, 529 U.S. 473 (2000). The Eleventh Circuit framed what it called "the COA question" this way: "Could a reasonable jurist find debatable the proposition that **no reasonable jurist at all** could agree with the state courts that the claim lacked merit? If **any** reasonable jurist

[14] The court of appeals did not mention *Buck* in its 48-page opinion denying the application for a COA. *See* App. 3.

could find **the rejection of the claim** debatable, the state court judgment rejecting it cannot be disturbed in a federal habeas proceeding." App. 3, at 10-11.

But this is utterly inconsistent with *Buck*. The appellate court asked a rhetorical question that could never be answered in the affirmative: since a United States District Judge rejected Petitioner's claim and denied the COA, there is *ab initio* at least **one** "jurist of reason" (the author of the opinion) who thinks that such an outcome is correct. Nor did the Eleventh Circuit disposition even require that there be a "jurist of reason" who **agrees** with the decision rejecting the claim, concluding that a petitioner must fail if there is a single "reasonable jurist" who might believe that the district court's decision was correct is even "debatable."[15]

In the Eleventh Circuit's formulation, therefore, if every "jurist of reason" but one considers the decision to be utterly and facially wrong, but the sole exception thinks that it is wrong but is willing to keep her mind open to persuasion, then a COA will not issue, and the petitioner will be forever deprived of the opportunity to seek appellate review of his constitutional claims.

This fundamental misunderstanding – indeed, this virtual reversal – of *Buck* cannot be allowed to stand. At the very least, the Eleventh Circuit Court of Appeals should be required to determine whether Petitioner's constitutional arguments, including those raised in Parts II-IV of this Petition, are "debatable," rather than

[15] If someone believes that "A" is true, and someone else believes "not-A," then the truth of A (or, equivalently, the truth of not-A) is debatable. But the decision of the court below appears to require a petitioner to show that the statement "no one can reasonably dispute the truth of A" ("no reasonable jurist at all could agree with the state courts that the claim lacked merit") is not **itself** debatable. But that is impossible: the judge below had already shown that he believes A (*i.e.*, here, that Petitioner's claims lack merit).

asking whether someone, somewhere, might actually agree with the district judge that they are entirely without merit.

In the instant case, "reasonable jurists" most certainly could disagree with the district court's determinations, *inter alia*, that the assistance provided to Petitioner at his trial was consistent with the Sixth Amendment's guarantee. "Reasonable jurists" might conclude, for example, that a defense presentation at the penalty phase of a capital trial lasting **less than one minute** is "debatably" ineffective assistance of counsel. "Jurists of reason" might agree that when **every word** of the outcome of a habeas corpus evidentiary hearing – then copied in large measure by the Court of Criminal Appeals, and then taken as entitled to deference by the district court – was written by the prosecution, and there is no evidence that the judge who purportedly issued it even read it, there has "debatably" been a denial of due process. Such jurists might also find "debatable" whether a capital sentence issued by a judge who expressly announced that he was not taking into account the recommendations of the (non-unanimous) jury is consistent with this Court's constitutional jurisprudence.

The resolution of these issues by the district court (and their consideration, much less their resolution, by the court of appeals) was, in Petitioner's respectful submission, wrong as a matter of law. The merits of the arguments were not the question to be resolved by the Eleventh Circuit in reviewing the COA application. The court below was tasked only with deciding whether Petitioner should have the right to submit his arguments for appellate review. In ignoring this Court's instructions on how to carry out that task, the Eleventh Circuit committed reversible

error,[16] failed to follow precedents of this Court, and issued a ruling that will surely serve, if it is allowed to stand, to deprive not only Petitioner but others to follow him of their constitutional right to the due process of law before they are executed.

II. The Misapplication of *Buck* by the Court of Appeals Led That Court Erroneously to Reject Petitioner's Claim That Trial Counsel's Failure to Perform Any Meaningful Investigation, or to Develop a Case for Reduced Culpability or Mitigation of Sentence, Constituted Ineffective Assistance.

The misinterpretation of *Buck* in the Eleventh Circuit, denying Petitioner a COA because the appellate court found his claims to be without merit, brings with it serious potential consequences. The court below rejected as unworthy of a COA Petitioner's claims that his trial counsel rendered ineffective assistance in failing to perform a meaningful investigation, to put forward a defense against the charge of capital murder, and to present to the jury any reason to recommend a sentence other than death. Judge Carnes did not ask whether those claims were debatable, as this Court has mandated: he asked whether they were correct. And in concluding that they were not, he accepted without hesitation and in full the determination of the district court, which in turn relied on the outcome of State court proceedings dictated in their entirely by the prosecution.

[16] The Eleventh Circuit has applied *Buck* correctly in numerous cases. For example, in *McWhorter v. Commissioner*, 824 Fed. Appx. 773 (11th Cir. 2020), a COA was granted on an ineffective assistance claim focusing specifically, as does the instant Petition, on a failure to investigate and/or to present a mitigation case. And even when it has denied COA applications, as in *Taylor v. Dunn*, 2018 WL 8058904 (11th Cir. 2018), *cert. den.*, 139 S. Ct. 2016 (2019), the Circuit did so not because the applicants failed to demonstrate that no reasonable jurist could have agreed with the district court's resolutions of their claims, but because they could not show that there was reasonable room for debate.

Under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), at 28 U.S.C. § 2254, a petitioner for a writ of habeas corpus in federal court must be able to demonstrate that the State court decision was (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or was (2) "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). But to obtain a COA – in other words, to earn the right to present his constitutional arguments to a court of appeals – Petitioner is not required to prove that the State court (or the district court that deferred to it) committed such a misapplication of binding law. He need only demonstrate that his claim that such a misapplication of the law occurred is debatable. That is what this Court held in *Buck*.

In the context of Petitioner's ineffective assistance claim, the Eleventh Circuit's error on this point is most glaring, and most potentially (and literally) fatal. In rejecting the argument, for example, that Mr. Barksdale's trial counsel did not adequately investigate potentially mitigating evidence (as will be demonstrated below, he conducted essentially no investigation), Judge Carnes concluded, "reasonable jurists would not doubt that **a fair-minded jurist could agree** with the Court of Criminal Appeals' decision that [Plaintiff's defense counsel] conducted a reasonable penalty stage investigation." App. 3, at 29. He dispatched the other claims of ineffective assistance similarly.

This is precisely what *Buck* instructed lower court judges reviewing COA petitions **not** to do. The Court of Appeals was **not** to determine whether any judge might **agree** with the outcome in State court, but rather whether reasonable jurists might believe its correctness to be open to discussion. And in concluding that Petitioner's arguments – pointing, for example, to the fact that the entire case in mitigation of a capital sentence took less than 60 seconds – were so unfounded as to be not even debatable, the court below also ignored a decades-long string of this Court's decisions on what kind of assistance of counsel qualifies as constitutionally adequate.

The jurisprudence of this Court on what constitutes ineffective assistance of counsel is well-developed. From *Strickland v. Washington*, 466 U.S. 668 (1984), through *Williams v. Taylor*, 529 U.S. 362 (2000), *Wiggins v. Smith*, 539 U.S. 510 (2003), *Rompilla v. Beard*, 545 U.S. 374 (2005), and most recently to *Andrus v. Texas*, 590 U.S. ___, 140 S. Ct. 1875 (2020), the Court has consistently reaffirmed that the constitutional guarantee of counsel to assist in the defense of someone accused by the State is satisfied only if that assistance is **effective**. That does not mean, of course, that it must be successful. But from *Strickland* to the present day, the Court has concluded that assistance of counsel is not effective if is it inconsistent with prevailing standards, and if the lapses shown by counsel cause uncertainty as to whether the resulting conviction and sentence are reliable.

This Court has articulated the principle in these words: "The right to the effective assistance of counsel is thus the right of the accused to require the

prosecution's case to survive the crucible of meaningful adversarial testing. … [I]f the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated." *United States v. Cronic*, 466 U.S. 648, 656-57 (1984) (footnotes omitted). The Court has regularly held that "assistance of counsel" encompasses more than just what happens in the courtroom: it includes investigation of the facts of the case at the guilt stage, and of potential mitigation (including the undermining of aggravators) at the punishment stage.

As Justice O'Connor wrote for the Court in *Strickland*, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." 466 U.S. at 691. Inaction and inattention are not effective assistance, and efforts to characterize them as "strategic" cannot pass constitutional muster. In *Wiggins*, reiterating its conclusion in *Williams*, the Court held that counsel have an "obligation to conduct a thorough investigation of the defendant's background." 539 U.S. at 522 (citing *Williams*, 529 U.S. at 396). The issue in *Wiggins*, as in the case at bar, was not (or, here, not only) "whether counsel should have presented a mitigation case." *Id*. at 523. It was whether "the investigation supporting counsel's decision not to introduce mitigating evidence of [the defendant's] background **was itself reasonable**." *Id*. (citing *Strickland*, 529 U.S. at 691; *Williams*, 529 U.S. at 415) (emphasis in original).

Counsel in *Wiggins* were found ineffective because they failed to "expand their investigation." 539 U.S. at 524. But here, as in *Porter v. McCollum*, 558 U.S. 30 (2009) (*per curiam*), counsel "did not even take the first step of interviewing witnesses or

requesting records." "[H]e ignored pertinent avenues for investigation of which he should have been aware." *Id.*, 558 U.S. at 40.

In this case, as this Court found in *Rompilla*, defense counsel failed to investigate. He had, but had no idea that he had,

> a mitigation case that bears no relation to the few naked pleas for mercy actually put before the jury, and although we suppose it is possible that a jury could have heard it all and still have decided on the death penalty, that is not the test. It goes without saying that **the undiscovered "mitigating evidence, taken as a whole, 'might well have influenced the jury's appraisal' of [the defendant's] culpability**," *Wiggins*, 539 U.S. at 538 (quoting *Williams*, 529 U.S. at 398), and the likelihood of a different result if the evidence had gone in is "sufficient to undermine confidence in the outcome" actually reached at sentencing, *Strickland*, 466 U.S. at 694.

545 U.S. at 393 (emphasis added).

Petitioner respectfully submits that **his is a limiting case: i**n **no** ineffective assistance decision of this Court has the record presented **less** investigation by counsel, and **less** content presented to the jury in support of a penalty less than death, than was demonstrated at Tony Barksdale's Tallapoosa County trial in 1996. In **no** case, from *Strickland* in 1984 through *Andrus* earlier his year, has this Court had to determine whether the failure to offer **any** defense at the guilt stage, or to call **any** witnesses, or to develop **any** strategy in mitigation of sentence, is constitutionally satisfactory. At the same time, the Court has not hesitated to declare that far greater, more energetic, and more substantive efforts by defense counsel were, for purposes of *Strickland* and its progeny, ineffective.

Failures far less egregious than those committed by trial counsel in this case were most recently held by this Court to be constitutionally inadequate last term in

Andrus. In that case, as here, counsel "performed virtually no investigation." 140 S. Ct. at 1877. As in *Andrus*, Petitioner's jury was never informed "of the many circumstances in [Mr. Barksdale's] life that could have served as powerful mitigating evidence." *Id*., at 1883. There, as here, the "untapped body of mitigating evidence was, as the habeas hearing revealed, simply vast." *Id*.

The similarities between this case and *Andrus* are many and deep. In both, counsel declined to present an opening statement at the punishment phase. At the guilt phase, counsel raised no material objections to the State's evidence and cross-examined the State's witnesses only briefly and superficially. In neither case did defense counsel look into the "myriad tragic circumstances that marked [his client's] life," *id*., at 1882, such as severe parental neglect and exposure to domestic violence, that might have persuaded the jury to recommend a sentence other than death. And in both cases, the little evidence that was presented relating even remotely to possible mitigation "backfired by bolstering the State's aggravation case," *id*., at 1881 (Mr. Barksdale's age was hardly going to be seen as a mitigator when the jury was reminded that he and Ms. Rhodes, the victim, were essentially the same age).

One difference between the two cases, however, must be acknowledged. Counsel for Andrus called only a "**few** witnesses … during the case in mitigation." *Id*., at 1883 (emphasis added). Four people testified (including his client's father and mother and an expert witness), although as this Court noted, counsel was "barely acquainted" with any of them, *id*., at 1882, and met with no other member of the family. In Petitioner's case, his counsel called **no** witnesses either to test the

aggravators or to introduce mitigating evidence, and made no effort to acquaint himself with anyone whose testimony might be helpful.

As in *Andrus*, counsel "failed to conduct any independent investigation of the State's case in aggravation, despite ample opportunity to do so. He thus could not, and did not, rebut critical aggravating evidence." *Id*., at 1884. In both cases, the State succeeded in tying the defendant to a robbery that defense counsel did not question, and the jury was permitted to draw unsupported inferences concerning the prior conviction because counsel did not know the facts.[17]

This Court, after describing these and other instances of ineffectiveness in *Andrus*, concluded simply, "[t]hat is hardly the work of reasonable counsel." *Id*., at 1885. The same conclusion is more than amply justified here.

Strickland requires that Petitioner demonstrate not only that the performance of his counsel, in (lack of) investigation and at trial, was deficient according to applicable standards, but he must also establish that, but for the ineffectiveness, "there is a reasonable probability that … the result of the proceeding would have been different." 466 U.S. at 694; see also *Wiggins*, 539 U. S. at 536. The "prejudice prong" means that Petitioner must show the Court "only 'a reasonable probability that at least one juror would have struck a different balance' regarding [his] 'moral

[17] This Court held in *Rompilla* that "counsel ha[s] a duty to make all reasonable efforts to learn what they c[an] about the offense" that the prosecution intends to present as aggravating evidence, 545 U.S. at 385. Here, counsel knew that the State intended to rely on the prior conviction from Virginia – an earlier conviction of a violent crime is a statutory aggravator in Alabama – but he did nothing to learn the facts and circumstances of that offense. Thus the jury was allowed to believe that Petitioner had been found guilty of active engagement with firearms when he was 14, when in fact he had been at most a passive participant in a robbery staged by older boys (including his brother). Such conduct, of course, is criminal, but it demonstrates no propensity toward the use or threat of violence.

culpability.' *Andrus*, 140 S. Ct. at 1886, quoting *Wiggins*, 539 U. S. at 537–38.

In the case at bar, precisely **no** evidence concerning Petitioner's "moral culpability" was tendered except for his age, and although that was described to the jury, in defense counsel's closing argument, as "a mitigating factor" (*in haec verba*) no guidance was offered as to how it was to be considered or weighed.[18] Had the jury known about Petitioner's childhood, would not "at least one juror … have struck a different balance"? Had they heard the views of Lieutenant Colonel Johnson, who believed his young friend Tony had the capacity to lead an upstanding life despite the horrific circumstances of his childhood, can it be said with confidence that no juror would have voted against execution?

Of course, as was noted in *Sears v. Upton*, 561 U. S. 945 (2010) (*per curiam*), such an inquiry requires the Court "to 'speculate' as to the effect of the new evidence" on the trial evidence." 561 U. S. at 954. But here, there was no "trial evidence" at all. When this Court noted in *Sears* that "[w]e have never limited the prejudice inquiry under *Strickland* to cases in which there was little or no mitigation evidence presented," *id*. (internal quotations omitted), it suggested that in cases where in fact there was no such evidence, the analysis is far more straightforward. No weighing or balancing is required in cases like this one. The question is simply this: had the defense reminded the jury that in fact Tony Barksdale is a human being, with a troubled past, not a monster characterized only by the brutal homicide of which he had been convicted and his passive participation as a young teen in a robbery several

[18] The trial judge denied defense counsel's request to provide a fuller explanation of exactly how and to what effect age was to be understood as a "mitigator."

years earlier, is there a reasonable probability that "at least one juror would have struck a different balance," and would have recommended that he be allowed to live?[19] As in *Porter*, "it is unreasonable to conclude otherwise." 558 U.S. at 42.

Nor is it reasonable to conclude that counsel's failure to investigate, his failure to confront witnesses, and his inability to put on a mitigation case (or a challenge to the State's proffered statutory aggravators) were somehow "strategic." They simply cannot have been parts of a coherent plan of defense, in light of *Wiggins*: a failure to present a mitigation case cannot be reasonable unless "the investigation supporting counsel's decision not to introduce mitigating evidence of [the defendant]'s background **was itself reasonable**." 539 U.S. at 523 (citing *Strickland*, 529 U.S. at 691; *Williams*, 529 U.S. at 415) (emphasis in original)[20].

As this Court has held, the effectiveness of counsel is reflected in whether the defense required "the prosecution's case to survive crucible of meaningful adversarial testing," and if that does not happen, "the constitutional guarantee is violated." *Cronic*, 466 U.S. at 656. That "crucible" demands more than "naked pleas for mercy," as this Court held in *Rompilla*, 545 U.S. at 393. And the most that can be said for any "strategy" that might be said to have informed defense counsel's approach to Petitioner's case – that referring to his client as "the least of us" in his five-minute closing argument might evoke some inchoate sympathy among a church-going jury

[19] Even absent mitigating evidence, one member of the "death-qualified jury" (that is, the jury none of whose members had views precluding the death penalty in all cases) voted for a sentence of life without parole. The capital recommendation was not unanimous.

[20] The context of this quotation from *Wiggins* shows that Justice O'Connor was referring to a decision by counsel not to introduce **particular pieces** of potentially mitigating evidence, not to suggest justification for failing to look for **any such evidence** at all.

whose members might happen to recognize its source[21] – is that it far fell short even of the "naked pleas" condemned by this Court as ineffective assistance in *Rompilla*. In short, Petitioner does not ask the Court to "second-guess" a strategy that was ultimately unsuccessful; he invites the unavoidable inference that there was no strategy at all.

This Court's precedents mandate – and most recently, in *Andrus*, reaffirmed – the conclusion that a defendant, even one accused of terrible acts, is entitled under the Sixth Amendment to the United States Constitution to the effective "assistance of counsel for his defense." The record here establishes beyond the possibility of doubt that Petitioner Tony Barksdale did not receive such assistance from defense counsel at his trial. There simply was no "meaningful adversarial testing" at either the guilt or the penalty phase, as this Court required in *Cronic*, 466 U.S. at 656. Both of the *Strickland* prongs are met,[22] and as in that case, "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*,

[21] Defense counsel told the jury: "inside this rail we are all protected by all the laws, everybody, even **the least of us**, even Tony Barksdale is." And at the Rule 32 hearing, he identified that as a key part of his strategy. The use of the words "the least of us" subtly referred to the Gospel According to Matthew, 25:40, where Jesus explained to the Apostles what the Kingdom of Heaven will be like. He said that, in response to the righteous, "the King will answer them, 'Truly, I say to you, as you did it to one of **the least of these** my brothers, you did it to me'" (emphasis added). It is possible that at least some members of the jury understood the allusion to this New Testament text, although it bore no apparent connection to any reason for the jury to spare Petitioner's life. Yet both the district court and the court of appeals appeared ready to conclude that the use of these four words in a closing argument was conclusive evidence that a sensible strategy guided the defense.

[22] As the Eleventh Circuit itself has noted, when capital defense counsel "neglect[s] to conduct any mitigation investigation at all" and fails to present mitigating evidence, "he cease[s] functioning as counsel under the Sixth Amendment." *Phillips v. White*, 851 F.3d 567, 576 (11th Cir. 2017). In such a case, the reviewing court should "presume prejudice," because "counsel's performance amounted to nonperformance; he essentially ceded the sentencing to the [prosecution]." *Id.*, at 581.

466 U.S. at 687.[23]

Not to conduct **any** meaningful investigation, and not to put on **any** evidence at all, are surely *per se* unreasonable. Or to put the point perhaps more starkly: if the lack of investigation and the failure to mount a defense against either the charge of capital murder or the sentence of death in Petitioner's trial constituted effective representation by counsel, then the very notion of constitutionally ineffective assistance, and this Court's consistent teachings, from *Strickland* through *Andrus*, are devoid of meaning.

Petitioner's conviction and his capital sentence should therefore be set aside.

III. The Verbatim Adoption by the State Court Judge of the Prosecution's Proposed Findings of Fact and Conclusions of Law in Petitioner's Habeas Proceedings Denied Him the Due Process and Is Entitled to No Deference.

It is beyond the possibility of disagreement that the essence of our adversary system of justice is that the two parties to litigation before the judiciary are tasked with presenting their cases as best they can, and the adjudicator – a neutral, disinterested tribunal – is to decide between their competing versions of the facts,

[23] It should be noted that in the month immediately preceding the submission of this Petition, federal courts have twice concluded that the assistance of defense counsel was ineffective in capital trials in Alabama demonstrating far more diligent representation than was seen in Petitioner's trial. In *Marshall v. Dunn*, No. 2:15-CV-1694-AKK, 2020 WL 6262430 (N.D. Ala, Oct. 23, 2020), counsel hired an investigator and a mitigation specialist, but did not use the material they found, putting no mitigating evidence before the jury. Judge Kallon held that "where, as here, the failure to do so was based on an inadequate investigation and trial counsel overlooked potential mitigation evidence in their files, their performance rises to the level of unconstitutional ineffectiveness." In Petitioner's case, neither a mitigation specialist nor an investigator was engaged. And in *Reeves v. Commissioner*, No. 19-11779 (11th Cir., Nov. 10, 2020), the Eleventh Circuit reversed a lower court and found ineffective assistance when trial counsel failed to hire a mental health expert, even though funds for such a retention had already been approved. Here, no mental health expert was hired. The lawyer whose assistance was found ineffective in *Reeves* was Thomas Goggans, Esq.: Petitioner's counsel at his trial in 1996.

and to apply the law as he or she determines it. Due process, enshrined in the Fifth and Fourteenth Amendments to our Constitution, requires no less, as this Court has affirmed countless times since the Nation's founding. *See*, *e.g.*, *Marshall v. Jerrico*, 446 U.S. 238, 242 (1980). The neutrality requirement preserves both the appearance and reality of impartial justice and it is no exaggeration to describe it as "necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself." *Williams v. Pennsylvania*, 579 U.S. ___, 136 S. Ct. 1899, 1909 (2016).

In principle, when a judge adopts as her own the proposed findings of facts and conclusions of laws of one of the parties, she "abandon[s] … the duty and the trust that has been placed in [her]." *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 656 n.4 (1964) (internal citations omitted). Judicial opinions that are not the work of a "neutral arbiter" are "the very antithesis of what they purported to be." *Id.* It is for this reason that trial and appellate courts have "strongly criticize[d] the practice of trial courts' uncritical wholesale adoption of the proposed orders or opinions submitted by a prevailing party." *Hamm v. Comm'r*, 620 F.App'x 752, 756 n.3 (11th Cir. 2015), *cert. den.*, 137 S. Ct. 39 (2016).

This Court has never had occasion to express its own views on the constitutionality of the practice in capital cases, which appears to be unfortunately commonplace in Alabama and elsewhere. The Court has, however, addressed "ghostwriting" in a civil case, *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985), and in a death penalty case applying the law as it was before the adoption of the AEDPA, *Jefferson v. Upton*, 560 U.S. 284 (2010) (*per curiam*). In both decisions it

"criticized" the practice, *Anderson*, 470 U.S. at 572; *Jefferson*, 560 U.S. at 294, even if the Court was willing to tolerate it where sufficient guarantees of fairness and neutrality are provided in other ways.

Where lower courts have declined to vacate decisions simply because they were written by one party, they have expressly premised those rulings on the presence of adequate reasons to conclude that the "ghost-written" orders actually reflected the independent thinking of the judge. The Eleventh Circuit itself has so held, in *Rhode v. Hall*, 582 F.3d 1273, 1281 n.4 (11th Cir. 2009), and *Jones v. GDCP Warden*, 753 F.3d 1171, 1183 (11th Cir. 2014). In both, the court found the decisions of the Alabama Rule 32 judges to be reliable and worthy of deference, because there was no reason to doubt that the judges themselves had reviewed, evaluated, and weighed the evidence, and had applied the law as they believed it to be.

Here, there is ample basis to deny the existence of such reasons. The pattern of the Rule 32 judge's conduct showed that he repeatedly signed, without addition, deletion, or alteration to the slightest degree, **every** proposed order put on his desk by the prosecution, over the entire three years of the State habeas proceedings, from the filing of the petition until its disposition (including, as has been mentioned, two orders bearing captions of other cases, and one that directly contradicted what the judge said in open court). This case demonstrates perfectly why the verbatim adoption of proposed findings should not be permitted in serious criminal trials, and certainly not in cases in which someone's life is at stake. Certiorari is appropriate to clarify this important point.

Anderson is not authority for the proposition that the practice passes constitutional muster. For one thing, this Court hardly offered a ringing endorsement, noting that, "[w]e, too, have criticized courts for their verbatim adoption of findings of fact prepared by prevailing parties," 470 U.S. at 572. Moreover, in that case, the district court did **not** "simply adopt the petitioner's proposed findings: the findings it ultimately issued – and particularly the crucial findings … – var[ied] considerably in organization and content from those submitted by petitioner's counsel." *Id*., at 572-73. Moreover, the *Anderson* Court had ample reason to conclude that the judge who entered the findings had done so after giving both sides an appropriate opportunity to make their cases. "**Under these circumstances**," the Court held, "we see no reason to doubt that the findings issued by the District Court represent the judge's own considered conclusions." *Id*., at 573 (emphasis added).

Here, as has been shown, the "circumstances" are quite dramatically different. One important reason for this difference is that this is a capital case, in which shortcuts and expedients are especially inapposite. In death penalty cases, this Court has "demanded that fact-finding procedures aspire to a heightened standard of reliability." *Ford v. Wainwright*, 477 U.S. 399, 411 (1986). In the context of habeas corpus petitions – which, as this Court has emphasized, serve "to maintain the 'delicate balance of governance' that is itself the surest safeguard of liberty," *Boumediene v. Bush*, 553 U.S. 723, 745 (2008) (citing *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (plurality opinion)) –no "balance" at all can be maintained, much less

a "delicate" one, if the State is able to prevail upon a judge to endorse every single word of its characterizations of the facts and of its arguments of law. The purpose of the "Great Writ" of habeas corpus is accountability, and accountability is undermined – indeed, it is obliterated – if the role of the judge is merely to rubber-stamp the position of the State.

In a case involving an *ex parte* request by the judge to the State to prepare his opinion, this Court found that a reviewing court is **not** "duty bound to accept any and all state-court findings that are fairly supported by the record." *Jefferson*, 560 U.S. at 293 (internal quotations omitted). Rather, the Court remanded the case with instructions to lower courts to consider whether the state court's factual findings warranted any presumption of correctness. *Id*. at 294. And on remand, the U.S. District Judge concluded that the state habeas court had not provided the petitioner with a full and fair fact-finding process, and thus had deprived him of his constitutional right to due process. *Jefferson v. Sellers*, 250 F.Supp.3d 1340, 1351 (N.D. Ga. 2017).[24]

Jefferson, not *Anderson*, provides the relevant guidance for the case at Bar.[25] Although in *Jefferson* the court made its request for proposed findings and conclusions *ex parte*, there is little substantive reason to distinguish between asking only one side for a submission, on the one hand, and asking both and then

[24] That district court also observed that the verbatim adoption of a prosecutor's proposed findings is "especially troublesome" in collateral review of death penalty cases. 250 F.Supp.3d at 1352.
[25] Indeed, in *Jefferson*, the Court cited *Anderson* only twice, in both instances specifically to observe that in the earlier case it had "criticized" the practice of ghost-written opinions, even in civil cases. 560 U.S. at 288, 294.

systematically ignoring one of them, on the other. Here, it was the common practice of the Circuit Court to ask both sides for proposed orders, but in every instance it was the prosecution's that was adopted, while Petitioner's was disregarded. As in *Jefferson*, therefore, the State court disposition of the habeas petition substantially reproduced and endorsed by the Court of Criminal Appeals, is not and should not be entitled to automatic deference.

To be sure, the current state of the law on this issue is unsettled. Although the courts of appeals have been almost uniformly critical of the practice of verbatim adoption of proposed findings, yet bound by *Anderson* to accept it to at least some degree,[26] they have applied differing standards of review to such opinions. Some courts have "squarely held that a district court's findings, when adopted verbatim from a party's proposed findings, do not demand more stringent scrutiny on appeal." *Lansford-Coaldale Joint Water Auth. v. Tonolli Corp.*, 4 F.3d 1209, 1215-16 (3d Cir. 1993); *see also Mt. Graham Red Squirrel v. Espy*, 986 F.2d 1568, 1571 (9th Cir. 1993); *Falcon Constr. Co. v. Economy Forms Corp.*, 805 F.2d 1229, 1232 (5th Cir. 1986).

Other appellate courts have reviewed orders adopted verbatim more closely to determine whether they are clearly erroneous. *See*, *e.g.*, *Kern Oil & Refining Co. v. Tenneco Oil Co.*, 792 F.2d 1380, 1386 (9th Cir. 1986) ("In such a case, the clearly erroneous standard applies, although 'close scrutiny' of the record is appropriate.");

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[26] *See*, *e.g.*, *Keystone Plastics, Inc. v. C & P Plastics, Inc.*, 506 F.2d 960, 962 (5th Cir. 1975); *Bradley v. Maryland Casualty Co.*, 382 F.2d 415, 423 (8th Cir. 1967); *Chicopee Mfg. Corp. v. Kendall Co.*, 288 F.2d 719, 724-25 (4th Cir. 1961), *cert. den.*, 368 U.S. 825 (1961); *Cuthbertson v. Biggers Bros., Inc.*, 702 F.2d 454, 458-59 (4th Cir. 1983); *In re Las Colinas, Inc.*, 426 F.2d 1005, 1009 & n.4 (1st Cir. 1970), *cert. den.*, 405 U.S. 1067 (1972); *Bright v. Westmoreland County*, 380 F.3d 729,731-32 (3d Cir. 2004); *In re Colony Square Co.*, 819 F.2d 272 (11th Cir. 1987), *cert. den.*, 485 U.S. 977 (1988).

In re Alock, 50 F.3d 1456, 1459 n.2 (9th Cir. 1995) ("[f]indings of fact prepared by counsel and adopted by the trial court are subject to greater scrutiny than those authored by the trial judge"); *Gimbel v. Commodity Futures Trading Comm'n*, 872 F.2d 196, 199 (7th Cir. 1989) ("we … will scrutinize these findings closely [as] this practice may create a negative impression about the [judge]'s diligence and impartiality").

Still other courts, while acknowledging that the "clearly erroneous" standard applies, have cast doubt as to whether wholly-adopted findings may ever be fully relied upon when the "badge of personal analysis" of the judge is missing. *Louis Dreyfus & Cie. v. Panama Canal Company*, 298 F.2d 733, 738-39 (5th Cir. 1962); *see also In re Las Colinas, Inc.*, 426 F.2d at 1009 ("the greater the extent to which the court's eventual decision reflects no independent work on its part, the more careful we are obliged to be in our review"); *In re Community Bank of Northern Virginia*, 418 F.3d 277, 300 (3d Cir. 2005) ("We are bound by the Supreme Court's decision in *Anderson.* … However, there must be evidence in the record demonstrating that the district court exercised 'independent judgment' in adopting a party's proposed findings"); *Pa. Envtl. Def. Found. v. Canon-Mcmillan Sch. Dist.*, 152 F.3d 228, 233 (3d Cir. 1998) ("[t]he central issue is whether the district court has made an independent judgment") (citing with approval *Odeco, Inc. v. Avondale Shipyards, Inc.* 663 F.2d 650, 652-53 (5th Cir. 1981)); *PepsiCo., Inc. v. Redmond*, 54 F.3d 1262, 1267 n.4 (7th Cir. 1995) (finding that the fact that the "court changed nothing in a party's submissions and even repeated that party's typographical errors … requires a closer

and harder look.").

The Eighth Circuit has explained that findings and conclusions that are not the product of the court's own consideration of the entire case can amount to abandonment of the judicial process. *Bradley*, 382 F.2d at 423. Similarly, the Fourth Circuit reversed and remanded a case holding that the ghostwriting practice "involves the failure of the trial judge to perform his judicial function and when it occurs without notice to the opposing side … it amounts to a denial of due process." *Chicopee Mfg. Corp.*, 288 F.2d at 724-5. The Third Circuit reversed the district court that adopted verbatim a party's proposed opinion, concluding that the district court had "vitiate[d] the vital purposes served by judicial opinions." *Bright*, 380 F.3d at 731-32.

There may be little consistency of outcomes here, yet running through all of these cases is a discernible thread. A judge may not abdicate his role as neutral adjudicator.[27] He may not openly favor one side over the other. He must weigh the facts and consider the law. And he must make clear that the opinions, orders, and conclusions that he issues are his, reflecting his personal decision-making. The carefully circumscribed tolerance shown by this Court in *Anderson* is abused when judges sign prosecutors' orders in death penalty cases – without exception and without change – and the practice of doing so is abhorrent. It is inconsistent with the due process of law to which all, even those accused of capital murder, are entitled

[27] As the Third Circuit has put it, "[w]hen the judge is absent at a 'critical stage' the forum is destroyed. ... There is no trial. The structure has been removed. There is no way of repairing it. The framework 'within which the trial proceeds' has been eliminated... The verdict is a nullity." *United States v. Mortimer*, 161 F.3d 240, 241 (3d Cir. 1998) (internal citations omitted).

under our Constitution.

Certiorari should be granted to clarify this vital matter, and to put the weight of this Court behind the proposition that when – indeed, **especially** when – State court judges hold defendants' lives in their hands, they must honor their oaths to do justice, themselves, to the best of their abilities.

IV. Certiorari Should Be Granted Because Alabama's Unique System Allowing a Non-Unanimous Jury Recommendation of Death Violates the Sixth and Eighth Amendments.

Alabama is one of only two States whose capital sentencing statutes still allow a judge to impose the death penalty based upon a jury's non-unanimous recommendation of death. *See* ALA. CODE § 13A-5-46(f); MO. REV. STAT. § 565.030.4; *see also* Michael L. Radelet & G. Ben Cohen, *The Decline of the Judicial Override*, 15 ANN. REV. L. & SOC. SCI. 539, 549 (2019).[28] All other States in which juries are involved in imposing the death sentence, as well as federal law, require a unanimous jury recommendation for a death penalty to be imposed.[29]

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[28] Missouri requires that the jury reach a unanimous recommendation of death, but the judge has the discretion to impose the death penalty in the event that the jury is not unanimous. MO. REV. STAT. § 565.030.4. Florida and Delaware, two other States that until recently allowed this practice, no longer do so. *See Rauf v. Delaware*, 145 A.3d 430 (Del. 2016); FLA. STAT § 921.141 (2019).

[29] *See* 18 U.S.C. § 3593(e) (requiring unanimous jury recommendation for death sentence); ARIZ. REV. STAT. § 13-703.01(J), (L) (allowing new jury to be impaneled if jury cannot reach a unanimous verdict); CAL. PEN. CODE § 190.4(b) (same); AR. CODE ANN. § 5-4-603(a) (requiring sentence of life without parole if jury cannot agree); TEX. CODE CRIM. PROC. Art. 37.071 (2013) (same); KAN. STAT. ANN § 21-6617(e) (same); LA. CODE CRIM. PROC. ANN. Art. 905.8 (2013) (same); OKLA. STAT. § 21-701.11 (2015) (same); GA. CODE § 17-10-31(c) (providing that the judge shall dismiss the jury and impose life imprisonment with or without parole if jury is unable to reach a unanimous sentencing recommendation); MISS. CODE ANN. § 99-19-101(3)(c) (2014) (same); N.C. GEN. STAT. § 15A-2000 (b) (providing that judge shall impose life imprisonment if jury cannot reach unanimous sentence recommendation); 42 PA. CONS. STAT. ANN. § 9711(c)(1)(v)(same); S.C. CODE ANN. § 16-3-20(C)(2013) (same); S.D. CODIFIED LAWS § 23A-27A-4 (2014) (same); TENN. CODE ANN. § 39-13-204 (2013) (same); VA. CODE ANN. § 19.2-264.4(D) (2014) (same); NEV. REV. STAT. § 175.556 (providing that a judge shall impose life imprisonment without the possibility of parole if jury fails to

The fact that only one other State allows non-unanimous jury recommendations of death is "strong evidence of consensus that our society does not regard this [procedure] as proper or humane." *Hall v. Florida*, 572 U.S. 701, 704 (2014); *see also Atkins v. Virginia*, 536 U.S. 304, 312 (quoting *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989) ("The clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures"). Alabama's capital sentencing statute fails to follow "the evolving standards of decency that mark the progress of a maturing society," from which the Eighth Amendment draws its meaning. *Atkins*, 536 U.S. at 311-12.

This Court has consistently held that "the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination." *California v. Ramos*, 463 U.S. 992, 998-99 (1983); *see also Ake v. Oklahoma*, 470 U.S. 68, 87 (1965) (Burger, C.J., concurring) ("In capital cases the finality of the sentence imposed warrants protections that may or may not be required in other cases."). In light of this high degree of scrutiny, this Court has placed "many … limits" on imposing capital punishment out of "a concern that the

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reach a unanimous sentencing recommendation); FLA. STAT. § 921.141(2)(b)(2) (requiring jury to find at least one aggravating factor unanimously in order to impose a death sentence); IDAHO CODE § 19-2515(7)(c) (same); IND. CODE ANN. § 35-50-2-9(e) (same); OHIO REV. CODE ANN. § 2929.03 (requiring jury to reach unanimous recommendation for death); UTAH CODE ANN. § 76-3-207(5) (2013) (same); WYO. STAT . ANN. § 6-2-102(d)(ii) (2013) (same); *State v. Moen*, 309 Ore. 45, 95 (Or. 1990) (interpreting OR. REV. STAT § 163.150 to require unanimous recommendation for death by jury); *State v. McLaughlin*, 265 S.W.3d 257, 268 (Ky. 2008) (interpreting KY. REV. STAT. ANN § 565.030.4 to require jury to reach unanimous sentencing recommendation, and to allow a judge to determine the question of punishment if the jury cannot). *See also* NEB. REV. STAT. § 29-2521(requiring jury to reach unanimous decision on aggravating factors that warrant the imposition of a death penalty and requiring a panel of judges to issue the sentence); MONT. CODE ANN. §§ 46-18-303, 46-18-301 (requiring a jury to unanimously find aggravating factors that warrant the imposition of a death penalty and requiring a judge to issue the sentence).

sentencing process should facilitate the responsible and reliable exercise of sentencing discretion." *Caldwell v. Mississippi*, 472 U.S. 320, 329 (1985). This concern has led this Court to "invalidate[] procedural rules that tend[] to diminish the reliability of the sentencing determination" or "introduce a level of uncertainty and unreliability into the factfinding process that cannot be tolerated in a capital case." *Beck v. Alabama*, 447 U.S. 625, 638, 643 (1980).

The lack of a unanimity requirement in the sentencing phase under Alabama law implicates these concerns of certainty and reliability in the factfinding process. This Court's recent decision in *Ramos v. Louisiana*, 590 U.S. ___, 140 S. Ct. 1390 (2020), ended the practice of permitting a non-unanimous jury verdict at the guilt phase of a criminal trial, an outlier practice that, like the acceptance of non-unanimous recommendations for capital punishment at issue here, persisted in only two jurisdictions (Louisiana and Oregon), and was held unconstitutional by this Court.

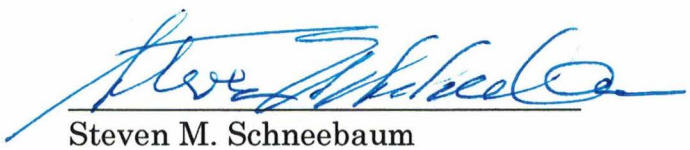
In addition to failing to meet the evolving standards of decency and thus running afoul of the prohibition on cruel and unusual punishment under the Eighth and Fourteenth Amendments, Alabama's non-unanimous jury rule raises additional issues given the unfortunate racist origins of non-unanimous jury verdicts. Both the Court's opinion as well as Justice Sotomayor's concurrence in *Ramos* placed significance on the "racist origins of the non-unanimous jury" in concluding that the Constitution forbids such verdicts at the guilt phase of the trials of serious crimes. *Ramos*, 140 S. Ct. at 1401, and at 1417 (2020) (Sotomayor, J., concurring).

From a string of cases, including *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *Hurst v. Florida*, 577 U.S. ___, 136 S. Ct. 616, 619 (2016) (holding that finding the facts prerequisite to the imposition of the death penalty is the province of the jury, not the judge), and *Ramos* (requiring that jury determinations of guilt be unanimous), the logical conclusion is that, to comport with the constitutional right to a jury trial, jury recommendations of death sentences in capital cases must be unanimous. This Court should grant certiorari in order to say so.

CONCLUSION

For all of the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



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