No. 24-6579
CAPITAL CASE

In the Supreme Court of the United States

TONY BARKSDALE,
Petitioner,
v.
STEVE T. MARSHALL, Attorney General,
State of Alabama, et al.,
Respondents.

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 again asks (*see* No. 20-6498) this Court to consider whether the Due Process Clause forbids a state court from adopting a proposed order from the State. The district court did not consider this claim because Barksdale failed to identify in his habeas petition a federal constitutional basis for relief, and it even threatened to sanction him for failing to do so. The Eleventh Circuit denied a COA. Barksdale asked this Court to consider the exact same question in 2020, alleging that the Due Process Clause forbids federal courts from applying AEDPA deference to state court orders if the State had proposed them. This Court denied cert. Should this Court take a second look at his claim?

2. After realizing that Judge Carnes made a mistake in his 2020 decision denying a COA, the Eleventh Circuit vacated his order and applied the correct standard of review when it ruled on Barksdale's motion for reconsideration in 2022. Did the Eleventh Circuit apply the wrong standard of review in its 2022 decision?

3. Did the Eleventh Circuit err in finding that Barksdale failed to prove that he was prejudiced by his trial counsel's allegedly deficient performance?

PARTIES

1. Tony Barksdale, Petitioner before this Court.

2. Steve T. 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 and are therefore are Respondents before this Court.

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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 back 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 and that, if necessary, he would shoot someone, but he would prefer to shoot one person rather than two. HC, Vol. 11, TR. 1268.[2]

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

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.

Shortly after 6:30 p.m., nineteen-year-old Julie Rhodes, who was driving back to work after dinner with her grandmother, stopped for Barksdale. HC, Vol. 9, 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 Rhodes, while Garrison and Barksdale sat in the back seat. *Id*. at 1270. Two of Rhodes's friends witnessed the three men getting in her car and noted that she appeared to be in some distress. HC, Vol. 9, TR. 891-92, 897-98.

Barksdale gave Rhodes directions to his friend's house, then directed her to an empty house on a dead-end street. HC, Vol. 11, TR. 1270-71. When they pulled up to the house that Barksdale specified, all three men opened their car doors to get out. *Id.* at 1272. But as Garrison was exiting the vehicle, he saw Barksdale reach for his gun. *Id.* Garrison slammed his door shut, then ran and hid behind a nearby shed, with Hillburn following him. *Id.* As they ran, they heard Rhodes scream, "Please, please don't shoot me." *Id*. at 1273. Rhodes then pulled down the street and into a driveway. *Id*. Barksdale yelled, "Bitch, you ain't going to let me out right here!" *Id*. Rhodes drove out of the driveway and toward the entrance to the dead-end street. *Id*. Barksdale fired two shots at her, and the car stopped. *Id*. at 1274. He then pushed Rhodes out of the car and left her in the road. Barksdale pointed his gun at Garrison and Hilburn and told them to get in. HC, Vol. 8, TR. 624, 628. The men complied, and they drove back to Guntersville. HC, Vol. 11, TR. 1275-76. During that drive, Barksdale told Garrison and Hillburn that he did all of this for them because he did not want their relatives to have to drive all the way down from Guntersville to pick

them up. *Id.* at 1293.

Several people saw the three men in Rhodes's car after they returned to 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 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—including a pregnant woman—in the apartment as if to shoot them. HC, Vol. 10, TR. 951-52.[3]

All three men were arrested several days later, and the gun and car were recovered.[4] *Barksdale*, 788 So. 2d at 902. After his arrest, Barksdale called one of his acquaintances from jail. Barksdale's acquaintance asked why he shot Rhodes instead of just taking the car, especially since there were three of them and only one of her; Barksdale replied that "he did not know." HC, Vol. 9, TR. 844.

The Alabama Court of Criminal Appeals (ACCA), quoting the trial court's

[3] Having to wrestle with these facts, the defense's theory of the case was that the shooting was an accident. Barksdale's trial counsel portrayed him to the jury as someone who lacked basic respect for gun safety and used a gun that was not in great condition. HC, Vol. 12, TR. 1351-53. However, while an expert testified that the gun was susceptible to jamming, no evidence was ever presented that the gun would go off on its own. HC, Vol. 11, TR. 1305-12.

[4] Hillburn died before the trial. Garrison accepted a plea deal and testified against Barksdale. Barksdale faults his trial counsel for failing to press for more details on what Garrison was able to see and hear when Barksdale shot Rhodes (Pet. 3 n.3), but Garrison's testimony on direct examination was quite detailed. HC, Vol. 11, TR. 1272-93. His testimony also fails to support Barksdale's contention that the car was closed and that Garrison was "some 100 yards away." Pet. 3 n.3, 5.

sentencing order, described Rhodes'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:

- 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 Goggans that his father abused him or his mother. *Id.* at 16.

- 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 Goggans was able to get 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.* Goggans testified that "it would be very risky" to place an uncooperative witness like Archie on the witness stand. *Id.* at 14.

- Goggans also talked with Barksdale's father, Tyrone Barksdale (Tyrone). *Id.* at 15. Tyrone was "pretty straight to the point, straightforward." *Id.* Goggans learned from Tyrone that he was in the military, that his son lived with him some and with Archie 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.

- 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 Archie's testimony at the evidentiary hearing:

- Although 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 evidentiary hearing after her son's postconviction attorneys "paid for everything." *Id.*

- In addition, 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 testified that Tyrone abused her but then testified that this only occurred two times after she was separated from him. While she testified that Tyrone 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, Archie continued to use drugs and disciplined Barksdale when she was "high." She continued to use drugs after the children went to live with Tyrone. *Id.*

- Archie did not know Maxwell Johnson. *Id.* at 16.

Finally,[5] the circuit court summarized the testimony of Maxwell Johnson, Barksdale's "godfather":

- 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 Maxwell prior to or during the trial, even though Maxwell lived in the same house in Virginia where he had lived 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 he 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.

- While 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. 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.

- 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.[6]

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5. 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 Connor's testimony. HC, Vol. 23, Tab #R-57, at 6–12.

6. Barksdale fails to cite to the record to support the allegations in his Statement of the Case. In fact, many of his alleged facts are contradicted by the record. For instance, Barksdale asserts the following: (1) Goggins conducted no mitigation investigation (Pet. 4-5); (2) Goggins did not interview any witnesses other than the ones he called (Pet. 4); (3) Goggins spent only thirty-six minutes total investigating (Pet. 4-5); (4) Goggins did not investigate Barksdale's prior conviction for robbery; (5) Goggins did not address the State's aggravators in his closing argument (Pet. 7); (6) Goggins spoke only twenty-one words in the "whole mitigation case" (Pet. 7 n.7); (7) the trial judge did not consider the jury's recommendation at all (Pet. 7-8); (8) Archie's testimony indicated that neither of Barksdale's parents noticed that he was gone (Pet. 10); and (9) Archie testified that Barksdale's trial attorney had never even suggested that she come to court (Pet. 10). These statements are contradicted by the record. *See, e.g.*, HC, Vol. 12, TR. 1421-33, 1453-54, 1466-68, 1471-72; Vol. 17, Tab #R-45, TR. 46, 88-89, 92-

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 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 cert petition. *Barksdale v. Alabama*, 532 U.S. 1055 (2001) (mem.).

Barksdale filed a petition for postconviction relief pursuant to 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 petition, finding that many were procedurally defaulted, the remaining substantive claims were meritless, and 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

93, 95-96, 99, 137-38, 142-56, 161-216. Barksdale also fails to mention that some of his key "facts" from the Rule 32 petition never came before the circuit court because he failed to plead them with specificity. *See, e.g.*, HC, Vol. 23, Tab R#58, 31-38.

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.[7] Vol. 23, Tab #R-57. The ACCA affirmed the denial of the postconviction petition in a memorandum opinion, and the Alabama Supreme Court denied certiorari. HC, Vol. 23, Tab #R-58, Tab #R-59.

Barksdale then filed a 28 U.S.C. § 2254 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 and threatening sanctions for, among other reasons, providing no basis for federal habeas relief when Barksdale blamed the Rule 32 court for adopting the State's proposed order.[8] 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.

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[7] Barksdale complains that the Rule 32 court should have allowed him more leeway to bring in evidence. Pet. 9 n.12. But the court reasonably excluded evidence unrelated to the allegations actually pleaded in his petition for postconviction relief. *See* ALA. R. CRIM. P. 32.6(b); HC, Vol. 17, Tab R#45, TR. 57 ("THE COURT: …[Y]ou want me to open the floodgates and let you bring in all these other things that were never mentioned. You could have mentioned this in the petition, correct? I mean, this is something you knew about…but that wasn't specifically mentioned in this petition."). And while Barksdale briefly cites *Andrus v. Texas*, 590 U.S. 806 (2020) (per curiam), nothing in that case addresses the issue of pleading with specificity in a postconviction petition. *See* 590 U.S. at 817-21.

[8] In his memorandum opinion, Judge Watkins held ten times that Barksdale may have violated Rule 11 of the Federal Rules of Civil Procedure. Pet. App'x 2 at 41, 85, 92, 138, 144, 146, 151 n.201, 157 n.214, 162. The first potentially sanctionable argument that Judge Watkins flagged included the "rubber stamping" issue, which is Barksdale's lead claim in this petition. *See id.* at 38-41. Judge Watkins held that he was going to issue a separate show-cause order requiring Barksdale to answer why he should not be sanctioned, *id.* at 317, but for some reason, the court never issued that order.

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 to the Eleventh Circuit on March 3, 2020, and applied for a certificate of appealability (COA). On June 29, 2020, Judge Ed Carnes entered a forty-eight-page order denying the application.[9] Pet. App'x 3. Barksdale moved for reconsideration; he also filed a petition for a writ of certiorari with this Court, which was denied. *Barksdale v. Dunn*, 141 S. Ct. 2523 (2021).[10] On September 7, 2022, Judges Carnes and Lagoa[11] granted Barksdale's motion only as to his penalty-phase IAC claim. Pet. App'x 4.

On May 24, 2024, a three-judge panel of the Eleventh Circuit affirmed the district court's decision denying Barksdale's IAC claim. Pet. App'x 5. The Eleventh Circuit declined to address whether trial counsel's performance was deficient because Barksdale had failed to satisfy the prejudice prong of the test established in *Strickland v. Washington*, 466 U.S. 668 (1984). Pet. App'x 5 at 18. Specifically, the

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[9] Submitting an application for a COA to a single judge is authorized by Rule 22(b)(2) of the Federal Rules of Appellate Procedure; the Eleventh Circuit simply applies what Rule 22(b)(2) already allows. 11th Cir. R. 22-1(c). Barksdale also faults Judge Carnes for following Eleventh Circuit precedent in making his decision (Pet. 12), but Judge Carnes was bound to follow circuit precedent unless the Eleventh Circuit overruled it en banc. *United States v. Hogan*, 986 F.2d 1364, 1369 (11th Cir. 1993) (en banc).

[10] Questions I and III of the previous petition are very similar to Questions I and II of the present petition. *Compare* Petition for Writ of Certiorari at 13-18, 28-36, *Barksdale v. Dunn*, 141 S. Ct. 2523 (2021) (arguing that the Eleventh Circuit employed the wrong standard in assessing the certificate of appealability and that the Alabama court's order was not entitled to deference under AEDPA) *with* Pet. 14-25 (arguing that the Alabama court's order was not entitled to deference under AEDPA and that the Eleventh Circuit used the wrong standard for the certificate of appealability).

[11] For the procedural reasons behind Judge Lagoa joining Judge Carnes on the motion for reconsideration, *see* App'x 4 at 2 n.1.

court found: (1) "[t]he agony endured by Ms. Rhodes from the moment she was shot twice by Mr. Barksdale until she died is undeniable," *id.* at 18-19; (2) some of the evidence presented at the Rule 32 hearing was a "potential double-edged sword," *id.* at 19; (3) the evidence of childhood abuse "was not overwhelming," *id.*; (4) Johnson's testimony was neither helpful nor credible, *id.* at 20; and (5) Barksdale's contention that trial counsel should have searched for educational, medical, and psychological records was "undermined by the fact that, at the Rule 32 hearing, post-conviction counsel presented no such evidence," *id.* at 21. Thus, the Eleventh Circuit concluded that "even without AEDPA deference," there was no prejudice under *Strickland* because "the new mitigating evidence 'would barely have altered the sentencing profile presented' to the decisionmaker." *Id.* at 23 (quoting *Strickland*, 466 U.S. at 700). Barksdale filed petitions for panel rehearing and en banc rehearing, which were denied on October 16, 2024. Pet. App'x 6. After receiving an extension, Barksdale filed the present cert petition on February 13, 2025.[12]

REASONS FOR DENYING THE PETITION

Barksdale raises three questions for certiorari review. Question I claims that the Eleventh Circuit's decision denying a COA on the "rubber stamping" issue violates the Due Process Clause. Question II claims that the Eleventh Circuit applied the wrong standard of review in denying the COA on that same issue. Question III

[12] On the same day, Barksdale also filed an application for a certificate of appealability to Justice Thomas. See Application for a Certificate of Appealability, *Barksdale v. Marshall*, No. 24A796. Justice Thomas denied that application on February 20, 2025. *Barksdale v. Marshall*, No. 24A796, 2025 WL 566443 (U.S. Feb. 20, 2025) (mem.). Barksdale renewed his application on February 28, sending it to Justice Jackson, who in turn has submitted the application to the Court as a whole.

alleges that the Eleventh Circuit erred in affirming the district court's decision on the IAC claim.

All three arguments are wrong. First, question I is barred because the Eleventh Circuit never granted a COA on it. The only question that Barksdale could ask is whether the Eleventh Circuit applied the correct standard of review to his application for a COA, which is what he does in question II. But analyzing question I on the merits goes too far. Additionally, Barksdale raised his due process claim for the first time to the Eleventh Circuit, and therefore, he failed to exhaust his remedies and is procedurally barred from doing so.

In the alternative, question I should be denied for other reasons. First, Barksdale asks this Court to skip its usual percolation process in addressing his fact-bound claim. No court, to the State's knowledge, has ever held that it is a due process violation per se to adopt a proposed order verbatim. Second, all of the precedents that Barksdale cites hold that there is no due process violation if the trial court's findings are not clearly erroneous, but Barksdale does not point to a single finding that he claims meets this criterion.

Question II should also be denied. Barksdale accuses the Eleventh Circuit of applying the wrong standard of review, but his argument is really that the Eleventh Circuit did not show its work to his satisfaction. While Barksdale may be unsatisfied with the court's decision, he fails to show that it erred.

Finally, question III should be denied. The heart of Barksdale's IAC claim is that the Eleventh Circuit's review was infected by the Rule 32 court's adoption of the

State's proposed order. But since that claim is untimely and meritless, the rest of Barksdale's claim is weak. The Eleventh Circuit thoroughly demonstrated why Barksdale was not prejudiced, and most of the cases in Barksdale's petition do not even address *Strickland*'s prejudice prong. For all of these reasons, the Court should deny the writ.

I. Question I is barred because the Eleventh Circuit refused to grant a COA on that issue, and even if it is not barred, it is meritless.

A. Question I is barred.

1. The Eleventh Circuit never granted a COA on this claim.

As a threshold matter, Barksdale asks this Court to adjudicate a matter that the Eleventh Circuit never reached: whether a state court's adoption of a state's proposed order violates the Due Process Clause. Pet. 14-23.As mentioned above, Barksdale applied for a COA on this issue, but the Eleventh Circuit denied it. *See* Pet. App'x 3 at 45-48, App'x 4 at 4.

"[U]ntil a COA has been issued federal courts of appeals lack jurisdiction to rule on the merits of appeals from habeas petitioners." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). Because the Eleventh Circuit never granted a COA on this issue, it never had jurisdiction to rule on the merits. Consequently, Barksdale may petition this Court for a writ of certiorari only as to whether the Eleventh Circuit should have granted a COA. This he has done in question II, and the State will address his argument *infra*. What the Eleventh Circuit never had the jurisdiction to do is to adjudicate the merits of this claim. "The COA inquiry, we have emphasized, is not coextensive with a merits analysis." *Buck v. Davis*, 580 U.S. 100, 115 (2017). Because

the Eleventh Circuit decided only that it would not grant a COA, that is the only "judgment" of the Eleventh Circuit that this Court may consider at this time. 28 U.S.C. § 2101(c). Indeed, Barksdale appears to be aware of this point because he filed an application for a COA with his cert petition. *See* note 12, *supra*. There is no reason to ask this Court for a certificate of appealability if it were possible to jump straight to the merits. Thus, question I is barred from this Court's consideration.

2. Barksdale failed to exhaust his remedies and is procedurally barred from doing so.

Barksdale never raised a due process challenge in state court. In his brief to the ACCA, Barksdale based his argument only on state law; he never invoked the Due Process Clause. HC, Vol. 20, R#46, 70-72. Unsurprisingly, the ACCA did not address the Due Process Clause in its memorandum opinion. It cited only Alabama cases holding that adopting proposed orders is proper as long as the findings are not clearly erroneous HC, Vol. 23, R#58, 76. Barksdale did not raise the Due Process Clause in his application for rehearing before the ACCA. HC, Vol. 21, R#49, 10-11. And when he petitioned the Alabama Supreme Court for certiorari, he did not even raise the "rubber stamping issue," much less the due process claim. See HC, Vol. 22, R#51.

"An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that…the applicant has exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(1)(A) Exhaustion required Barksdale to "fairly present federal claims to the state courts in order to give the State the opportunity to pass upon and

correct alleged violations of its prisoners' federal rights." *Duncan v. Henry*, 513 U.S. 364, 365 (1995) (cleaned up). For his due process claim to be considered, Barksdale had to "give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." *O'Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999). His claim is procedurally barred if Barksdale failed to exhaust his remedies and the state court would now find his claim procedurally barred. *Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991).

In this case, it is undisputed that Barksdale *never* raised a due process claim in the Alabama courts; therefore, he never gave the state courts the chance to adjudicate them, and so he failed to exhaust his state remedies. Further, it is well settled under Alabama law that even a constitutional claim may be waived if it is not timely raised. *Church v. City of Huntsville*, 361 So. 3d 212, 218 (Ala. Crim. App. 2021). Alabama's rules allow only a limited number of claims to avoid its procedural time bars, and there is no mechanism for allowing Barksdale to resurrect a claim like this that died on his watch. *See* ALA. R. CRIM. P. 32.2. Thus, Barksdale is procedurally barred from bringing this claim.

Moreover, 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 an Alabama case to support his argument that the verbatim adoption of the proposed orders was erroneous. *Id*. ("'[C]ourts should be reluctant to adopt

verbatim the findings of fact and conclusions of law prepared by the prevailing party.' *Weeks v. State*, 568 So. 2d 864, 865 (Ala. Crim. App. 1989)."). Neither *Weeks* nor Barksdale mentioned the Due Process Clause, and therefore, the district court had no notice that Barksdale was making a constitutional claim.

The district court properly refused to consider the merits of this claim because Barksdale 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 fact, the district court found that this claim was "without arguable legal basis and potentially a violation of Rule 11(b)(1) & 11(b)(2), Fed. R. Civ. P." *Barksdale v. Dunn*, ECF No. 62 at 39-41.

On appeal, Judge Carnes acknowledged that the district court denied Barksdale's habeas petition on procedural grounds rather than the merits. Pet. App'x 3 at 45-46. Questioning whether Barksdale even raised a federal issue and assuming that the procedural default questions even could be set aside, Judge Carnes denied a COA because Eleventh Circuit precedent held that a state court's order is due AEDPA deference if its findings are not clearly erroneous. *Id.* at 46-48.

In granting Barksdale's motion for reconsideration, Judges Carnes and Lagoa agreed that the correct standard of review is not whether the petitioner is correct on the merits but whether reasonable jurists could disagree on whether he was correct. Pet. App'x 4 at 3-4. But even then, the Eleventh Circuit denied the COA as to this

issue, finding that reasonable jurists could not disagree. *Id.* at 4. The Eleventh Circuit did not specify whether this was because Barksdale procedurally defaulted in the state courts, because he failed to raise this issue properly to the district court, or because reasonable jurists would not find the merits debatable. *Id.*

"Where a plain procedural bar is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further. In such a circumstance, no appeal would be warranted." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Because the Eleventh Circuit vacated Judge Carnes's order and applied the correct standard of review on Barksdale's motion for reconsideration, Barksdale fails to explain whether the Eleventh Circuit denied the COA on procedural grounds rather than on the merits. Having failed to raise the due process issue in the state courts and in the district court, Barksdale sought to raise it for the first time before the Eleventh Circuit. The Eleventh Circuit could have rejected this argument as not properly before the court, and this Court should do the same.

B. In the alternative, Barksdale's claim is meritless.

1. Barksdale's claim is not worthy of certiorari.

Barksdale cites no grounds under Supreme Court Rule 10 for certiorari review. There is no circuit split on this issue. SUP. CT. R. 10(a). Although Barksdale does not say as much, his argument appears to be that he presents an important federal question that has not been "but should be…settled by this Court." SUP. CT. R. 10(c).

If so, his argument is unpersuasive because, to the State's knowledge, no other court in the country has ever held that the Due Process Clause forbids adopting a proposed order verbatim under circumstances like these. This Court typically allows issues to percolate before granting certiorari so that it has the benefit seeing how experience has exposed the strengths and weaknesses of various positions. *See, e.g.*, *FDA v. Alliance for Hippocratic Medicine*, 602 U.S. 367, 380 (2024) (favoring a policy of percolation); *Baker v. City of McKinney, Tex.*, 145 S. Ct. 11, 13 (2024) (statement of Sotomayor, J., respecting denial of certiorari) (flagging "an important and complex question that would benefit from further percolation in the lower courts prior to this Court's intervention"); *Box v. Planned Parenthood of Ind.*, 587 U.S. 490, 496 (2019) (Thomas, J., concurring) ("because further percolation may assist our review of this issue of first impression, I join the Court in declining to take up the issue now"). Not only has Barksdale failed to identify a circuit split, but he has also failed to identify *any case* in the lower courts that addresses the question that he presents. If the Court ever decides to take up the question that Barksdale presents, it would be better to let the question percolate first instead of granting cert in a case where procedural default plagues the petition.

2. There was nothing improper about the Rule 32 court's adoption of the State's proposed order.

When a court adopts a party's findings of fact and conclusions of law verbatim, this Court has recognized that "[t]hose findings, though not the product of the workings of the district judge's mind, are formally his; they are not to be rejected out-of-hand, and they will stand if supported by evidence." *United States v. El Paso*

Natural Gas Co., 376 U.S. 651, 656 (1964). As Judge Carnes noted, Barksdale failed to "point to a single incorrect factfinding contained in either Rule 32 order." Pet. App'x 3 at 48. Barksdale has not presented either the Eleventh Circuit or this Court any reason to believe that the Rule 32 court's findings were incorrect.

Despite this critical failure, Barksdale argues that the Due Process Clause and AEDPA mandate a different result. Barksdale makes absolutely no argument from the text of AEDPA to prove his point, nor does he give any historical examples that could be relevant to interpreting the Due Process Clause. Instead, he relies on highly generalized due process rules, *see* Pet. 14, and the alleged purpose of AEDPA, *id.* at 23. But even assuming a purposivist interpretation of AEDPA would be proper,[13] this argument cuts against him. One of AEDPA's major purposes was to reduce delay in habeas review and to respect the finality of state-court judgments. *Rhines v. Weber*, 544 U.S. 269, 276 (2005). Thus, Barksdale's own argument cuts against him: AEDPA favors *more* deference to state courts when they adopt proposed orders instead of less deference.

Barksdale cites several decisions from this Court, but they do not help him. In *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564 (1985), this Court noted that it had "criticized courts for their verbatim adoption of findings of fact prepared by prevailing parties, particularly when those findings have taken the form of conclusory statements unsupported by citation to the record." 470 U.S. at 572. But importantly,

[13] As Justice Kagan famously said, "We're all textualists now." Harvard Law School, *The Antonin Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE (Nov. 25, 2015), https://www.youtube.com/watch?v=dpEtszFT0Tg.

Anderson also held that "even when the trial judge adopts proposed findings verbatim, the findings are those of the court and may be reversed only if clearly erroneous." *Id.* In this case, the proposed orders of which Barksdale complains were not conclusory statements but rather contained detailed findings of fact. HC, Vol. 23, Tab #R-57. Further, Barksdale fails to show how the Rule 32 court erred in even a single finding of fact—a far cry from showing that its findings were clearly erroneous.

Barksdale also argues that *Jefferson v. Upton*, 560 U.S. 284 (2010) (per curiam), suggests that there might be problems if (1) a judge solicited proposed findings ex parte, (2) the judge did not provide the opposing party with the chance to object or to submit his own findings of facts, or (3) internal evidence suggests that the judge did not read them. 560 U.S. at 294. But *Jefferson* is distinguishable because in that case, the trial judge solicited the proposed order ex parte and never gave notice or a chance to be heard to the other side. *Id.* at 294. In this case, the Rule 32 court solicited proposed orders from both sides, and Barksdale was heard on his objections to the State's proposed order. Pet. App'x 3 at 47-48.[14]

Barksdale also makes passing references to *United States v. Leon*, 468 U.S. 897 (1984), and *Proffit v. Florida*, 428 U.S. 242 (1976) (plurality opinion). Pet. 19-20. *Leon* held that deference to a magistrate's finding of probable cause to issue a warrant applies only if he performs "his neutral and detached function" and not automatically

[14] Barksdale hangs his hat on *Jefferson*'s dicta about the possibility of internal evidence suggesting that the trial court did not read the facts, but he cites no authority suggesting that this case rises to that level. If this legal issue should be explored in the future, this Court should take that up at another time when the petitioner is not procedurally barred.

approving everything the police do. 468 U.S. at 914 (cleaned up). But the critical issue in *Leon* was the Fourth Amendment, which has no application to this matter.[15] And contrary to Barksdale's assertion, *Proffit* did not "remind reviewing courts that it would be wrong to engage 'in only cursory or rubber-stamp review of death penalty cases.'" Pet. 20. Instead, it commended the Florida Supreme Court for adopting the proportionality analysis that this Court announced in *Gregg v. Georgia*, 428 U.S. 153 (1976). *Proffitt*, 428 U.S. at 259.

Finally, the two Alabama Supreme Court cases that Barksdale cites are distinguishable. In *Ex parte Ingram*, 51 So. 3d 1119 (Ala. 2010), the court overturned the judgment of a Rule 32 court because the circuit court claimed that it had personal knowledge of the trial when the judge had not, in fact, presided over the trial. 51 So. 3d at 1125. In contrast, the Rule 32 judge in this case claimed no such personal knowledge of the trial. In *Ex parte Scott*, 262 So. 3d 1266 (Ala. 2011), the court overturned a Rule 32 court because it adopted verbatim the State's *answer*, which was only a pleading and not even a proposed order. 262 So. 3d at 1274. Not so here.

II. The Eleventh Circuit applied the correct standard of review to Barksdale's claims.

Barksdale claims that the Eleventh Circuit "[m]isconstrued [b]inding [p]recedent" from this Court when it denied a COA as to the due-process issue. Pet. 23. Yet Barksdale never tells us which binding precedent the Eleventh Circuit allegedly misconstrued. In the end, there is no conflict with binding precedent.

[15] For that reason, Barksdale's string-cite to three other Fourth Amendment cases, Pet. 18-19, does not help him, either.

Barksdale simply disagrees with the Eleventh Circuit's decision.

Barksdale opens his three-page argument by criticizing Judge Carnes for applying the wrong standard of review. Pet. 23. But to Judge Carnes's credit, he realized his error, and he (along with Judge Lagoa) vacated the previous order and analyzed the application again under the correct standard of review. Pet. App'x 4 (quoting *Buck v. Davis*, 580 U.S. 100, 115 (2017), and *Slack*, 529 U.S. at 484). After applying the correct standard of review, the judges concluded that "Barksdale has not shown that jurists of reason could disagree with or find debatable or deserving of encouragement to proceed further any of the claims and issues for which he is seeking a COA," except for the IAC claim. Pet. App'x 4 at 4.

Barksdale criticizes Judges Carnes and Lagoa's decision for failing to discuss his due process claim. But he cites no authority providing that the Eleventh Circuit had to issue another forty-eight-page order that discussed all of his claims in detail. He *assumes* that the Eleventh Circuit failed to analyze his claim properly, but he does not *prove* it. Pet. 25. He seems to argue that because *Anderson* and *Jefferson* criticize the practice of adopting proposed orders, reasonable jurists could have disagreed. However, Barksdale fails to address the issues of procedural default, which the district court found fatal to his claim. Likewise, the cases on which he relies provide that the practice of adopting orders verbatim is disfavored, but the orders will be upheld if the findings are not clearly erroneous. Barksdale fails to cite a *single fact*

that was allegedly found erroneously.[16] Consequently, Barksdale fails to show how reasonable jurists could have disagreed on any of these points, just as he fails to identify which "binding precedent" of this Court that the Eleventh Circuit allegedly "misconstrued."

III. Question III is meritless because it is mostly an extension of Barksdale's due-process argument and barely addresses *Strickland*'s prejudice prong.

The heart of Barksdale's IAC argument is, once again, that it was improper for the Rule 32 court to adopt the State's proposed order verbatim. Barksdale argues that by adopting the State's order, the Rule 32 court doomed his ineffective-assistance claim because the ACCA, the district court, and the Eleventh Circuit would all be reviewing faulty findings of fact. *See* Pet. 25-26. But as demonstrated thoroughly above, this argument is flawed because adopted orders are the court's as long as its findings are not clearly erroneous. Thus, the core of Barksdale's IAC claim is meritless.

The rest is also meritless. First, Barksdale claims that the Eleventh Circuit panel applied the wrong standard in evaluating the "abuse" he suffered as a child. When the Eleventh Circuit held that the evidence of his abuse "was not

[16] Importantly, Barksdale fails to show how this could have been the basis for federal habeas relief because the Rule 32 court's adoption of the State's order had nothing to do with his conviction and sentence. *See Carroll v. Secretary, DOC*, 574 F.3d 1354, 1365 (11th Cir. 2009) (holding that "defects in state collateral proceedings do not provide a basis for habeas relief" because "challenge to a state collateral proceeding does not undermine the legality of the detention or imprisonment—i.e., the conviction itself—and thus habeas relief is not an appropriate remedy"). This Court has likewise held that even if a petitioner overcomes all of AEDPA's limits, he is not entitled to habeas relief unless he persuades a federal court that "law and justice require relief." *Shinn v. Ramirez,* 596 U.S. 366, 377 (2022) (cleaned up). Law and justice do not require relieving Barksdale of his *conviction* or *sentence* just because the *postconviction procedures* are allegedly unfair.

overwhelming," he claims that the court invented a new standard of review instead of following the reasonable-probability standard from *Wiggins v. Smith*, 539 U.S. 510 (2003). Pet. App'x 5 at 26. But the Eleventh Circuit's colloquial way of describing the problems with Barksdale's argument does not mean it employed a different standard of review. On the contrary, the Eleventh Circuit found that (1) the four instances of abuse "did not reveal highly traumatic incidents of *systemic* physical, emotional, or verbal abuse," (2) Barksdale's mother knew nothing of his upbringing past the age of ten because he went to live with his father, and (3) Barksdale was upset about quitting sports and had to care for his grandmother after school. *Id.* (emphasis added). Clearly, the state court's determination that Barksdale was not prejudiced by failing to present this evidence was reasonable. *Id.* at 18.

Barksdale next appeals to *Andrus v. Texas*, 590 U.S. 806 (2020) (per curiam) ("*Andrus I*"), but it does not help him. *Andrus I* held that the petitioner's counsel flunked the performance prong of *Strickland*, but it remanded the case to determine whether he flunked the prejudice prong. 590 U.S. at 824. In this case, the Eleventh Circuit set aside whether Barksdale's counsel was deficient and asked only whether Barksdale was prejudiced, and therefore, *Andrus I* is inapposite.[17] Pet. App'x 5 at 18. And while Barksdale has identified a few factual similarities between the two cases, Pet. 28, he ignores others. For instance, the petitioner in *Andrus* had been diagnosed with affective psychosis and PTSD, possibly had schizophrenia, and had previously

[17] This is the same problem with Barksdale's drive-by reference to *Rompilla v. Beard*, 545 U.S. 374 (2005), which addressed *Strickland*'s performance prong but not its prejudice prong. *See* Pet. 28 (briefly mentioning but not really discussing *Rompilla*).

attempted suicide. *Andrus I*, 590 U.S. at 811, 815-16. Moreover, in Barksdale's case, the introduction of some of the mitigating evidence would have presented a double-edged sword problem. *See, e.g.*, *Cullen v. Pinholster*, 563 U.S. 170, 201 (2011) (holding that calling a psychiatric expert would have opened the door to rebuttal by a state expert); *Wong v. Belmontes*, 558 U.S. 15, 24 (2009) (holding that introducing certain mitigating evidence would have led to the defendant being exposed to further aggravating evidence). As the Eleventh Circuit noted, introducing testimony about Barksdale's Virginia robbery could have led to the victim testifying, which could have shown that he committed the Virginia crime (and therefore possibly *this* crime) with a degree of deviousness. Pet. App'x 5 at 19. No such issue existed in *Andrus*.[18] It was therefore a reasonable strategy to appeal to Barksdale's age alone, which was not the case in *Andrus I*, in which counsel offered no strategic reason at all for his actions. *Andrus I*, 590 U.S. at 814.

Barksdale also makes passing references in two footnotes to cases from the Eleventh Circuit and from this Court. First, he argues that under Eleventh Circuit precedent, it is reasonable to assume that counsel was deficient for failing to argue that the previous crime was not as damning as the current crime. Pet. 29 n.24. But this argument misses the finer point that opening the door *in this case* could have

[18] However, on remand, the Texas Court of Criminal Appeals found that "much of the evidence that Applicant said should have been presented was 'double edged.'" *Ex parte Andrus*, 622 S.W.3d 892, 895 (Tex. Ct. Crim. App. 2021). After that court held that counsel's performance did not prejudice Andrus, he petitioned this Court for certiorari again, which it denied. *Andrus v. Texas*, 142 S.Ct. 1866 (2022) ("*Andrus II*"). The dissenting justices argued that there was not a double-edged sword problem, and even if there were, it would not have been dispositive. *Andrus II*, 142 S.Ct. at 1873 (Sotomayor, J., dissenting). Nevertheless, the State's point remains that Barksdale's appeal to *Andrus I* does not help him.

backfired. *See* App'x 5 at 19. Second, he argues that trial counsel's investigation was deficient under this Court's precedents. Pet. 29 n.26. However, he again misses the point that even if his assertions are true, the cases he cites address only the performance prong of *Strickland*. *See id.* They don't address the prejudice prong, which is the only issue properly before this Court.

Finally, Barksdale claims that the jury saw "no mitigating evidence because none was admitted[.]" Pet. 30. That is patently untrue. It is undisputed that trial counsel presented Barksdale's age to the jury, which is undoubtedly a mitigating factor. Pet. App'x 5 at 5. Barksdale makes only one brief reference to *Strickland*'s prejudice prong, and it is based on the faulty premise that counsel did not present any mitigation evidence at all. Pet. 30. But since his premise is patently incorrect, his measly attempt to address *Strickland*'s prejudice prong fails.[19]

CONCLUSION

For the foregoing reasons, Barksdale's petition should be denied.

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[19] Finally, the State notes that Goggins's performance was not even deficient under *Strickland*'s performance prong. Goggins did not learn about Maxwell's existence because Barksdale never mentioned him. And why would he, since Barksdale lived with Maxwell for only a couple months years before the murder? Goggins got as much as he could out of Barksdale's mother. He rightly determined that putting Barksdale's father on the stand would be dangerous because Tyrone would have testified that Barksdale was a liar—a character trait that juries don't forgive. Goggins rightly decided not to call the victim from the Virginia robbery, as having a live witness testify about Barksdale's crime (and who could have persuaded the jury that Barksdale was devious) is more dangerous than simply admitting a piece of paper saying that the crime happened. Goggins's performance was not deficient. He simply had an unwinnable case.

/s/Matthew James Clark
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