THIS IS A CAPITAL CASE

No. _____

In the

Supreme Court of the United States

_____

TONY BARKSDALE,

Petitioner,

v.

ATTORNEY GENERAL,
STATE OF ALABAMA, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI

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THIS IS A CAPITAL CASE

QUESTIONS PRESENTED

1. Does a brief written by the prosecution in a State habeas proceeding, and then rubber-stamped by State judges, qualify as a judgment entitled to deference under the AEDPA, 28 U.S.C. § 2254?

2. Did the Eleventh Circuit err when it denied a Certificate of Appealability on the rubber-stamping issue based on what it acknowledged was an improper standard of review?

3. 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 *Strickland v. Washington*, 466 U.S. 668 (1984); *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 *Andrus v. Texas*, 590 U.S. 806 (2020)?

LIST OF PARTIES BEFORE THE CASE BELOW

1. Tony Barksdale, Petitioner before this Court.
2. Steve Marshall, Attorney General of the State of Alabama, Respondent before this Court.
3. The Commissioner of the Alabama Department of Corrections and the Warden, Holman Correctional Facility, were identified as additional appellees in the decisions 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.) (denying Certificate of Appealability); 2020 WL 698278.

Barksdale v. Attorney General, State of Alabama, et al., No. 20-10993-P (11th Cir. 2022) (granting limited COA)

Barksdale v. Attorney General, State of Alabama, et al., No. 20-10993-P (11th Cir. 2024); 2024 WL 2698399 (decision on the merits); 2024 WL 2698399

Barksdale v. Attorney General, State of Alabama, et al., No. 20-10993-P (denying rehearing).

TABLE OF CONTENTS

INDEX OF APPENDICES

TABLE OF AUTHORITIES

CASES

FEDERAL STATUTES

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 unpublished December 21, 2018, order of the U.S. District Court for the Middle District of Alabama, denying Mr.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

The district court's unpublished denial of the motion to reconsider, and/or to grant a certificate of appealability, issued on February 11, 2020, 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.), issued on June 29, 2020, and also unpublished, is attached as Appendix 3.

On September 7, 2022, a panel of the U.S. Court of Appeals for the Eleventh Circuit reconsidered the denial of a COA, and granted the Certificate, limited to a single claim: ineffective assistance of counsel ("IAC") at the punishment phase of Petitioner's trial. That unpublished decision is attached as Appendix 4.

The case was argued in open Court on October 24, 2023. The unpublished *per curiam* opinion of the panel was issued on May 24, 2024. It may be found at 2024 WL 2698399 and in Appendix 5. The Circuit Court denied rehearing and rehearing *en banc* on October 16, 2024; *see* Appendix 6.

JURISDICTIONAL STATEMENT

On November 26, 2024, Justice Thomas, Circuit Justice for the Eleventh Circuit, granted an extension of time for the filing of this Petition for a Writ of Certiorari to February 13, 2025. It is timely filed within that extended deadline. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides 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." 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, then 18 years of age, and two other young men stole a car and a gun in Guntersville, Alabama. They drove to Alexander City, where Petitioner had previously resided, and spent the day there. Having wrecked the stolen car during their drive, they had no way of returning to Guntersville. They tried to persuade friends, acquaintances, and finally a young woman they did not know, 19-year-old Julia Katherine Rhodes, to give them a lift.

The three persuaded Ms. Rhodes to drive them part-way to a place where they believed they could spend the night. 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. She died of her injuries some hours later. The three teenagers took possession of her car and drove it back to Guntersville, where all three were arrested.

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

Mr. Barksdale's defense was that the shooting was unintentional. He contended that he was attempting to unload the gun and not to fire it. A forensic expert was hired to examine the weapon, and he reported that it was defective in a way consistent with Mr. Barksdale's explanation: it was susceptible to jamming as

[1] The third teenager, Kevin Hilburn, was killed by another detainee inside the Tallapoosa County Jail in Dadeville, Alabama, shortly after their transportation there from Guntersville.

[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 and hid 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.

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 investigate his client's history, background, or defenses. 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 called two witnesses at the guilt stage of the trial – the owner of the stolen weapon, and the forensic expert – while the state presented 73. And he called none at the penalty phase. Most significantly, he did not make the slightest attempt either to identify or to develop mitigating evidence, or to mount a challenge to the aggravators on which he knew the state would rely in seeking a capital sentence.

Mr. Goggans's time records, which he attested under oath 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 18 minutes on the telephone with Petitioner's father, and another 18 minutes with his mother, before concluding that they would be unreliable or unhelpful witnesses.[4] Those 36 minutes were the totality

[3] The statements of fact in this and the following paragraphs are uncontestably part of the record of proceedings below. The accuracy of Mr. Goggans's time records, introduced at the State habeas evidentiary hearing, has never been challenged.

[4] The fact that the parents were so uncooperative should have been a reason for conducting more, not less, investigation. What kind of home life had his client had, counsel might well have wondered, if his father expresses no concern about whether his teenage son is executed? What prospects does a young man have of functioning 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 their son? *See*, generally, *Rompilla v. Beard*, 545 U.S. 374 (2005).

of the time that counsel committed to his "investigation" of the facts of the crime, or of his client, in a capital trial. The total time Mr. Goggans spent meeting with Mr. Barksdale, from the date of appointment until the first day of trial, was no more than five hours.

He did not do anything – not even place 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 in Virginia, at age 16, even though he knew that the prosecution intended to use that conviction as a statutory aggravator in seeking the death penalty. He did not make any 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 came to be 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 damaging elements of his testimony: the recounting of exchanges between Petitioner and Ms. Rhodes that, according to the witness's own sworn account, took place in a closed car some 100 yards away from where he and Kevin Hilburn had hidden after they saw the gun. Nor did he probe precisely what Mr. Garrison claimed to have seen and heard

[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 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. The cross-examinations of 26 of the other 32 were reported in less than a single page of transcript.

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 Petitioner had maintained. And he did not challenge testimony from the state's witnesses – acquaintances of Petitioner's from his time 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 invited 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, and never harmed or threatened to harm anyone).

Lest it be thought that the reference to a penalty phase of less than one minute is an exaggeration, we reproduce here in its entirety defense counsel's presentation,

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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 testimony. Neither was explored at trial.

[8] The prosecution also introduced 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. He was not, as even a cursory review of the court file would have shown.

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 the State's aggravators. The only personal information offered about Petitioner was 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 argument – if it can be said to have had a theme – is that age is "not an excuse," but 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]

The jury returned a recommendation of death by a vote of 11-1. At the sentencing hearing, Judge Hamner was unambiguous – indeed, he was emphatic – in announcing that he did not take that recommendation into account in making the

[9] In the whole mitigation case in a capital trial, defense counsel spoke a total of 21 words, including "defense rests."

[10] The apparent effort to generate compassion for Mr. Barksdale, because he was 18 at the time of the crime, backfired badly when the District Attorney reminded the jury that Ms. Rhodes was 19 when her life was brutally ended.

ultimate sentencing decision. Observing with apparent surprise that the defense had offered no statutory or other mitigating considerations aside from 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 petitioned the state court in which he was originally tried for a writ of habeas corpus. A two-day evidentiary hearing was conducted in Alexander City, Alabama, in June 2005.

During that entire three-year period, Judge Tom Young (replacing Judge Hamner, who had retired from the Bench), signed every single paper put in front of him by the prosecution, including severe limitations on the scope of the petition, document production procedures, and the like, without change and without even retyping. On two occasions, the Attorney General placed before the Judge proposed orders bearing the caption of an entirely different case, or containing the name of another defendant, but Judge Young signed them anyway. When a discovery dispute arose over Petitioner's right to access his co-defendants' arrest records, the Judge asked for oral argument, and in open court accepted Mr. Barksdale's request to see those files after *in camera* review. But when the state submitted its proposed order to the court denying the motion that the judge had just granted, he signed it anyway,

[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).

again without alteration. Petitioner was required to seek reconsideration, following which the Circuit Court, for the first and only time, issued a ruling (allowing counsel to see the 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 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 aggressive temper. When Tony was

[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. 806 (2020) (*per curiam*), which demonstrated that aggravators and mitigators are two sides of the identical evidentiary coin.

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 appeared 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 life.

These witnesses, in other words, provided the 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.

Following the hearing, Judge Young asked the parties to submit proposed findings of fact and conclusions of law, and those were filed and exchanged on September 6, 2005. In early October, undersigned counsel received in the mail from the Circuit Court for Tallapoosa County what appeared to be a second copy of the state's submission. The document was identical to the one sent from 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 prosecutors tendered to him (and every typographical error) comported perfectly with his own assessments of the facts, the evidence, and the law.

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" – that is, the prosecution's brief – again verbatim, at least as to the issues of greatest importance, such as ineffective assistance of counsel. A motion for reconsideration was denied, and the Alabama Supreme Court denied discretionary review on April 26, 2008.

It is to the state appellate tribunal's disposition of the case, written in relevant part not by a judge but by one party, to which the district court deferred, and which the Eleventh Circuit has suggested is all of the legal process 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 (W. Keith Watkins,

J.) denied the petition without oral argument on December 21, 2018, also refusing to grant Petitioner a Certificate of Appealability ("COA"), Docket No. 3:08-CV-327; 2018 WL 6731175 (Appendix 1 hereto).

Judge Watkins denied a request for reconsideration and/or amendment of that order to include a COA, 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, Docket No. 20-10993-P, seeking permission to raise four issues, two of which were the ineffective assistance of counsel at both phases of his trial, and the inappropriate rubber-stamping of the prosecution's submissions as court orders throughout the Rule 32 proceedings.

That application was denied as to all claims by a single judge (E. Carnes, J.) on June 29, 2020 (Appendix 3). Judge Carnes based his decision with respect to the rubber-stamping on two Eleventh Circuit cases, *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), which he apparently believed placed the constitutionality of the practice beyond debate.

Mr. Barksdale timely petitioned the Eleventh Circuit to reconsider the denial of the COA. That request was granted by a panel of judges which concluded that, as Petitioner had argued, Judge Carnes's opinion had been based on an incorrect reading of this Court's directions on the standards for Certificates of Appealability, in *Buck v. Davis*, 580 U.S. 100, 115 (2017), and *Miller–El v. Cockrell*, 537 U.S. 322, 327 (2003). Appendix 4. Yet the Panel saw fit to grant the COA only on the claim of

ineffective assistance, and even that only with respect to the penalty phase of Mr. Barksdale's trial. The reconsideration did not review, or even mention, the other claims in light of the correct COA guidelines. :

After briefing, the case, restricted to the single issue, was argued in October 2023. During oral argument, referring to trial counsel's defense overall, Judge Adalberto Jordan observed, "[that] is really bad … that is deficient performance."[13] Having asked for citations to relevant precedent, he added, "I can't find anything close to this case."[14] Nevertheless, without citation to the voluminous record, the Panel concluded that "we need not and do not examine whether [trial counsel]'s performance was deficient." Appendix 5, at 18. Because the Panel held that Mr. Barksdale – now on Death Row – was not prejudiced by anything his defense counsel did or failed to do, the standards for unconstitutional ineffectiveness set out by this Court in *Strickland v. Washington*, 466 U.S. 668 (1984), and the many decisions applying that precedent, were not met.

Since the COA did not allow an appeal on the rubber-stamping issue, and the reconsideration decision of the court below did not address it at all, the appellate court's final judgment on that matter remains the one issued by Judge Carnes (acting alone) in 2020.

Petitioner respectfully submits that a rubber-stamped prosecution brief, signed by a state judge (and later adopted verbatim by a state appellate tribunal) is

[13] Audio recording of the oral argument, available at https://www.ca11.uscourts.gov/oral-argument-recordings (October 24, 2023), at 29:42.
[14] Id., at 35:17.

entitled to no deference under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2254, as if it were the considered, independent judgment of a state court. That all-too-common practice should be rejected by this Court as inconsistent with constitutional guarantees. But at the very least, the questions raised by this challenge are certainly "debatable," and a COA should have been granted to permit the court below, and eventually this Court, to make that determination.

Finally, the Circuit Court below grossly erred in concluding that the evidence presented at the state habeas proceeding – both of inadequacy before and at trial, and also of mitigation that the jury never saw – was insufficient to show that the grossly deficient performance of trial counsel prejudiced his client's interests and constituted ineffective assistance under *Strickland*, *Williams v. Taylor*, 529 U.S. 362 (2000), *Wiggins v. Smith*, 539 U.S. 510 (2003), *Rompilla*, and *Andrus v. Texas*, 590 U.S. 806 (2020) (*per curiam*).

REASONS FOR GRANTING THE WRIT

I. A Brief Written by the Prosecution in a State Habeas Proceeding, and Then Rubber-Stamped by State Judges, Does Not Qualify as a Judgment Entitled to Deference under the AEDPA, 28 U.S.C. § 2254.

"The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases." *Marshall v. Jerrico*, 446 U.S. 238, 242 (1980). As a result, "[b]oth the appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself." *Williams v. Pennsylvania*, 579 U.S. 1, 16 (2016).

The wholesale adoption of the state's proposed orders in the Alabama Rule 32 proceedings, including detailed findings of fact and conclusions of law, undermines both "the appearance and the reality of impartial justice" guaranteed to Petitioner by the Due Process Clause.

In the order denying Petitioner's application to the state court for a writ of habeas corpus, and in every other contested matter presented to him for adjudication over a period of over three years, Judge Tom Young of the Tallapoosa Circuit Court failed to indicate that he undertook any review of the facts or of the law applicable to this case. Instead, repeatedly and with only one exception, he simply signed whatever brief or order was presented to him by the Attorney General. That practice constitutes a denial of due process, because it deprives defendants like Petitioner of the opportunity for impartial judicial review that has been protected since time immemorial by "the Great Writ" of habeas corpus.

Justice Kennedy surveyed the history of the venerable writ, and its importance to Anglo-American jurisprudence, in his opinion for this Court in *Boumediene v. Bush*, 553 U.S. 723, 739-46 (2008).[15] He observed that the Constitution itself "ensures that, except during periods of formal suspension, the Judiciary will have a time-tested device, the writ, to maintain the 'delicate balance of governance' that is itself the surest safeguard of liberty." *Id*. at 745 (citing *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (plurality opinion)).

[15] The writ is of such fundamental importance to our system of justice that the Constitution itself provides that it "shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." Art. I, § 9, cl. 3.

The "delicate balance" to which this Court adverted cannot be reached if one of the parties to litigation – the state – has leaned its weight onto the scales of justice. There is no "balance" at all, much less a "delicate" one, if the state is able to prevail upon a judge to endorse every word of its characterizations of the facts elicited at an evidentiary hearing, and every word of its arguments of law submitted by both parties in extensive briefing and hearings. The purpose 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 prosecution.

It is for this reason that a group of *amici curiae*, including three former Presidents of the Alabama Bar and three retired Justices of the Court of Criminal Appeals and the State Supreme Court, told this Court that "[t]he practice of Alabama trial court judges of adopting verbatim the state's proposed orders in death penalty cases is, even in the least egregious circumstances, **abhorrent**."[16] As the distinguished Alabama jurists concluded, "[w]here the State courts afford no meaningful review for the death-sentenced inmate's post-conviction claims, **fundamental fairness demands that Federal courts afford no deference to the resulting denial of those claims**." *Hamm* Amici Br., at ¶ 23 (emphasis added).

In this case, the Rule 32 Judge's willingness to accept whatever the state put in front of him could be seen not only in his acceptance of the prosecution's brief as his own judgment. There is no evidence in the record that the trial judge even read

[16] Brief of *Amici Curiae* Alabama Appellate Court Justices and Bar Presidents in Support of Petitioner, in *Hamm v. Allen* (No. 15-8753) (April 28, 2016) ["*Hamm* Amici Br."], p. 3 (emphasis added). This Court denied certiorari on October 3, 2016. 137 S.Ct. 39. In *Hamm*, however, the issue had not been preserved on appeal. Here, it has been.

the document. The copy mailed to Petitioner's counsel did not have the Judge's signature on it. And since the draft presented by the Attorney General was not dated, neither was the court's "order."

Judge Young had adopted whatever the prosecution asked him to sign numerous times before. He once endorsed a draft order presented by the state that bore the captions of another case. On a different occasion, he signed an order that had the correct caption, but whose text referred to a different defendant. And he issued another order that was in direct contradiction to a ruling he had made in open court.

The practice followed by the Judge in Petitioner's habeas proceedings has been condemned, albeit not flat-out prohibited, by the Alabama Supreme Court. For example, in *Ex parte Ingram*, 51 So. 3d 1119, 1124 (Ala. 2010), that court cautioned that "appellate courts must be careful to evaluate a claim that a prepared order drafted by the prevailing party and adopted by the trial court verbatim does not reflect the independent and impartial findings and conclusions of the trial court." And in *Ex parte Scott*, 2011 WL 925761 (Ala. 2011), in which the Rule 32 judge did exactly what Judge Young did here, the court held:

> [W]e do not even have the benefit of an order proposed or "prepared" by a party; rather the order is a judicial incorporation of a party's pleading as the "independent and impartial findings and conclusions of the trial court." [*Ex parte Ingram*], at 1124. The first and most fundamental requirement of the reviewing court is to determine "that the order and the findings and conclusions in such order are in fact those of the trial court." *Id.* at 1124. The trial court's verbatim adoption of the State's answer to Scott's Rule 32 petition as its order, by its nature, violates this Court's holding in *Ex parte Ingram*.

Id. at *7.

The rubber-stamping[17] of parties' (virtually always the state's) briefs, converting them into judicial opinions, has also been roundly criticized by circuit courts, as the Eleventh Circuit itself noted:

> This Circuit and other appellate courts have condemned the ghostwriting of judicial orders by litigants. *In re Colony Square Co.*, 819 F.2d 272 (11th Cir. 1987); *cert. den.*, 485 U.S. 977 (1988); *Keystone Plastics, Inc. v. C & P Plastics, Inc.*, 506 F.2d 960 (5th Cir. 1975); *Bradley v. Maryland Casualty Co.*, 382 F.2d 415 (8th Cir. 1967). In *Colony Square*, this Court noted that the dangers of ghostwriting are obvious. "When an interested party is permitted to draft a judicial order without response by or notice to the opposing side, the temptation to overreach and exaggerate is overwhelming." 819 F.2d at 275.[18]

In re Dixie Broadcasting, Inc., 871 F.2d 1023, 1029-30 (11th Cir. 1989). And in *King v. Secretary, Department of Corrections*, 793 F. App'x 834 (11th Cir. 2019), the Eleventh Circuit again "caution[ed] district courts against this practice." *Id.* at 841.

In the *Colony Square* and *Dixie Broadcasting* cases, there was no "response by or notice to the opposing side." And to be sure, the habeas judge in Alexander City

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[17] In writing about this issue, some courts have used the term ""ghost-writing." But that is not entirely applicable. In "ghost-writing," there is a contractual arrangement between A and B providing that B will write something (often a book or an op-ed piece), on which A's name will be shown as the author, A will generally claim credit, and B will typically deny (or at least not be open about) his or her role. Here, there was (we hope) no prior agreement that the prosecution's submissions would be endorsed verbatim by the judge. Nor did the actual authors of the briefs that became judicial opinions without alteration attempt to conceal their authorship: their submissions may be found on the public record, both before and after Judge Young affixed his signature to them. "Rubber-stamping" is a far more accurate descriptor for this "abhorrent" (*see* note 16, *supra*) practice.

[18] In *Keystone*, the Fifth Circuit repeated its "reiterated admonition" that courts should not "uncritically accept[] findings proposed by one of the parties," 506 F.2d 960, 963. And the Eighth Circuit (*per* Blackmun, J.) in *Bradley* indicated that it would find "a deprival of due process" "where we might conclude, with justification, that the findings and conclusions are not the product of the court's own careful consideration of the evidence, of the witnesses, and of the entire case." 382 F.2d 415, 423. There is ample justification for that conclusion here.

did solicit, accept, and pretend to review submissions by Petitioner.[19] But given the record of this case, in which the judge signed every proposed order presented by the State without even bothering to retype a single one, including ones containing the names of other parties and another directly contradicting a ruling made in open court, the conclusion is inescapable: he did not read them. It is inappropriate to refer to them as judicial opinions.

At its core, due process means that parties before our courts are guaranteed the right to be heard, and the right to meaningful review of their claims. This Court has enshrined this principle numerous times. And "when a person has an opportunity to speak up in his own defense, and when the State must listen to what he has to say, substantively unfair and simply mistaken deprivations of property interests can be prevented." *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972). Surely the deprivation of lives at the hands of the state calls for at least the same consideration.

This Court's jurisprudence likewise supports the proposition that when a court rubber-stamps the position of the state, it is abandoning the sacred judicial role of neutral arbiter. For example, in *United States v. Leon*, 468 U.S. 897 (1984), the Court explained the importance of a magistrate not acting as "a rubber stamp for the police" when reviewing affidavits for and issuing search warrants. *Id*. at 914; *see also Illinois*

[19] Judge Carnes, in denying the COA, wrote that in this case, "[t]he state court permitted both parties to submit their own proposed orders **and respond to the other side's proposed orders**." *See* Appendix 3, p. 47 (emphasis added). This is simply incorrect. Nothing in the record suggests that Petitioner was accorded the opportunity to respond to the prosecution's brief, and the cited record reference says nothing of the kind. In fact, two sets of proposed findings and conclusions were submitted: the state's was 35 pages in length, and Petitioner's was 52 pages. The two had nearly no factual or legal overlap. Yet the Eleventh Circuit was prepared to accept that the Rule 32 judge considered, agreed with, and endorsed every word of the state's submission, and not a single word of Petitioner's.

v. Gates, 462 U.S. 213, 239 (1983); *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 326–327 (1979); *Aguilar v. Texas*, 378 U.S. 108, 111 (1964). Many circuit courts have said essentially the same thing as the Third Circuit in *Roberts v. Ross*, 344 F.2d 747, 751–52 (3d Cir. 1965): "Findings and conclusions prepared *ex post facto* by counsel, even though signed by the judge, do not serve adequately the function contemplated" by the Federal Rule of Civil Procedure requiring judges in non-jury cases to issue findings of fact and conclusions of law. "The circuits do have one thing in common: they consistently take the opportunity to criticize ghostwriting." Ulate, "The Ghost in the Courtroom: When Opinions Are Adopted Verbatim from Prosecutors," 68 DUKE L.J. 807, 817 (2019).

And in *Proffitt v. Florida*, 428 U.S. 242 (1976), just as this Court was setting out new requirements and procedures for death penalty prosecutions following *Gregg v. Georgia*, 428 U.S. 153 (1976), the Court reminded reviewing courts that it would be wrong to engage "in only cursory or rubber-stamp review of death penalty cases." 428 U.S. at 259. Yet that is precisely what the Alabama Court of Criminal Appeals did here, simply adopting the lower court's order that was itself written, word-for-word, by the state.

This Court has specifically addressed the practice of rubber-stamping in two decisions, although it did not categorically denounce it as unconstitutional in either. And while neither of those reported decisions revealed a situation as egregious as the one presented here, the Court made it quite clear that the rubber-stamping of party briefs is problematic at best.

In *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564 (1985), a civil and not a criminal case, this Court suggested that a judge's acceptance of **some** verbatim text provided by one party in litigation does not in itself indicate a denial of due process. But in *Anderson*, the trial court had not "simply adopt[ed] petitioner's proposed findings." To the contrary, "the findings it ultimately issued … vary considerably in organization and content from those submitted by petitioner's counsel." And the opposing party was given a chance to react to the other side's submission before it was adopted. Nevertheless, although finding no constitutional violation on those facts, the Court "criticized courts for their verbatim adoption of findings of fact prepared by prevailing parties." *Id.*, at 572-73 (citations omitted).

Jefferson v. Upton, 560 U.S. 284 (2010), raised the question whether the rubber-stamping of a state's submission in a criminal case is constitutionally acceptable. The *per curiam* opinion includes this language:

> [W]e have not considered the lawfulness of, nor the application of the habeas statute to, the use of such a practice where (1) a judge solicits the proposed findings ex parte, (2) does not provide the opposing party an opportunity to criticize the findings or to submit his own, or (3) adopts findings that contain internal evidence suggesting that the judge may not have read them.

560 U.S. 284, 294. The case was remanded precisely in order to have lower courts "determine on remand whether the state court's factual findings warrant a presumption of correctness." *Id.*[20]

[20] *Jefferson* applied pre-AEDPA standards. Nevertheless, on remand, the district court opined that "the practice of adopting verbatim findings of fact prepared by the prevailing party in the context of a death penalty case is especially troublesome," *Jefferson v. Sellers*, 250 F. Supp.3d 1340, 1351–52 (N.D.

Here, there may not be "internal evidence" suggesting that Judge Young did not read the order that was issued over his signature, and which the Court of Criminal Appeals accepted as meriting not only deference but word-perfect repetition. But there is no shortage of evidence elsewhere in the record, given the judge's verbatim endorsement of the prosecution's submissions, completely ignoring every single word submitted by Petitioner, again and again and again.

Moreover, even the Eleventh Circuit caselaw that Judge Carnes found sufficient to deny the claim of unconstitutionality outright is not solid precedent. In *Rhode v. Hall*, for example, the Circuit Court did indeed write, in a footnote, that "[t]he state habeas court's verbatim adoption of the State's facts would not rise to 'a substantial showing of the denial of a constitutional right' [as provided in 28 U.S.C. § 2253(c)(2)] and thus cannot be certified as an issue in a COA." 582 F.3d 1273, 1281 n.4. But the court cited as support for this blanket proposition only *Anderson*, *supra*, a civil case in which this Court said nothing about the rights of criminal defendants.

This Court has not yet addressed the question presented here: whether the deference that AEDPA requires federal courts to give to state court adjudications applies to opinions written by prosecutors and not judges. But surely it does not. The essence of the Due Process clause is that it "entitles a person to an impartial and disinterested tribunal in both civil and criminal cases." *Marshall v. Jerrico*, 446 U.S. 238, 242 (1980). A judge who invariably adopts not only the position of the prosecution

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Ga. 2017), *aff'd sub nom. Jefferson v. GDCP Warden*, 941 F.3d 452 (11th Cir. 2019). The district court concluded that the petitioner "did not receive a full, fair, and adequate hearing that comported with due process before the state habeas corpus court. As a result, the factual findings are not entitled to a presumption of correctness." 250 F. Supp.3d 1340, 1387.

but its very words is decidedly neither impartial nor disinterested. The AEDPA was intended to ensure that the interpretation of state law by state judges, not state prosecutors, would not reopened in federal courts. "In sum, it is clear that § 2254(d) was not meant to rubber-stamp state decisions. But, when federal courts are expected to defer to verbatim adopted opinions, they are doing precisely that." Ulate, *supra*, 68 DUKE L.J. 807, 833.

This Court should now take this opportunity to condemn this "abhorrent" practice, once and for all, as the constitutional violation that it is.

II. The Eleventh Circuit Misconstrued Binding Precedents of This Court When It Denied a Certificate of Appealability on the Rubber-Stamping Issue.

When Petitioner first applied for a COA to the Eleventh Circuit, his request was denied as to each of the claims. By all accounts, in issuing the denial, Judge Carnes applied the wrong legal standard.

The order of denial began with the Judge's statement of the burden that he believed a COA applicant must carry:

> the COA question is this: 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 could find the rejection of the claim debatable, the state court judgment rejecting it cannot be disturbed in a federal habeas proceeding.

Appendix 3, at 10-11. That is, the Judge required of Petitioner that he demonstrate not that his serious constitutional claims are open to debate among jurists of reason, but that **no** reasonable jurist could consider the correctness of the disposition of those claims by the State courts **to be even debatable**. And he did so without mentioning

or citing the leading case on point, *Buck v. Davis*, 580 U.S. 100 (2017). This Court's opinion in *Buck* makes it crystal clear that the COA standard is **not** whether any reasonable jurist might **agree** with the resolution, but whether any such judge could **disagree** with it:

> 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."

580 U.S. 100, 115 (emphasis added)

Judge Carnes's denial of the COA application was therefore based on a clear misunderstanding of this Court's teachings. When Petitioner asked the court to reconsider, it corrected what it agreed was a misstatement of the law: "We will … revise or correct that earlier order's statement of the COA standard, **and we will apply the correct standard here**." Appendix 4, at 2-3 (emphasis added). Yet while the court then applied the proper criteria, it granted the requested COA on only one single issue (ineffective assistance of counsel at the penalty phase). It said nothing about the other claims, although they too had been denied on the same obviously flawed interpretation of the law and of this Court's teachings.

The court did **not** say, applying the methodology of *Buck*, *Miller-El*, and other decisions of this Court, that it believed that "no jurist of reason could disagree with the district court's resolution" of the rubber-stamping claim. It did **not** opine that no

rational jurist could conclude that "the issue presented was adequate to deserve encouragement to proceed further." It did **not** discuss the claim at all. As has been noted, the authority cited by Judge Carnes for rejecting the rubber-stamping claim was an Eleventh Circuit case purporting to apply, but in actuality misconstruing, *Anderson v. City of Bessemer City*. Surely it cannot be maintained that the constitutionality of courts' rubber-stamping the briefs of one party, a practice "criticized" by the Supreme Court of the United States in a civil case (*Anderson*) and a pre-AEDPA criminal case (*Jefferson*), found problematic by Circuit Courts, and roundly condemned by judges and scholars, is not even "debatable."

The Eleventh Circuit's denial of the COA, which would have permitted Petitioner to argue that the consistent rubber-stamping of prosecution briefs during his state habeas corpus proceedings was an unconstitutional denial of due process, was inconsistent with this Court's precedent. Allowing it to stand would be a retroactive endorsement of the very argument that this Court rejected in *Miller-El* and *Buck*. And it would constitute a flagrant denial of the due process of law.

III. The Failure of Defense Counsel in a Capital Trial to Perform Any Meaningful Investigation, or to Develop a Case for Mitigation of Sentence, Constitutes Ineffective Assistance under the Sixth Amendment, and Where Virtually No Mitigation Case Is Presented, *Strickland* Prejudice Is Inevitable.

The rubber-stamping by the Rule 32 court in Alabama infected and tainted every subsequent step in this proceeding. In rejecting Petitioner's appeal, for example, the Eleventh Circuit determined that the evidence proffered at the post-conviction hearing did not satisfy the "prejudice prong" of this Court's decision in

Strickland. *See* Appendix 5, pp. 18-23. But it did so based not on the record of the Rule 32 hearing itself (which was before the Circuit Court), but on the summary of that record by the Tallapoosa County judge, which is to say, by the prosecution. That rendering consistently ignored, devalued, and mischaracterized the actual evidence provided at the hearing by way of mitigation that should have been, but was not, presented to the jury during the sentencing phase of Petitioner's trial.

The Eleventh Circuit, conceding that "[a] defendant's upbringing, background, and character are relevant" to potential mitigation, *id*., at 18-19, found that "the evidence concerning abuse suffered by Mr. Barksdale during his childhood was not overwhelming." *Id*., at 18. But of course, as the panel itself acknowledged, *id*., at 16, it did not need to be "overwhelming": that has never been a requirement of this Court. "[T]he question is whether 'there is **a reasonable probability** that [at least two more jurors] would have struck a different balance.'" *Wiggins*, 539 U.S. at 537 (emphasis added). And "a reasonable probability" is one that is "sufficient to undermine confidence" in the sentence. Such a "probability" not only does **not** require "overwhelming" evidence, but it need not even require a showing "that counsel's deficient conduct more likely than not altered the outcome of [Petitioner's] penalty proceeding." *Wiggins*, citing *Porter v. McCollum*, 558 U.S. 30, 44 (2005), in turn quoting *Strickland*, 466 U.S. at 693-94.

In summarizing the evidence concerning Petitioner's childhood that the Circuit panel, relying on the State courts' resolution of the case (written by the Office of the Attorney General), found "not overwhelming," it made no mention of (to cite just three

examples)[21]:

- Petitioner's mother's testimony that her serious addiction to crack cocaine had caused her to abdicate her role as parent to her son;

- Her accounts of episodes of violence that took place in the family home, including a gruesome incident (attested to tearfully in open court) of an attempted rape by Petitioner's father, armed with a broom handle;

- The testimony of both Ms. Archey and LTC Max Johnson that Petitioner's parents seemed not to have noticed his disappearance from his home for "weeks or months" at a time.[22]

The Circuit panel, without reference to any of this testimony that was elicited at the Rule 32 hearing, instead found mitigation essentially did not matter, because "the aggravating factors – especially the heinous, atrocious, and cruel nature of Ms. Rhodes's murder – are well- established in the record … and the jury found beyond a reasonable doubt that this aggravating factor had been proven. Appendix 5, at 18-19. But there is, in fact, nothing in the record to suggest that the jury accepted this aggravator, since they were not asked that question. They rendered a recommendation of death without specifying which of the aggravators they concluded had been proved beyond a reasonable doubt.

[21] These illustrations of mitigating evidence, produced at the Rule 32 hearing in Alexander City, are amply documented in the record.

[22] The panel doubted the reliability of the testimony of LTC Johnson, the father of the family with whom Mr. Barksdale lived during his lengthy absence from home. And it did so, as the court wrote, because "both the Rule 32 court **and the ACCA** [Alabama Court of Criminal Appeals] expressly stated that they 'did not find [Mr. Johnson] to be a very credible witness' due to inconsistencies in his testimony." Appendix 5, at 21 (emphasis added), This is extremely troublesome, for at least two reasons. First, the appellate court was in no position to make its own determinations of the credibility of witnesses from whom it had never heard. And second, the "express statement" of the trial court was not written by the judge, and the ACCA merely cut and pasted it into its own opinion. These were not the views of two courts acting independently: they were the words of the prosecutor, copied twice, and therefore cloaked with unwarranted judicial deference.

Whether or not the mitigation evidence presented at the Rule 32 hearing was "overwhelming," in the opinions of three Circuit Court judges, it was undoubtedly substantial. This becomes clear by comparison with the facts discussed in this Court's decision in *Andrus*. Among the bleak circumstances cited in the *Andrus* opinion – matters that, in this Court's view, were sufficient to cast the capital sentence into unreliability – were that "his mother sold drugs and engaged in prostitution, … was high more often than not, and would leave her children for weekends and weeks when she was high."[23] Yet in her Rule 32 testimony, Mr. Barksdale's mother reported that she too sold drugs, she too engaged in prostitution, and she too was high more often than not. And because she was high, she was unaware that her younger son had left the family home for weeks, during which his mother made no effort to be in contact with him.

These facts were omitted from the prosecution's order that the Rule 32 judge signed, and therefore they were not in the Court of Criminal Appeals decision which the Eleventh Circuit took as gospel. The panel also disparaged the suggestion that it was a gross violation of the standards of professional conduct – not to mention the express teachings of this Court in such cases as *Rompilla* – for defense counsel at trial, aware that the State intended to rely on a "prior conviction of a crime of violence" aggravator, to fail to conduct any investigation of the facts of that earlier crime. That failure was undoubtedly prejudicial, as it allowed the jury to believe that

[23] 590 U.S. 806, 811.

his client had been armed during robbery when in fact he was not.[24]

Where a habeas petitioner alleges the ineffective assistance of his trial counsel, he frequently points out that counsel mismanaged a certain cross-examination, failed to call a particular witness, or did not engage an expert. And after the missing material is presented in an evidentiary proceeding, the question for the reviewing court is whether, had that evidence been before the jury, the outcome likely would have been the same. If what was elicited is merely cumulative, repeating what was already there, the petition will be denied. That was made clear by this Court in its recent decision in *Thornell v. Jones*, 608 U.S. ___ (2024).

But in this case, the evidence put before the Rule 32 court could not have been "cumulative," since **no** substantive mitigation evidence was introduced at trial.[25] The defense's presentation at the punishment phase of Mr. Barksdale's trial lasted less than a minute, and consisted of the submission of a single documentary exhibit. The five-minute closing argument made no reference to the state's aggravators, and no mention of any facts of circumstances of Petitioner's life, except his age. [26]

In *Sears v. Upton*, 561 U.S. 945 (2010), this Court wrote that "[w]e certainly have never held that counsel's effort to present some mitigation evidence should

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[24] The Eleventh Circuit itself has acknowledged that it is reasonable to "assume that the jury could give more relative weight to a prior violent felony aggravator where defense counsel missed an opportunity to argue that circumstances of the prior conviction were less damning than the prosecution's characterization of the conviction would suggest." *Daniel v. Commissioner, Alabama DOC*, 822 F.3d 1248, 1277 (11th Cir. 2016), citing *Rompilla*, 545 U.S. at 386 n.5 (emphasis added).

[25] No cumulative effort was made to establish the undeniable fact that Petitioner was, at the time, 18 years old.

[26] The deficiency in the mitigation presentation reflected counsel's grossly inadequate investigation, which, as previously noted, included no more than 36 minutes on the telephone with two potential witnesses, and nothing else. This was certainly not acceptable under this Court's tests of reasonableness in *Wiggins*, 539 U.S. at 523 (O'Connor, J., concurring), *Strickland*, 466 U.S. at 691, and *Williams v. Taylor*, 529 U.S. 362, 415 (2000).

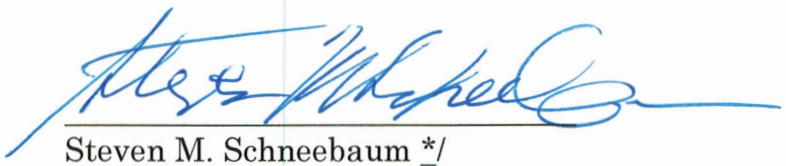
foreclose an inquiry into whether a facially deficient mitigation investigation might have prejudiced the defendant." *Id.*, at 955. In this case, there was essentially no inquiry. The facts concerning prejudice on which the Eleventh Circuit relied were not the judgment of a neutral court: they were the rubber-stamped words of the prosecution, signed by a judge who may well not have read them, reiterated without alteration by the State appellate tribunal, and then accorded deference by the district and circuit courts below.

That deference was unmerited, and the Eleventh Circuit's determination that the virtual absence of a mitigation case did not prejudice a defendant sentenced to death was incorrect as a matter of fact, unsupported as a matter of law, and unsound in any logical consideration of the issue. Where in the very rare situation like this one, where defense counsel presented no substantive mitigation case to the jury and the defendant was then sentenced to die, the courts must be especially amenable to conclude "that counsel's deficient conduct" – that is, his failure to give the sentencing jury any reason to consider a result other than death – "more likely than not altered the outcome of [Petitioner's] penalty proceeding." *Wiggins*, citing *Porter v. McCollum*, 558 U.S. 30, 44 (2005), in turn quoting *Strickland*, 466 U.S. at 693-94. In other words, when the jury sees no evidence urging a lesser sentence because none was submitted, a client sentenced to die at the hands of the State quite clearly has been prejudiced by the omission.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



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