No. 20-6498
CAPITAL CASE

In the
Supreme Court of the United States

TONY BARKSDALE,
Petitioner,
v.
JEFFERSON S. DUNN, Commissioner,
Alabama Department of Corrections,
Respondent.

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

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED

1. Barksdale's constitutional claims were denied on the merits by state courts. When he brought the claims through a federal habeas petition under 28 U.S.C. § 2254(d), the district court denied them as well. When Barksdale sought a certificate of appealability from the Eleventh Circuit, that court considered whether the district court's decision to reject Barksdale's claims under § 2254(d) was debatable. Did the Court of Appeals apply the correct COA standard?
2. The district court held that the state court's rejection of Barksdale's ineffective assistance of counsel claim was reasonable. Could reasonable jurists have debated that conclusion?
3. Did the Eleventh Circuit properly deny Barksdale's request for a COA on his claim concerning the state court's adoption of proposed orders because the claim failed to present a constitutional violation?
4. Did the Eleventh Circuit properly deny Barksdale's request for a COA on his claim that Alabama's capital sentencing scheme violates the Sixth and Eighth Amendments?

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STATEMENT OF THE CASE

A. Statement of the Facts

1. Facts of the crime

During the early morning hours of December 1, 1995, Tony Barksdale, Jonathon David Garrison, and Kevin Hilburn stole a car in Guntersville, Alabama. *Barksdale v. State*, 788 So. 2d 898, 901 (Ala. Crim. App. 2000). Barksdale had lived in Alexander City, Alabama, for a time and had numerous contacts in the city. Habeas Checklist (HC), Vol. 11, TR. 1259. After stealing the car, Barksdale wanted to go to Alexander City, so the three men headed out, with Barksdale driving the stolen vehicle. *Id*. at 1258–60. Around 7:00 a.m., Barksdale wrecked the car near Sylacauga, Alabama. The three men abandoned the car but obtained a ride into Alexander City from a man who lived near the crash site. HC, Vol. 9, TR. 745; Vol. 11, TR 1261. After arriving in Alexander City, the men visited with people who knew Barksdale.[1] They asked several people to take them to Guntersville, but no one would. HC, Vol. 9, TR. 758, 773, 808. They also made several attempts to flag down vehicles, but few would stop. *Barksdale,* 788 So. 2d at 901. Barksdale told Garrison and Hilburn that he would find a way back to Guntersville for them; if necessary, he would shoot someone, but he would prefer to shoot one person rather than two. HC, Vol. 11,

1. Garrison and Hilburn were not familiar with Alexander City. *Barksdale*, 788 So. 2d at 901.

TR. 1268.[2]

Shortly after 6:30 p.m., Julie Rhodes, who was on her way back to work from her dinner break, stopped for Barksdale. HC, Vol. 8, TR. 885; Vol. 11, TR. 1269. Barksdale asked her to take them to a friend's house, and she agreed. HC, Vol. 11, TR. 1269–70. Hilburn sat in the front seat with Julie, while Garrison and Barksdale sat in the back seat. *Id*. at 1270. Two of Julie's friends witnessed the three men getting in Julie's car and noted that she appeared to be in some distress. HC, Vol. 9, TR. 891–92, 897–98.

Barksdale gave Julie directions to his friend's house, then directed her to an empty house on a dead-end street. HC, Vol. 11, TR. 1270–71. Garrison and Hilburn exited the car and ran behind a nearby shed. *Id*. at 1272. As they ran, they heard Julie scream, "Please, please don't shoot me." *Id*. at 1273. Julie then pulled down the street and into a driveway. *Id*. Barksdale yelled, "Bitch, you ain't going to let me out right here!" *Id*. Julie drove the car out of the driveway and toward the entrance to the dead-end street. *Id*. Barksdale fired two shots at Julie, and the car stopped. *Id*. at 1274. He then pushed Julie out of the car and told Garrison and Hilburn to get back in. HC, Vol. 8, TR. 624, 628. The men complied with Barksdale's demand. HC, Vol. 11, TR. 1275. After disposing of some items from the car in Alexander City, the men drove back to Guntersville. *Id*. at 1276.

Several people saw the three men in Julie's car after they returned to

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2. Several witnesses saw Barksdale with a gun during the day. He had the gun with him when the men left Guntersville, and he was the only one of the men who was armed. *Barksdale*, 788 So. 2d at 901–02.

Guntersville and described it as a gray Nissan Maxima with a hole in the driver's-side window. HC, Vol. 10, TR. 927, 1001. Barksdale told several people that the car belonged to the three men but that he, the shooter, had made the down payment on it. *Id.* at 1002. He further explained that the hole in the window was the result of a gun going off while they were "playing" with it. *Id.* at 1003. Later that night, Barksdale and Garrison arrived at a friend's apartment, where they spent the night. HC, Vol. 11, TR. 1279. While at the apartment, Barksdale continually displayed his 9mm pistol. Several times, he pointed the gun at the other people in the apartment as if to shoot them. HC, Vol. 10, TR. 951. All three men were arrested several days later, and the gun and car were recovered. *Barksdale*, 788 So. at 902.

The Alabama Court of Criminal Appeals (ACCA), quoting the trial court's sentencing order, described Julie's struggle to survive and her last moments:

> Desperately seeking help and trying to escape, Julie managed to get to some nearby houses. Someone heard her screams and she was discovered lying in the yard of a house, bleeding profusely. Medics were called and she was transported to a local hospital for emergency treatment and then transported by helicopter to Birmingham. She was dead on arrival in Birmingham. She was shot once in the face and once in the back. She was bleeding to death and went into shock. She was fearful and was trying to escape her assailant, and expressed several times to various persons, including medical personnel, that she was going to die. She was correct.

Barksdale, 788 So. 2d at 902.

2. Facts from the postconviction evidentiary hearing

The Rule 32 (postconviction) court noted the following facts it learned from Barksdale's trial attorney, Thomas Goggans:

- Mr. Goggans is an experienced criminal defense attorney. HC, Vol. 23, Tab #R-57, at 4.
- He had handled twenty to twenty-five capital cases and had presented legal education seminars, including seminars on capital litigation. *Id*. at 5.
- He obtained "a good bit" of background information from Barksdale. *Id*. at 13. Barksdale never indicated to Mr. Goggans that his father abused him or his mother. *Id*. at 16.
- Mr. Goggans contacted Barksdale's mother, Mary Archie, before the trial. He talked to her three times, but she was uncooperative, it was difficult to keep her on the telephone, and she did not provide any background information. *Id*. at 13. When Mr. Goggans was able to get Ms. Archie to talk, she told him, "Well, you know, Tony got himself into the trouble, you know, he did it; he has got to get himself out." *Id*. Mr. Goggans testified that "it would be very risky" to place an uncooperative witness like Ms. Archie on the witness stand. *Id*. at 14.
- Mr. Goggans also talked with Barksdale's father, Tyrone Barksdale. *Id*. at 15. Mr. Barksdale was "pretty straight to the point, straightforward." *Id*. Mr. Goggans learned from Mr. Barksdale that he was in the military, that his son lived with him some and with his mother some, and that they moved because of his military service. *Id*. He also learned that "Tony had gotten involved with gangs and selling drugs and things like that" and that "Tony had

a pattern of when he got in trouble that he would try to lie his way out of it." *Id*. at 15–16.

- Mr. Goggans testified that he did not recall Barksdale ever mentioning the name Maxwell Johnson to him. *Id*. at 16.
- Barksdale did not tell Mr. Goggans that he had any medical or mental health conditions, and Barksdale did not display or give any indication that he suffered from any mental disturbance or deficiencies. *Id*. at 18.

The circuit court also found the following facts from Ms. Archie's testimony at the evidentiary hearing:

- Although Ms. Archie was aware that her son was on trial in Alabama, she did not attend because she did not have the finances to make the trip. *Id*. at 14.
- She testified at the Rule 32 hearing after her son's postconviction attorneys "paid for everything." *Id*.
- In addition, Ms. Archie did not appear with her son in juvenile court, presumably in Virginia, or when he was in court for a robbery charge in Virginia. *Id*. at 14–15.
- She admitted that she used drugs but denied that her children ever saw her doing so. *Id*. at 26.
- She also testified that Barksdale's father abused her but then testified that this only occurred two times after she was separated from him. While she testified that Barksdale's father was abusive to Barksdale, she also testified that such abuse occurred only four times. *Id*.

- Although Barksdale had some medical issues (poor circulation, headaches, and anemia) when he was living with her, the medical issues were discovered and treated by the family doctor. *Id.* at 26–27.
- After receiving custody of the children in the divorce, Ms. Archie continued to use drugs and disciplined Barksdale when she was "high." She continued to use drugs after the children went to live with her former husband. *Id.*
- Ms. Archie did not know Maxwell Johnson. *Id.* at 16.

Finally,[3] the circuit court summarized the testimony of Maxwell Johnson, Barksdale's "godfather."

- Mr. Maxwell did not learn of Barksdale's trial until after the murder, trial, and sentencing. *Id.*
- He did not know Barksdale's parents and had never spoken to them. *Id.* at 16–17.
- Barksdale did not contact Mr. Maxwell prior to or during the trial, even though Mr. Maxwell lived in the same house in Virginia that he had lived in when he knew Barksdale. *Id.* at 17.
- He testified that Barksdale lived with his family for "several weeks if not a couple of months" but did not obtain permission from Barksdale's parents for their son to move in with him, let them know that he was living with them, or obtain any kind of court-ordered custody. *Id.* at 28–29.

3. Barksdale also called Ernest Lee Connor to testify at the evidentiary hearing as an expert on the issue of ineffective assistance of counsel. The circuit court refused to consider Mr. Connor's testimony. HC, Vol. 23, Tab #R-57, at 6–12.

- While Mr. Maxwell "heard" that some physical abuse had occurred between the parents and Barksdale, he did not contact social services, the police, or Barksdale's parents, and never asked Barksdale about it. Mr. Maxwell testified that he did not contact the police because they could have taken Barksdale from his parents, and "he goes downhill from there." *Id.* at 29.
- Mr. Maxwell testified that when Barksdale moved in with him, he did not think he was dishonest or violent. However, when Barksdale attempted to borrow $200 from him to go to Alabama, he refused but offered to buy him a bus ticket, take him to the bus station, and give him $50 because "I wasn't born yesterday." *Id.* at 30–31.[4]

B. The Proceedings Below

On November 24, 1996, Barksdale was convicted of two counts of capital murder for the murder of Julie Rhodes. HC, Vol. 12, TR. 1411–14. Specifically, Barksdale was found guilty of murder during a robbery in violation of section 13A-5-40(a)(2) of the Code of Alabama, and with murder by and through the use of a pistol while the victim was in a vehicle, in violation of section 13A-5-40(a)(17). Doc. 62 at

4. Barksdale fails to cite to the record to support the allegations in his Statement of the Case. In fact, many of the facts contained in his Statement of the Case are contradicted by the record. For instance, Barksdale asserts that his attorney conducted no mitigation investigation (Pet. 4–6), that the trial judge did not consider the jury's recommendation at all (Pet. 8), that Barksdale's mother's testimony indicated that neither of his parents noticed that he was gone (Pet. 10), and that Barksdale's mother testified that his trial attorney had never even suggested that she come to court (Pet. 11). These statements are contradicted by the record. See HC, Vol. 17, Tab #R-45, TR. 46, 92–93, 95–96, 99, 137–38, 142–43, 161–230.

24. The trial court accepted the jury's recommendation and sentenced Barksdale to death. HC, Vol. 4, TR. at 786–801.

On direct appeal, the ACCA and the Alabama Supreme Court affirmed Barksdale's convictions and death sentence. *Barksdale v. State*, 788 So. 2d 898 (Ala. Crim. App. 2000), *cert. denied*, *Ex parte Barksdale*, 788 So. 2d 915 (Ala. 2000). This Court also denied Barksdale's petition for writ of certiorari. *Barksdale v. Alabama*, 532 U.S. 1055 (2001).

Barksdale filed a petition for postconviction relief under Rule 32 of the Alabama Rules of Criminal Procedure in May 2002. HC, Vol. 15, Tab #R-39. The circuit court summarily dismissed most of the claims in the Rule 32, petition finding that many of the substantive claims were procedurally defaulted, that the remaining substantive claims were meritless, and that most of the ineffective assistance of counsel (IAC) claims were insufficiently pleaded. HC, Vol. 23, Tab #R-56. An evidentiary hearing was held on the remaining two claims—that counsel was ineffective for failing to investigate and present mitigating evidence at the penalty phase, and that counsel failed to object to alleged emotional displays by the victim's family in front of the jury. HC, Vol. 17, Tab #R-45. After the evidentiary hearing, the circuit court denied the remaining claims. Vol. 23, Tab #R-57. The ACCA affirmed the denial of the postconviction petition in a memorandum opinion, and the Alabama Supreme Court certiorari. HC, Vol. 23, Tab #R-58, Tab #R-59.

Barksdale then filed a petition for writ of habeas corpus. Doc. 1. On December 21, 2018, Judge William Keith Watkins entered a memorandum opinion and final

judgment denying the habeas petition. Memorandum Opinion and Order, *Barksdale v. Dunn*, 3:08-cv-00327 (M.D. Ala. Dec. 21, 2018), ECF No. 62; *see* ECF No. 63 (Final Judgment). Barksdale filed a Rule 59(e) motion and asked for a certificate of appealability (COA). Petitioner's Motion to Alter or Amend the Judgment, *Barksdale v. Dunn*, 3:08-cv-00327 (M.D. Ala. Jan. 18, 2019), ECF No. 64. Approximately thirteen months later, the district court denied the motion. Order Denying Rule 59(e) Motion, *Barksdale v. Dunn*, 3:08-cv-00327 (M.D. Ala. Feb. 11, 2020), ECF No. 74. Barksdale filed a notice of appeal on March 3, 2020.

Barksdale then moved for a COA in the Eleventh Circuit Court of Appeals. On June 29, 2020, Judge Ed Carnes entered a forty-eight-page order denying the motion. Pet. App'x 3. Barksdale moved for reconsideration of the denial of his COA, which is still pending in the court of appeals.

REASONS FOR DENYING THE PETITION

The question before this Court is whether the Eleventh Circuit applied the wrong standard when it denied Barksdale's motion for COA. The answer to this question is no—a COA was properly denied because Barksdale failed to make "a substantial showing of the denial of a constitutional right," as required by 28 U.S.C. § 2253(c)(2). Applying the COA standard to the claims that were subject to review under the Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2241, *et seq*., the Eleventh Circuit properly denied Barksdale's COA because "the issue sought to be appealed is *not* whether the constitutional claim had merit, but instead whether the state court decision that it did not have merit is due to be rejected under

the demanding standards of AEDPA deference." Pet. App'x 3 at 10. The court's decision to deny a COA is entirely consistent with *Buck v. Davis*, where this Court held, "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 ....'" 137 S. Ct. 759, 773 (2020).

As set forth below, the Eleventh Circuit properly determined that Barksdale was not entitled to a COA on any of the claims raised in his application because the claims did not meet the COA standard. Barksdale has not raised any certworthy issue. The decision below does not implicate any split, involves only factbound claims, and presents no novel issue. This Court should, therefore, deny Barksdale's petition for writ of certiorari. *See* Sup. Ct. R. 10.

I. The Eleventh Circuit applied the correct COA standard to Barksdale's claims.

Barksdale's lead claim fails because both the district court and the Eleventh Circuit applied the correct COA standard to the claims in Barksdale's habeas petition. In denying Barksdale's request for a COA, the district court noted that to be entitled to a COA, a petitioner must make "a substantial showing of a denial of the constitutional right," relying on this Court's opinions in *Tennard v. Dretke*, 542 U.S. 274 (2004), *Miller-El v. Johnson*, 537 U.S. 322 (2003), and *Slack v. McDaniel*, 529 U.S. 473 (2000). Pet. App'x 1 at 313. The district court then noted that "[t]o make such a showing, the petitioner *need* not show he will prevail on the merits, but, rather, must demonstrate that reasonable jurists could debate whether (or, for that matter, agree) the petition should have been resolved in a different manner or that the issues

presented are adequate to deserve encouragement to proceed further," relying on *Tennard* and *Miller-El*. *Id*.

The Eleventh Circuit set forth the following standard in its order denying Barksdale's COA:

> This Court may grant an application for a COA "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Where the petitioner seeks a COA on a claim that the district court denied on the merits, he must show "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). He does not have to show, however, that "he will ultimately succeed on appeal." *Lamarca v. Sec'y Dep't of Corr.*, 568 F.3d 929, 934 (11th Cir. 2009). As the Supreme Court has put it, "[t]he question is the debatability of the underlying constitutional claim, not the resolution of that debate." *Miller-El v. Cockrell*, 537 U.S. 322, 342 (2003).

Pet. App'x 3 at 7–8. The Eleventh Circuit then discussed the AEDPA standard and how that standard and the COA standard combine. *Id*. at 8–11. Applying the COA standard to the AEDPA standard, the court held:

> [T]he COA question is *not* whether reasonable jurists could find the merits of the claim debatable. Applying that standard to the COA determination in that circumstance would be wrong. It would be wrong because the issue sought to be appealed is *not* whether the constitutional claim had merit, but instead whether the state court decision that it did not have merit is due to be rejected under the demanding standards of AEDPA deference.

Id. at 10. The Eleventh Circuit then applied this standard to the claims in Barksdale's COA.

While the Eleventh Circuit did not cite this Court's opinion in *Buck v. Davis*, 137 S. Ct. 759 (2017), the court's denial of the COA in Barksdale's case is entirely consistent with *Buck*. As this Court explained in *Buck*, citing *Miller-El*, "At the COA

stage, the only question is whether the application 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.'" 137 S. Ct. at 773. This is the same standard applied by the Eleventh Circuit in denying Barksdale's COA. Barksdale's argument to the contrary is without merit.

As set forth below, the Eleventh Circuit applied the correct COA standard to the claims in Barksdale's application for a COA. Since the Eleventh Circuit properly denied a COA, this Court should decline to grant certiorari.

II. The Eleventh Circuit properly determined that Barksdale was not entitled to a COA on his penalty-phase IAC claim because reasonable jurists would not find the district court's rejection of this claim "debatable or wrong."[5]

The Eleventh Circuit refused to grant Barksdale a COA on his penalty-phase IAC claim because the district court concluded that the ACCA's determination that counsel's performance was not deficient and that Barksdale was not thereby prejudiced was neither contrary to nor an unreasonable application of clearly

5. Barksdale makes a very general claim in this Court that he was denied the effective assistance of counsel during the guilt phase but does not specifically identify what that claim is. It appears that he makes only the general claim that his attorney failed to conduct an adequate guilt-stage investigation. As the Eleventh Circuit noted, this claim was not raised in the state postconviction proceedings and is procedurally defaulted. Pet. App'x 3 at 23. Barksdale has not alleged cause or prejudice or a fundamental miscarriage of justice to overcome the default. In addition, Barksdale did not raise this claim in his habeas petition, and it was therefore not properly before the Eleventh Circuit. *Ferguson v. Sec'y for Dep't of Corr.*, 580 F.3d 1183, 1193 (11th Cir. 2009); *Smith v. Sec'y, Dep't of Corr.*, 572 F.3d 1327, 1352 (11th Cir. 2009).

established federal law. Pet. App'x 3 at 27. The circuit court then noted, "Reasonable jurists would not find the district court's conclusion 'debatable or wrong,' *Slack*, 529 U.S. at 484, especially given the deferential review AEDPA mandates." *Id*. As set forth above, the Eleventh Circuit applied the correct standard in denying a COA on this claim.

A. The legal standard for reviewing IAC claims under AEDPA.

In *Strickland v. Washington*, 466 U.S. 668 (1984), this Court set forth the standard by which IAC claims are to be judged. In promulgating that standard, this Court held:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. at 687. The *Strickland* standard is "highly demanding," *Kimmelman v. Morrison*, 472 U.S. 365, 382 (1986), and is difficult to meet. *Shinn v. Kayer*, 141 S. Ct. 517, 523 (2020) (quoting *Harrington v. Richter*, 562 U.S. 86, 109 (2011)).

The standard for judging counsel's performance is "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. There is a strong presumption that counsel's conduct falls within the "wide range of reasonable professional assistance." *Id*. at 689. The *Strickland* standard and AEDPA's standard "are both highly deferential, and when the two apply in tandem, doubly so. The *Strickland* standard is a general one, so the range of reasonable application is

substantial." *Richter*, 562 U.S. at 105 (internal citations and quotations omitted). Thus, "[w]hen § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard." *Id*.

Under the prejudice prong of *Strickland*, 466 U.S. at 693, "[i]t is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." Instead, "[t]he question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id*. at 695. In determining whether, "without the errors, there is a reasonable probability that the balance of aggravating and mitigating circumstances would have been different," a reviewing court must consider the aggravating circumstances that were proven beyond a reasonable doubt at trial. *Bolender v. Singletary*, 16 F.3d 1547, 1556–57 (11th Cir. 1994). And AEDPA's deferential standard applies to any prejudice determination made by a state court.

B. There was no deficient performance by counsel concerning the mitigation investigation.

Barksdale alleges that counsel failed to investigate and present mitigating evidence during the penalty phase of his trial because counsel failed to speak adequately with his parents and failed to speak with Maxwell Johnson.[6] Contrary to

6. There was another component of this claim in the state proceedings—that counsel failed to have Barksdale examined by an expert. It appears that counsel have abandoned that portion of the claim in this Court, and for good reason: there was

Barksdale's argument to this Court, his attorney did conduct a mitigation investigation.

First, trial counsel, Tommy Goggans, testified that he obtained "a good bit" of background investigation from Barksdale himself. HC, Doc. 21, Tab #R-45, at 99. Second, as set forth above, Mr. Goggans also contacted Barksdale's mother, Mary Archie, prior to the trial, but she was uncooperative and unhelpful. *Id.* at 92, 137, 142–43. Her testimony at the postconviction hearing confirmed counsel's contention that she would have made a dangerous witness. Indeed, she admitted that she was on drugs, a fact that would have made her a very unpredictable witness. *Id.* at 171–72, 184–85, 205–09, 222–23. Further, as shown through Mr. Goggans's mitigation case, Ms. Archie had never taken an interest in helping her son during his earlier trouble with the law. In short, Mr. Goggans conducted an investigation into Barksdale's mother, and he did not like what he saw. Mr. Goggans thus made the reasonable strategic choice to highlight for the jury Ms. Archies's abandonment of her child while not giving the State an opportunity to elicit potentially damaging information about Barksdale through cross-examination of a highly unpredictable witness.

Third, as discussed above, Mr. Goggans also talked to Barksdale's father, Tyrone Barksdale, Sr, who spoke about his military service and about how Barksdale "had gotten involved with gangs and selling drugs and things like that." *Id.* at 96,

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no evidence presented to support this claim during the state postconviction hearing.

143. More importantly, Mr. Barksdale told Mr. Goggans that "Tony had a pattern of when he got in trouble that he would try to lie his way out of it." *Id.* at 96. Mr. Goggans deemed it too risky to put Mr. Barksdale on the stand lest he tell the jury that his son would lie to get out of trouble. *Id.* at 143–44. Interestingly, Barksdale did not call his father to testify during the postconviction hearing. Barksdale's failure to call his father at the later proceeding prevents him from establishing that Mr. Goggans's efforts in this regard were unreasonable. Just as Mr. Goggans decided against calling Barksdale's father, so did collateral counsel.

Barksdale also contends that trial counsel was ineffective because he failed to locate, interview, and present Maxwell Johnson as a witness during the penalty phase of the trial. There is nothing in the record to indicate that a reasonable investigation would have uncovered the existence of Mr. Johnson. Neither of Barksdale's parents knew him. *Id.* at 146, 232. Barksdale did not tell counsel about Mr. Johnson, and he is not referenced in any documents concerning Barksdale. In fact, Mr. Johnson admitted that he was traveling in and out of the country during the relevant period of time. *Id.* at 251–52, 266. Mr. Johnson's testimony at the postconviction hearing establishes that he was never a huge figure in Barksdale's life and does not appear to be someone whose existence would have been disclosed through a reasonable investigation. Oddly enough, to this day, there is still no indication as to how collateral counsel were able to locate Mr. Johnson.

Barksdale has not established that Mr. Goggans was in any way deficient in his dealings with his parents or in his failure to discover Mr. Johnson. Therefore, he has not established deficient performance.

C. Barksdale was not prejudiced by counsel's performance during the penalty phase.

Barksdale has also failed to prove that he was prejudiced by counsel's failure to present this evidence during the penalty phase.

As noted above, Barksdale did not present the testimony of his father in the postconviction proceedings. Accordingly, there is no basis in the record for this Court to find prejudice regarding Mr. Goggans's interaction with Barksdale's father or his failure to call him at the penalty phase. Barksdale cannot prove prejudice because there was no testimony from the witness in question.

As for Barksdale's mother, her testimony does not establish prejudice. Her testimony was consistent with what the jury knew about her: she had nothing to do with Barksdale. Although she did testify to a few instances of domestic violence that occurred when she was pregnant with Barksdale, that his father was violent with Barksdale when he was very young, and that his father hit Barksdale in the chest four time before he turned four (a fact that Barksdale apparently does not remember), there was no evidence that this alleged abuse had a serious impact on Barksdale's development.

Neither did Mr. Johnson's testimony assist Barksdale's mitigation case. His testimony established that he knew Barksdale when he was in junior high school because Barksdale was friends with his son. According to Mr. Johnson, Barksdale

was a good athlete who got good grades. *Id*. at 241. Mr. Johnson, however, did not know any details about Barksdale's background and never heard any allegations about abuse from Barksdale. *Id*. at 241, 263. After Barksdale turned thirteen, Mr. Johnson had only "sporadic" contact with him. *Id*. at 266. When Barksdale would get in trouble with the law, Mr. Johnson only knew about it through the grapevine. *Id*. at 265. Finally, Mr. Johnson testified that immediately before the Alabama murder, he refused to give Barksdale direct financial assistance ($200) to move to Alabama because "I wasn't born yesterday." *Id*. at 249. Instead, Mr. Johnson purchased him a bus ticket and gave him $50. Mr. Johnson's testimony was not good mitigating testimony and does not prove that Barksdale was prejudiced by the failure to present it.

The evidence presented in the state postconviction proceedings does not consist of the type of compelling mitigation that was offered in the two cases Barksdale relies upon, *Andrus v. Texas*, 140 S. Ct. 1875 (2020) and *Sears v. Upton*, 561 U.S. 945 (2010). The facts in both these cases are easily distinguishable from the facts in the instant matter.

In *Andrus,* counsel performed almost no mitigation investigation and overlooked "vast tranches" of mitigation. 140 S. Ct. at 1881. This Court found that counsel's investigation was "an empty exercise." *Id.* at 1882. Counsel also failed to investigate the State's aggravating circumstances, including an allegation that Andrus committed a knifepoint robbery of a dry-cleaning business, even though Andrus denied responsibility for the offense, which was borne out by the record. None

of those facts exist in this case. *Id*. at 1882–83. Barksdale's counsel investigated potential mitigation and talked to the victim of Barksdale's prior robbery, who identified him as one of the perpetrators.

Additionally, the mitigating evidence that allegedly could have been offered in Barksdale's case is much less than the mitigating evidence presented in *Andrus* and *Sears*. In *Andrus*, postconviction counsel presented evidence that the defendant's childhood was marked by extreme neglect and privation; that he was raised in a neighborhood known for frequent shootings, gang fights, and drug overdoses; that his stepfathers never stayed as part of the family; that one of the stepfathers raped a younger half-sister when she was a child; that they were all addicted to drugs and had criminal histories; that his mother sold drugs and engaged in prostitution, made drug sales and used drugs in front of her five children, was high more often than not, and would leave her children for weekends and weeks when she was high; that Andrus was head of the household for his four siblings and was diagnosed with affective psychosis when he was only ten or eleven; that he was sent to a juvenile facility, where he was prescribed high doses of psychotropic drugs, often spent time in isolation, and had multiple instances of self-harm and threats of suicide; and that while in jail awaiting trial for capital murder, he attempted to commit suicide. 140 S. Ct. at 1879–80. In *Sears*, counsel showed that the defendant's parents had a physically abusive relationship; that he suffered sexual abuse at the hands of an adolescent male cousin; that his mother referred to her children as "little mother f---
---"; that his father was verbally abusive and disciplined him with age-inappropriate

military-style drills; and that he was classified as "severely learning disabled and as severely behaviorally handicapped" and suffered from "significant frontal lobe abnormalities." 561 U.S. at 948–49.[7]

The mitigating evidence that counsel failed to present in this case is not nearly as compelling as the evidence presented in the cases Barksdale cited. The evidence he offered during the state postconviction proceedings would not have made a difference in the outcome of the penalty phase and would not have negated the three aggravating circumstances offered by the State. The supposed failure of Barksdale's attorney to present more mitigating evidence did not prejudice him.[8]

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7. Barksdale briefly mentions *Williams v. Taylor*, 529 U.S. 362 (2000), *Wiggins v. Smith*, 539 U.S. 510 (2003), and *Rompilla v. Beard*, 545 U.S. 374 (2005), in his petition. None of the mitigating evidence counsel failed to present in Barksdale's case is as compelling as the mitigating evidence that counsel failed to present in those cases. There was no evidence that Barksdale was locked in a small wire mesh dog pen that was filthy and excrement filled, had no indoor plumbing, slept in the attic with no heat, and attended school in rags. *Rompilla*, 545 U.S. at 391–92. There was no evidence that he suffered "severe privation and abuse in the first six years of his life while in the custody of his alcoholic, absentee mother" and also "suffered physical torment, sexual molestation, and repeated rape during his subsequent years in foster care." *Wiggins*, 529 U.S. at 535. There was also no evidence that Barksdale's parents had been imprisoned for the criminal neglect of Barksdale, that he had been severely and repeatedly beaten by his father, that he was placed in one abusive foster home, and was then returned to his parents' custody. *Williams*, 529 U.S. at 395.
8. Barksdale briefly argues in his petition at page 24 that his attorney was ineffective because he did not challenge the State's aggravating circumstance concerning his prior robbery conviction. However, this IAC allegation is not properly before this Court because Barksdale did not raise it in his postconviction petition, and the ACCA refused to consider it on appeal because it was not raised below. HC, Vol. 23, Tab #R-58, at 29–31. Barksdale has not shown cause and prejudice or a fundamental miscarriage of justice to overcome the procedural default of this claim. In fact, Barksdale does not acknowledge that this claim is defaulted.

III. The Eleventh Circuit properly denied Barksdale's COA on his claim concerning the postconviction court's adoption of the State's proposed orders because the claim failed to present a constitutional violation.

Barksdale's federal habeas petition did not raise a due process challenge to the state court's adoption of two proposed orders. Petition for a Writ of Habeas Corpus at 47–49, *Barksdale v. Dunn*, 3:08-cv-00327 (M.D. Ala. May 1, 2008), ECF No. 1. In fact, Barksdale never mentioned due process in his habeas petition and cited only state law to support his argument that the verbatim adoption of the proposed orders was erroneous. *Id*. The district court properly refused to consider the merits of this claim because it failed to provide a basis for federal habeas relief. Memorandum Opinion and Order, *Barksdale v. Dunn*, ECF No. 62 at 39–41. Indeed, the district court could not consider a federal constitutional challenge because Barksdale did not raise a due process claim in state court, and the ACCA denied relief exclusively on state law grounds. HC, Vol. 23, Tab #R-58, at 76.

In addition, the Eleventh Circuit correctly denied a COA on this claim because— to the extent it raised a constitutional challenge, and setting aside the procedural default problems—a state court's "verbatim adoption of a proposed order would not rise to 'a substantial showing of the denial of a constitutional right'" under Eleventh Circuit precedent. Pet. App'x 3 at 46–47. The verbatim adoption of an order is entitled to AEDPA deference as long as "(1) both parties 'had the opportunity to present the state habeas court with their version of the facts' and (2) the adopted findings are not clearly erroneous."' *Id*. at 47. In this case, the Eleventh Circuit found that both of those conditions were met, *id*., and so he properly denied a COA.

Moreover, the verbatim adoption of the State's orders in this case does not violate *Anderson v. Bessemer City, North Carolina*, 470 U.S. 564, 572 (1985), or *Jefferson v. City of Upton*, 560 U.S. 284 (2010). Barksdale has not shown that the findings of fact made by the postconviction court were "clearly erroneous." *Anderson*, 470 U.S. at 572. Instead, he argues that the postconviction court was biased in the State's favor because it adopted verbatim most of the orders drafted by the State. But that is not the standard. Even though Barksdale has argued in the ACCA, in the district court, and in this Court that the verbatim adoption of the State's proposed order violates *Anderson*, he has yet to make any attempt to show that the findings of the postconviction court are clearly erroneous. Nor do the facts that existed in *Jefferson* exist in this case. This is not a case where the judge requested a proposed order from the State "*ex parte* and without prior notice" and "did not seek a proposed order from Petitioner." *Jefferson*, 560 U.S. at 294. Further, Barksdale has not pointed to any factual finding that is wrong. The Eleventh Circuit, therefore, properly denied a COA as to this argument.

Barksdale argues that the "state of the law on this issue is unsettled," but it can't be that "unsettled" because, as Barksdale admits, courts remained "bound by *Anderson*." Pet. 33. Barksdale suggests "at least some degree" of variance regarding how closely a federal appeals courts will scrutinize lower courts' findings when they have adopted proposed orders verbatim. *Id.* But the decisions he cites do not arise in the AEDPA context. And, as important, Barksdale has not attempted to show that the findings of the postconviction court are clearly erroneous. Because Barksdale has

not shown that the findings are clearly erroneous, this Court should decline to grant his cert petition.

IV. The Eleventh Circuit properly denied a COA on Barksdale's claim that Alabama's sentencing scheme violates the Sixth and Eighth Amendments.

Barksdale contends that Alabama's sentencing scheme violates the Sixth and Eighth Amendments because the State allows the sentencing judge to consider the non-binding recommendation of a non-unanimous jury. The Eleventh Circuit properly denied a COA on these claims. Barksdale raised his Eighth Amendment claim for the first time in his COA application. The Eleventh Circuit correctly found that this claim was procedurally defaulted because it was not raised in the state courts. Pet. App'x 3 at 34–35; *see Smith v. Jones*, 256 F.3d 1135, 1138 (11th Cir. 2001) ("If the petitioner had failed to exhaust state remedies that are no longer available, that failure is a procedural default which will bar federal habeas relief, unless either the cause and prejudice or fundamental miscarriage of justice exception is established."). Barksdale does not even acknowledge that this claim is procedurally defaulted, much less attempt to show cause and prejudice or a fundamental miscarriage of justice to overcome the procedural default. *Smith v. Murray*, 477 U.S. 527, 537–38 (1986); *Wainwright v. Sykes*, 433 U.S. 72 (1977). Because the claim is procedurally defaulted, Barksdale must show "that jurists of reason would find it debatable whether . . . the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Barksdale completely failed to do this, and therefore, this Court should deny his cert petition.

In addition, as the Eleventh Circuit found, this Court

> has repeatedly held that the Constitution does not require a jury, as opposed to a judge, to make the ultimate decision about whether to sentence a defendant to death. *See McKinney v. Arizona*, 140 S. Ct. 702, 707 (2020) ("[I]mportantly, in a capital sentencing proceeding, just as in an ordinary sentencing proceeding, a jury (as opposed to a judge) is not constitutionally required to weigh the aggravating and mitigating circumstances or to make the ultimate sentencing decision within the relevant sentencing range."); i*d*. ("[A]s Justice Scalia explained, the 'States that leave the ultimate life-or-death decision to the judge may continue to do so.") (citation omitted); *Spaziano v. Florida*, 468 U.S. 447, 460 (1984) (rejecting claim that Florida's capital sentencing scheme violated the Eighth Amendment because it authorized the judge to decide whether to impose death) *overruled in non-relevant part by Hurst v. Florida*, 136 S. Ct. 616 (2016); *Profitt v. Florida*, 428 U.S. 242, 252-53 (1976) (same). If the Constitution does not require the jury to make the ultimate life-or-death decision, the Constitution does not require a unanimous jury recommendation when the State chooses to include the jury in an advisory fashion.

Pet. App'x 3 at 35–36. Barksdale's Eight Amendment claim is meritless and does not entitle him to certiorari.

This Court should also refuse to grant certiorari on Barksdale's Sixth Amendment claim based on *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *Ring v. Arizona*, 536 U.S. 584 (2002), and *Hurst v. Florida*, 136 S. Ct. 616 (2016). These cases were decided after his conviction became final and are not retroactively applicable to him. *Schriro v. Summerlin*, 542 U.S. 348 (2004). Moreover, Barksdale's claim is meritless. As long as the jury finds the existence of at least one aggravating factor at the guilt phase, the resulting death sentence complies with *Apprendi*, *Ring*, and *Hurst*. As the postconviction court found, "[i]n Alabama, at least one statutory aggravating circumstance must be proven in order for death to be the maximum punishment authorized by law," and "[b]y finding Barksdale guilty of a murder

during the course of a robbery, the jury found the necessary fact required to authorize death under Alabama law." HC, Vol. 23, Tab #R-56, at 53; *see also Lee v. Comm'r, Ala. Dep't of Corrs.*, 726 F.3d 1172, 1197–98 (11th Cir. 2013) (same).

Barksdale's reliance on *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), is misplaced. In *Ramos*, this Court abrogated its prior decisions in *Apodoca v. Oregon,* 406 U.S. 404 (1972), and *Johnson v. Louisiana*, 406 U.S. 356 (1972), and held that "state juries must be unanimous in order to convict a criminal defendant." 140 S. Ct. at 1410 (Kavanaugh, J., concurring). Here, the jury unanimously found beyond a reasonable doubt that Barksdale committed murder and that an aggravating factor existed. *Ramos* in no way speaks to the separate and distinct question of whether a non-binding jury recommendation to a sentencing judge must be unanimous before the judge can sentence the defendant to death. Therefore, certiorari is unwarranted.

CONCLUSION

For the foregoing reasons, this Court should deny Barksdale's petition for writ of certiorari.

Respectfully submitted,

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