No. 20-6498

# 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

## REPLY TO RESPONDENT'S OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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

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**REPLY TO RESPONDENT'S OPPOSITION**
**TO THE PETITION FOR A WRIT OF CERTIORARI**

Pursuant to Rule 15.6 of this Court's Rules, Petitioner Tony Barksdale respectfully replies to Respondent's Brief in Opposition ("Op. Cert.") to his Petition for a Writ of Certiorari ("Cert. Pet.") to the U.S. Court of Appeals for the Eleventh Circuit.

## Introduction

Mr. Barksdale's Petition for Certiorari is grounded in four principal arguments, all of which raise issues of fundamental constitutional rights that have been denied to him throughout the process of trial, appeal, and collateral review:

1. If the disposition of the request for a Certificate of Appealability in the Eleventh Circuit correctly states the law, then a COA will be out of reach for nearly every applicant because the judge who denied the application will have been a "jurist of reason" who believes the Certificate not to be warranted.

2. If the near-total lack of investigation seen here, and the failure of trial counsel to present a case at trial, are not ineffective assistance under this Court's binding precedents, then such a claim can never succeed: a total of half an hour invested in interviewing potential sources of information, the lack of any substantial challenge to the State at either the guilt or the punishment phase, a mitigation case consisting of 21 words, and a five-minute closing argument, do not meet the standards of performance that this Court has on numerous occasions framed as required by the Sixth Amendment. Trial counsel's conduct was plainly deficient under – indeed largely indistinguishable from – *Andrus v. Texas,* 590 U.S. ___, 140 S. Ct. 1875 (2020),

and if a Certificate of Appealability is not available here it never will be for failure to investigate and present a defense.

3. If the routine, consistent, and unquestioning acceptance of the prosecution's submissions by the trial court in State habeas proceedings represents constitutionally-acceptable due process, then there is hardly a need for an adversary process at all: the State's arguments, briefs, and objections may be accepted as correct without scrutiny, its assessments of witness credibility are subject to no independent judicial review, and the very purpose of the ancient writ of habeas corpus – "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)) – is fatally undermined. Among other things, the judge here signed orders submitted by the state with the wrong caption and others that directly contradicted what he had decided in court. If a Certificate of Appealability is not available on these facts, abdicating the judicial role to the prosecutors can never be the basis for a claim of denial of due process.

4. And if a trial judge may on his own authority, disregarding the recommendation of the jury, determine the facts sufficient to justify imposition of a capital sentence, then the Sixth Amendment's guarantee of "the right to a speedy and public trial, by an impartial jury" is rendered meaningless.

Respondent's strategy in opposing the Petition for Certiorari is entirely clear: it is to downplay the unique features of this case that make it a compelling candidate for review by this Court. Yet the treatment of the Barksdale case at every step of the

proceedings below – the staggering ineffectiveness of defense counsel before and at trial, the perfunctory collateral review by a State court that repeatedly signed off on briefs submitted by the prosecution, transforming pieces of advocacy into court orders to which the State appellate tribunals extended unquestioning deference, and the misapplication of this Court's jurisprudence concerning Certificates of Appealability in the Eleventh Circuit Court of Appeals – all transform this capital case into an object lesson calling for meaningful review, which will be denied if a Certificate of Appealability is not granted.

Respondent asserts that Petitioner has presented to this Court facts "contradicted by the record." Op. Cert., p. 7, n.4. In actuality, it is the Commissioner who is guilty of selective citation and outright mischaracterization, as shall be seen in the pages that follow. Nor does Respondent seriously refute the legal arguments by which Petitioner Barksdale demonstrates that, absent this Court's intervention, he will be executed despite never having had a constitutionally adequate trial or collateral review.

## I. The Eleventh Circuit Misconstrued This Court's Precedents Regarding the Standards for a Certificate of Appealability.

Respondent correctly summarizes the instructions given by this Court regarding the criteria to be assessed in considering whether to grant a Certificate of Appealability to a petitioner: "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 …'" *Buck v. Davis*, 137 S. Ct. 759, 773, citing *Miller-El v. Cockrell*, 537 U. S. 322, 327 (2003) (emphasis added); Op. Cert., at 10.

But that is manifestly not the basis on which the Circuit Court denied the COA to Mr. Barksdale. The court below did not ask whether jurists of reason could **disagree** with the conclusions of the district court or the State courts: it asked whether any reasonable judge might be found who **agreed** with them. The Eleventh Circuit posed "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?" Cert. Pet., App. 3, at 10-11 (emphasis added). But obviously "a reasonable judge" might be found who **agreed** with the State court determinations: we know that to a certainty, because the Alabama Court of Criminal Appeals and the district court had already done so.

What the Eleventh Circuit did in this case, and what Respondent now attempts to defend, would empty the COA standards, and this Court's decision in *Buck*, of all meaning. *Buck* allows a federal habeas petitioner, like Mr. Barksdale, to secure appellate review of the rejection of a constitutional argument whose correctness is debatable: "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." *Buck*, 137 S. Ct. at 774. For a proposition to be "reasonably debatable," there must be reasonable people who agree with it, and others who disagree.

Moreover, the determination of whether the claim is "debatable" is not dependent on whether it is likely ultimately to prevail. This Court said that in express terms in *Buck*:

> 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). Thus, when Respondent writes that "[t]he Eleventh Circuit refused to grant Barksdale a COA on his penalty-phase [ineffective assistance of counsel] claim because the district court concluded that the ACCA's determination that counsel's performance was not deficient," Op. Cert., at 12, he concedes that the Circuit Court in denying the COA did **precisely** what this Court taught in *Buck* that appellate courts must **not** do: it crossed the "threshold," and grounded its affirmance of the district court opinion in its independent evaluation of the merits of Petitioner's claims, not the "debatability" of the constitutional claims that he has raised.

Yet in this case, the uncontroverted record reflects a level of preparation, investigation, and presentation of any actual defense by trial counsel so low as to be nowhere replicated in this Court's death penalty jurisprudence. Pointing out those inadequacies surely raises a "debatable" claim, as to which "reasonable jurists" may differ. The same is true of the arguments that the State habeas determination was the result of a tainted and constitutionally inadequate process, and that his condemnation to death by a less-than-unanimous jury and a trial judge who openly stated that he was not influenced by the jury's recommendation, but would have imposed a capital sentence even without it. The effect of the rulings of the courts below is to preclude any appellate consideration of these issues. That the Eleventh Circuit barred further consideration of the serious constitutional issues raised here

mandates review by this Court.

## II. Petitioner Has Presented at Least a "Debatable" Claim That Trial Counsel Did Not Provide Effective Assistance.

The affirmance below, rejecting Petitioner's ineffective assistance claim, was expressly based on the Circuit Court's determination that "reasonable jurists would not doubt that a fair-minded jurist **could agree** with the Court of Criminal Appeals' decision that [Petitioner's defense counsel] conducted a reasonable penalty stage investigation." Cert. Pet., App. 3, at 29 (emphasis added). And while Respondent taxes Petitioner with making "only factbound claims," Op. Cert., at 10, it is the irrefutable facts – facts entirely ignored or thoroughly distorted in Respondent's submission – that demonstrate the degree of his counsel's ineffectiveness, including the utter failure to investigate the crime, the aggravators on which the State had indicated it intended to rely, or the mitigating evidence that was available and that nevertheless went undiscovered and undeveloped.

Trial counsel's time records were introduced into evidence at the Rule 32 hearing through his own testimony. Respondent tells this Court that Mr. Goggans "contacted Barksdale's mother, Mary [Archie], before the trial. He talked with her three times …."[1] Op. Cert., at 4. Omitted is the fact that the total duration of those

[1] Of course, when Respondent relates that these statements were "noted" by the Tallapoosa County Circuit Court following the Rule 32 hearing, Op. Cert., at 3-7, he does not mention that every word of the decision was in fact written by the prosecution. It makes no reference to the many instances in which Ms. Archie's own testimony contradicted or otherwise deviated from that of trial counsel. So, for example, while the prosecution argued that Mr. Barksdale's mother did not attend court with him when he was accused of a crime in Virginia, suggesting that she had washed her hands of her apparently incorrigible son, it ignored her testimony that the reason for her apathy was that she was strung out on drugs at the time.

phone calls did not exceed one-fifth of an hour: 12 minutes.[2] Those 12 minutes on the telephone, in the Commissioner's view, permit the representation to this Court that "Mr. Goggans conducted an investigation into Barksdale's mother." Op. Cert., at 15.[3]

Respondent reports that counsel "also talked with Barksdale's father." *Id*. But what he does not reveal is that those conversations lasted no more than .3 of an hour, or 18 minutes in aggregate. Trial counsel did in fact testify at the Rule 32 hearing that he obtained "'a good bit' of background information" from his client, Op. Cert., at 4, but he failed to explain – nor did the State habeas decision comment upon – the fact that his time records show not one minute spent tracking down, that "good bit" of information. Those records do not reflect a single phone call or a single letter to anyone who might have been able to shed light on Mr. Barksdale's utterly dysfunctional childhood. As far as the records show, the entirety of the "investigation" that trial counsel conducted, in the ten months between his appointment and the start of a capital trial, consisted of no more than half an hour in inconclusive phone calls with his client's parents, and at the very most a total of five hours spent with Mr. Barksdale himself.

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[2] It was during those 12 minutes, apparently, that Mr. Goggans came to the conclusion that Ms. Archie would be a "risky" witness. Op. Cert., at 4. After all, he concluded, she did not care enough to try to save her son's life, failed to attend his earlier court proceedings when they were far closer to home, and showed little interest in a case that might well have led to his execution. An adequate investigation, however, would have treated these observations as the starting point to obtain more information about a mother so remarkably unconcerned about the welfare of her son. But counsel instead considered them to be a blind alley, worth no further investigation. This is precisely the kind of aborted investigation that this Court considered to be constitutionally inadequate in *Rompilla v. Beard*, 545 U.S. 374 (2005).

[3] Curiously, Respondent also tells this Court that "Mr. Goggans's mitigation case" "show[ed]" that Petitioner's mother "had never taken an interest in helping her son." Op. Cert., at 15. But Petitioner has placed before the Court the entirety of that "mitigation case" presented to the jury. *See* Cert. Pet., at 7. It consisted of 21 words spoken by defense counsel, not one of which referred to Ms. Archie.

What was revealed at the Rule 32 hearing, however, was not only that Petitioner's mother – the supposedly custodial parent – was an active drug addict, far more concerned with securing her supply than with raising her sons; that she was so addled by her addiction that she actually sold a friend into prostitution to raise money to buy drugs; that there were periodic episodes of violence initiated by Petitioner's father against his mother, including an attempted rape using a broomstick, while Petitioner and his brother were in the house; and that when Mr. Barksdale, then of junior high school age, ran away from his family home and into the home of the father of a school friend, LTC Maxwell Johnson (USMC, Ret.)[4] for months, neither parent ever went looking for him.

Perhaps the most egregious distortion of the record by Respondent, however, has to do with the failure of trial counsel to demonstrate the slightest curiosity concerning the facts of his client's earlier conviction for involvement in an armed robbery in Virginia, when Petitioner was 14. Counsel knew that this was going to be one of the aggravators on which the State would rely in seeking a capital sentence. The Commissioner represents to this Court that "Barksdale's counsel investigated potential mitigation and talked to the victim of Barksdale's prior robbery, who identified him as one of the perpetrators." Op. Cert., at 19.

What he fails to disclose, however, is that trial counsel admitted, during the

[4] Colonel Johnson testified at the Rule 32 hearing. Trial counsel conceded that he had never heard his name mentioned before that. Respondent would have the Court infer from that that Col. Johnson – erroneously referred to in the Op. Cert. as "Mr. Maxwell" – was not really very important to Petitioner. Perhaps a more accurate inference is that counsel's unfamiliarity is further evidence of the failure to conduct a proper investigation. It is not sufficient for capital defense counsel simply to take his client's word for what was and what was not important in his history, as *Rampulla* explicitly demonstrates.

Rule 32 proceedings, that he had never attempted to secure the court records of the earlier case, and that the only "talk" he had with the victim was a several-seconds exchange that took place in the courtroom in Alexander City, Alabama, as the State was preparing its punishment-phase presentation. And the entire "conversation" (if it can be so described), to the best of counsel's recollection, consisted of Mr. Cervantes (the pizza deliveryman who was held up by Petitioner's brother and another teenager, with Petitioner acting as the "lure") stating that he recognized Mr. Barksdale as a participant in the crime.

That, according to Respondent, constituted a constitutionally adequate investigation: that, along with less than half an hour – in total – of phone calls with his client's parents, no contact with any other potential witness, and no more than five hours of interaction with Petitioner in his jail cell in Tallapoosa County. The records maintained by Mr. Goggans at the time, which he testified were accurate and which were submitted to the State court to support his fee request, show not one further minute spent investigating the crime or the defendant whose life he was tasked with trying to save.

Mr. Barksdale relied in his Petition for the Writ, and relies here, on the string of decisions of this Court 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), to *Rompilla*, *Porter v. McCollum*, 558 U.S. 30 (2009) (*per curiam*), and most recently, *Andrus v. Texas*, 140 S. Ct. 1875 (2020). In each of those cases, this Court held that the constitutional right "to have the assistance of counsel for his defense," enshrined

in the Sixth Amendment, means the right to effective assistance. And while effective assistance does not necessarily mean assistance that is ultimately successful, it does include the "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691.

In each of these reported decisions, an effective defense lawyer would have discovered the existence of mitigating evidence that might possibly have swayed the jury. Of course, it can never be said with confidence what the jury would have done had it had all of the relevant facts, but that prediction is unnecessary: the omission of a viable defense was sufficient to render the outcomes of the trials in those cases unreliable. "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, … 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." *Rompilla*, 545 U.S. at 393, citing *Strickland*, 466 U.S. at 694, *Williams*, 529 U.S. at 398, and *Wiggins*, 539 U.S. at 538.

That is precisely the claim here. There was evidence to demonstrate that Mr. Barksdale was subjected to the kinds and types of trauma, of mistreatment, and of abandonment that might well have caused members of the jury to see him as a human being and, as a consequence, to deem him not beyond redemption. That evidence was never collected by defense counsel, and the jury was unaware of its existence.

Respondent counters the citation to these opinions of the Court by reciting at length just how horrific were the childhood circumstances of the petitioners in the

earlier cases. Op. Cert., at 19-20. In the Commissioner's estimation, apparently, there is some metric by which the degree of dysfunction of a person's upbringing may be assessed, and only those that score above a certain level may qualify for presentation as mitigating evidence in capital trials. "The mitigating evidence that counsel failed to present in this case," Respondent urges, "is not nearly as compelling as the evidence presented in the cases Barksdale cited." *Id*., at 20.

Of course, such an assessment is not properly the province of Respondent: it should have been the role of the jury. And it would have been, had counsel provided the evidence for their consideration. Petitioner's burden is to show that the outcome of the trial was unreliable because of the failure of counsel to present – and indeed his failure to discover or identify – the evidence in mitigation that was presented at the Rule 32 hearing. It is not to show that he was "locked in a small wire mesh dog pen that was filthy and excrement filled," Op. Cert., at 20 and n. 7, in order to qualify as having been subjected to mistreatment similar to that to which other victims of ineffective assistance of their capital defense counsel were exposed.

The capital trial – the trial that resulted in Mr. Barksdale's being sentenced to death – was characterized by the presentation of virtually no testimony or other evidence at the guilt stage, and the reliance on a single undisputed fact (Petitioner's age) at the penalty phase. As is detailed at greater length in the Petition, the entire defense at the punishment stage lasted less than a single minute, and is reported in

half a page of trial transcript.[5] The members of the jury were given no reason – no facts from which they could decide that the crime was not "heinous, atrocious and cruel," and no basis to think that the defendant whose life was in their hands was other than a cold-blooded murderer – to cast a vote for a sentence less than death.[6]

Precisely what this Court said in its *per curiam* opinion in *Andrus* is equally applicable to the case at bar:

> First, counsel performed almost no mitigation investigation, overlooking vast tranches of mitigating evidence. Second, due to counsel's failure to investigate compelling mitigating evidence, what little evidence counsel did present backfired by bolstering the State's aggravation case. Third, counsel failed adequately to investigate the State's aggravating evidence, thereby forgoing critical opportunities to rebut the case in aggravation. Taken together, those deficiencies effected an unconstitutional abnegation of prevailing professional norms.

140 S. Ct. at 1881-82.

### III. The Verbatim Endorsement of the Prosecution's Submissions By the State Habeas Court Is Inconsistent with Due Process.

Following the hearing, the Tallapoosa County judge presiding over the collateral review proceedings did not merely issue the prosecutor's proposed findings of fact and conclusions of law as his "decision" without changing a comma, but he similarly signed every other proposed order given to him by the prosecution. In at least two instances, it is fair to infer that he did not even read what he was signing, because the papers bore captions from other cases. On another occasion, the judge in

[5] *See* Cert. Pet., at 7. The Opposition is devoid of any discussion of how a mitigation case of such duration can possibly be consistent with professional standards in a capital case, unless there are some defendants, or some crimes, so dreadful that normal constitutional protections do not apply to them.
[6] Nevertheless, one juror did dissent from the recommendation of the death sentence.

open court orally granted Petitioner's counsel access to certain discovery materials,[7] but when the State submitted a proposed order expressly contradicting his oral decision, he signed it anyway.

No decision of this Court has ever concluded that such a practice is consistent with the requirements of due process. To the contrary, the Court has "criticized" the practice, in *Anderson v. City of Bessemer City*, 470 U.S. 564, 572 (1985), and in *Jefferson v. Upton*, 560 U.S. 284, 294 (2010) (*per curiam*), even though it has been willing to tolerate it where sufficient guarantees of fairness and neutrality are present.

There is no ironclad test to determine whether such guarantees have or have not been provided. Surely the mere fact that both sides in litigation are invited to make submissions to the court offers no assurance that both filings will actually be read. The notion that a proposed order of 40+ pages drafted by the State is accepted as perfect in every respect – every assessment of the credibility of witnesses, every appraisal of documentary evidence, and every citation to legal principles or precedents – while a comparably-sized brief from the defendant is considered

[7] The materials in question were the arrest records of the two accomplices in the crime for which Petitioner was sentenced to die. Their relevance was explained as potentially bearing on the aggravating factors on which the State had relied at trial and as to which defense counsel had done no investigation. The trial judge allowed access based on that explanation, demonstrating that ineffectiveness of counsel in failing to address aggravators was, in fact, a proper part of the Rule 32 proceedings. Yet the court assiduously denied Petitioner the opportunity to develop that issue at the hearing, based on the State's objection that only mitigators, not aggravators, were the subject of the Rule 32 petition. As this Court made clear in *Andrus*, and as appears a matter of the literal meaning of words, "mitigation" in this context means anything that might undermine the case for death, including evidence and argument that the proffered aggravators do not apply, are not supported, or are countermanded by other considerations. The State court's treatment of this issue is further evidence that the Rule 32 process was entirely driven by the prosecution, and was by no means a fair consideration of the requested writ.

inaccurate or incorrect in each and every particular, ought to give rise to healthy skepticism. Here, however, the pattern adopted by the Rule 32 judge, signing every paper put in front of him by the prosecution from the beginning to the end of the proceedings, justifies even greater doubt.

In *Anderson*, a civil case which Respondent appears to suggest is a ringing endorsement of the practice of "ghost-writing" by parties to capital litigation, the Court observed that the challenged order was not, in fact, a verbatim adoption of one side's submission. Instead, "the findings [the court below] ultimately issued … var[ied] considerably in organization and content from those submitted by petitioner's counsel." 470 U.S., at 572-73. Moreover, there were additional and persuasive reasons to conclude that the opinion under review was in fact the considered decision of the court that issued it. Here, by contrast, there are no such reasons: indeed, the conduct of Judge Tom Young, Jr., throughout the Rule 32 process strongly suggests that he had essentially abdicated his assigned judicial role.

Petitioner does not argue that in all instances the adoption by a trial judge of proposed findings of fact drafted by one side in litigation denies due process to the other side. But *Anderson* cannot be read as a general license for a practice that is so easily abused. That is why the Eighth Circuit opined that findings and conclusions not the product of the court's own consideration of the case can amount to abandonment of the judicial process, *Bradley v. Maryland Casualty Co.,* 382 F.2d 415, 423 (8th Cir. 1967); the Fourth Circuit held 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. v. Kendall Co.,* 288 F.2d 719, 724-25 (4th Cir. 1961), *cert. den.,* 368 U.S. 825 (1961); and the Third Circuit described the verbatim adoption of a party's proposed opinion, "vitiat[ing] the vital purposes served by judicial opinions." *Bright v. Westmoreland County*, 380 F.3d 729,731-32 (3d Cir. 2004). The practice is troublesome enough in ordinary litigation; it is especially problematic in capital cases, where the deference standards of the AEDPA can easily be subverted by the perfunctory relabeling of a prosecution brief as an order of the court.

## IV. The Non-Unanimous Jury Recommendation of Death Violates the Sixth and Eighth Amendments.

The entirety of Respondent's counter-argument to this claim is that Petitioner has "completely failed" to show that reasonable jurists would consider the point debatable. Yet since *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), which forbade the practice of permitting a non-unanimous jury verdict at the guilt phase of a State criminal trial, this Court has not had cause to address whether, by the same logic or even *a fortiori*, non-unanimous recommendations for capital punishment should also be held unconstitutional. *Hurst v. Florida*, 136 S. Ct. 616 (2016), is applicable here as well: if the determination of the facts prerequisite to the imposition of the death penalty is for the jury and not the judge, and if determinations of guilt by a jury must be unanimous, then recommendations of the ultimate penalty should require nothing less. This issue too cries out for this Court's resolution.

## Conclusion

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: March 19, 2021