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

No. 24-6579

In the
Supreme Court of the United States

TONY BARKSDALE,

Petitioner,

v.

STEVE T. MARSHALL,
Attorney General, State of Alabama, *et al.*,

Respondent.

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

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

Steven M. Schneebaum */
D.C. Bar No, 956250
STEVEN M. SCHNEEBAUM, P.C.
1750 K Street, N.W.; Suite #1210
Washington, D.C. 20006
Tel.: (202) 742-5900
Email: sms@smslawdc.com

*/ Counsel of Record
for Petitioner Tony Barksdale

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

REPLY TO RESPONDENT'S OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI 1

INTRODUCTION 1

I. A Rubber-Stamped Prosecution Brief Does Not Qualify as a Judgment Entitled to Deference under the AEDPA. 4

II. The Eleventh Circuit Erred When It Denied a Certificate of Appealability on the Rubber-Stamping Issue. 9

III. When Capital Defense Counsel Conducts No Investigation and Presents No Meaningful Mitigation Case, *Strickland* Prejudice Is Inevitable. 10

CONCLUSION 15

TABLE OF AUTHORITIES

CASES

Anderson v. City of Bessemer City,
470 U.S. 564 (1985) 5, 9

Andrus v. Texas,
590 U.S. ___, 140 S. Ct. 1875 (2020) 12, 14

Bradley v. Maryland Casualty Co.,
382 F.2d 415 (8th Cir. 1967) 8

Buck v. Davis,
580 U.S. 100 (2017) 4, 9

Gregg v. Georgia,
428 U.S. 153 (1976) 15

In re Colony Square Co.,
819 F.2d 272 (11th Cir. 1987); *cert. den.*, 485 U.S. 977 (1988) 8

In re Dixie Broadcasting, Inc.,
871 F.2d 1023 (11th Cir. 1989) 9

Jefferson v. Upton,
560 U.S. 284 (2010) (per curium) 5, 6

Keystone Plastics, Inc. v. C & P Plastics, Inc.,
506 F.2d 960 (5th Cir. 1975) 8

King v. Secretary, Department of Corrections,
793 F. App'x 834 (11th Cir. 2019) 9

Miller-El v. Cockrell,
537 U. S. 322 (2003) 4, 9

Porter v. McCollum,
558 U.S. 30 (2009) (*per curiam*) 13

Proffitt v. Florida,
428 U.S. 242 (1976) 8

Rompilla v. Beard,
545 U.S. 374 (2005) 11

Strickland v. Washington,
466 U.S. 668 (1984) 1, 10, 12, 13, 15

Wiggins v. Smith,
539 U.S. 510 (2003) 12, 13

FEDERAL STATUTES

Antiterrorism and Effective Death Penalty Act of 1996,
Pub. L. No. 104-132, (April 24, 1996, 110 Stat. 1214),
28 U.S.C. 2254 ..... 2, 8

FEDERAL RULES

S. Ct. Rule 15.6 1

CONSTITUTIONAL PROVISIONS

U.S. CONST. AMENDMENT V 1, 5

U.S. CONST. AMENDMENT VI 1

U.S. CONST. AMENDMENT XIV 5

U.S. CONST. ARTICLE I, § 9 5

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

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

Introduction

The Constitution of the United States provides that no one may be deprived of life, liberty, or property without "due process of law." Amendment V, and that everyone accused of a crime has the right "to counsel to assist in his defense." Amendment VI. "Due process of law" includes the right to trial before an impartial tribunal. This Court hardly needs to be reminded that this latter entitlement means "effective" assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668 (1984), and its abundant progeny. And should an aberration occur, and a criminal defendant be denied the right to counsel or other indicia of due process, he may take advantage of the "privilege of the writ of habeas corpus," Article I, § 9.

Here, Petitioner Tony Barksdale was denied due process of law and effective assistance of counsel at his trial, and specifically at the penalty phase. Respondents before this Court unabashedly deny the undeniable facts in the record illustrating the extent to which his counsel was ineffective, in neglecting to present his client's defense, in failing to conduct an investigation, and at the punishment stage, in offering no challenge to the State's aggravators and no meaningful case in mitigation.

Yet the flawed trial and conviction in Alabama were the beginning, not the end, of the constitutional violations that have pervaded this case since Day One. The State habeas corpus proceedings were conducted by a judge who accepted, and signed, every draft order put in front of him by the prosecution, even when it bore the names of other defendants. After an evidentiary hearing involving witness testimony and documentary exhibits, both parties submitted their proposed findings of fact and conclusions of law and, true to form and entirely consistently with his handling of the case since he was assigned to it, the judge endorsed every word of the prosecution's submission, without even bothering to have it retyped. There is no evidence that he read it (just as he presumably did not read before he signed the prosecution's earlier orders containing names other than Petitioner's).

And even that does not conclude the story. The Alabama Court of Criminal Appeals simply reproduced large portions of the prosecution's brief, a.k.a. the habeas judge's order, impressing on the submissions of one party to a criminal proceeding – and a capital criminal proceeding, at that – the official imprimatur of the highest court in the State to which there is an appeal by right And once that was done, the U.S. District Court for the Middle District of Alabama not only accepted that the "opinion" was entitled to deference under the Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2254, but – as Respondents correctly point out – suggested

that Petitioner's counsel might be subject to sanctions for having the temerity to raise challenges to its sources or its conclusions.[1]

Capital defendants are, or should be, entitled to counsel who spend more than 36 minutes "investigating" potential mitigation evidence, and who speak more than 21 words in presenting that evidence to the jury. They are, or should be, entitled to consideration of their habeas petitions by a judge who does not simply endorse every document presented to him by the prosecution, even when they contain glaring errors. And they are, or should be, entitled to a review in federal courts that does not treat a prosecution brief as if it were the opinion of an impartial judicial officer.

Tony Barksdale, a prisoner on Death Row in Alabama, received neither of these things: neither due process and the constitutional entitlement to effective assistance at trial, nor a fair and impartial assessment of his evidence and argument on collateral review. That is what is at issue in this Petition for a Writ of Certiorari.

As shall be seen below, in defense of its position that some defendants do not need or deserve a fair trial or access to habeas corpus, Respondents spin the facts, ignore the facts, and when it suits them, simply deny the facts or make up new ones. Their efforts are, or should be, unavailing. Tony Barksdale does not claim that he is innocent of the killing of Julia Katherine Rhodes. But he does claim that the Constitution nevertheless guarantees him rights that have been ignored in the

[1] [1] Respondents want to make sure that the Court does not miss this point, mentioning it twice in their Opposition. Op. Cert., p. 8 n.8, and p. 15. But the fact is that Judge Watkins did not issue any kind of order to show cause, and it is conceivable that that is because the arguments were entirely proper, and he recognized that Petitioner's counsel – unlike his defense attorney at trial – were doing their best to represent their client diligently and within the applicable Rules.

proceedings below, and that it would be unconscionable to permit his execution in violation of those rights. Respondents' arguments to the contrary are without merit.

I. A Rubber-Stamped Prosecution Brief Does Not Qualify as a Judgment Entitled to Deference under the AEDPA.

First, Respondents submit that this Court is without jurisdiction to entertain the argument that the opinion of the state habeas court, of which every word was written by the prosecutor, constituted a denial of due process. In support of that position, they cite *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). Op. Cert. at 12. But the very passage that they excerpt – "until a COA has been issued federal courts of appeals lack jurisdiction to rule on the merits of appeals from habeas petitioners" – demonstrates on its face that it is inapposite. *Miller-El* addresses the jurisdiction of the appellate courts, not this Court, which most assuredly always has the authority to address alleged denials of due process in the federal courts over which it exercises oversight.

But the Certificate of Appealability ("COA") applications submitted to the Eleventh Circuit and to Justices of this Court were intended to allow Petitioner to raise the constitutional issue before the Circuit Court.[2] Under *Miller-El* and *Buck v. Davis*, 580 U.S. 100 (2017), he is now foreclosed from presenting his argument there.[3] A denial of a COA, however, does not preclude Petitioner from arguing before this Court that the underlying claim, that a state court "opinion" written by the district

[2] Simultaneously with the instant Petition for Certiorari, Mr. Barksdale filed a COA application with Justice Clarence Thomas, Circuit Justice for the Eleventh Circuit. It was denied on February 20, 2025. He then refiled the application with Justice Ketanji Brown Jackson, who referred it to the full Court. And it was again denied, on March 31, 2025.

[3] Petitioner argues, in his second question presented to this Court, that the denial of a COA was itself inconsistent with this Court's precedents. *See* Cert. Pet, at pp. 23-25, and pp. 9-10, *infra*.

attorney and not a judge is not entitled to deference under the AEDPA, requires review as a denial of due process under the Fifth and Fourteenth Amendments.

Nor was Petitioner procedurally barred from raising this issue in federal habeas review, as Respondents now argue. They tell this Court that "it is undisputed that Barksdale never raised a due process claim in the Alabama courts." Op. Cert., at 14. But this is, not uniquely, an outright misrepresentation. In his brief before the Court of Criminal Appeals, Petitioner included a section entitled "It Was Error for the Court to Adopt Verbatim the State's Proposed Order," citing federal and state court decisions, and specifically raising the question of whether rubber-stamping comports with due process. *See* Record Doc. 20-21, pp. 80-82.

Turning to the merits of the constitutional claim, in his Petition for Certiorari, Mr. Barksdale has pointed out that, in the first decision in which it addressed the question of judicial rubber-stamping, this Court "criticized courts for their verbatim adoption of findings of fact prepared by prevailing parties." *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 572-73 (1985) (citations omitted). And later, *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 Court said, of such prosecution briefs transformed into judicial opinions, that:

> we 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 (emphasis added). Respondents argue that this language is inapplicable here because "Barksdale was heard on his objections to the State's proposed order."[4] Yet that assertion is utterly false. Petitioner was **never** given a chance to be "heard" in response to the proposed findings of fact and conclusions of law that were to become the habeas court's "opinion," nor does the case record suggest otherwise. The briefs of the two parties were submitted during the week of September 5, 2005. There was no opportunity to file a rebuttal. And the state court signed the prosecution's brief on October 4, 2005.

Respondents are quite correct to observe that Petitioner has proffered no **internal** "evidence suggesting that the judge may not have read" the "order" that he signed (which this Court indicated in *Jefferson* would merit its condemnation). Op. Cert., at p. 19, n.14. But Petitioner has tendered a great deal of **external** evidence supporting that inference. Among that evidence is the consistent and virtually unbroken record of the habeas judge in signing every piece of paper put in front of him by the prosecution throughout the three years he presided over this case, including two documents containing names of other defendants (one of them in the very caption on top of the first page), and another that directly contradicted an order issued in open court. *See* Cert. Pet., at pp. 17, 19. And the fact that the habeas order "contained detailed findings of fact." Op. Cert. at p. 19, means nothing. Of course it

[4] Op. Cert., at 19, citing Judge Carnes's COA denial, Cert. Pet., App. 3, at pp. 47-48. But Judge Carnes failed to cite the record or any other authority to buttress his assertion. And that is because no such evidence exists.

contained detailed statements of purported fact: precisely, and only, the ones fed to the judge by the district attorney.

Nor has Mr. Barksdale failed to point out numerous errors and omissions in the order-*cum*-opinion, as alleged by Respondents. Among those were significant misrepresentations of the testimony of Petitioner's mother, who recounted her debilitating drug addiction, and the violent acts by her then-husband, many of which occurred while young Tony was present.[5] There were also mischaracterizations of the testimony of Thomas Goggans, Esq., defense counsel at trial, whose account of his two telephone conversations with Ms. Archey was believed without hesitation,[6] while her testimony was either distorted or simply ignored.

All of this was integral to the denial of due process. The lesson to be learned, if this travesty is allowed to stand, is that a prosecutor can avoid having to prove its case if he has a compliant judge, who will clear his docket by signing off on every word, every conclusion, every omission, and every "spin" to finalize a hapless habeas petitioner's condemnation to capital punishment. Once the state's brief is signed by the judge, it becomes bullet-proof: when affirmed by the state appellate court, it is untouchable on federal review. And the more detail the better: the diligence of the

[5] The Rule 32 "opinion," and therefore the opinion of the Court of Criminal Appeals to which the federal courts then deferred, makes virtually no mention, for example, of her incapacitating drug addiction, or to Petitioner's father's violence toward her. Both were topics of lengthy and intensely emotional testimony at the evidentiary hearing.

[6] To promote its counterfactual position that defense counsel conducted a proper investigation, for example, the state quoted him as testifying that he spoke with Ms. Archie on the phone three times. But the habeas "order" neglects to mention that – according to Mr. Goggans's own sworn time records – not one of these calls lasted over six minutes.

prosecution team in crafting findings of fact and conclusions of law will shield the judge from criticism, and insulate the outcome from subsequent judicial oversight.

To be sure, that is what happened here. Well over a hundred pages of briefs submitted to the Tallapoosa County Circuit Court by the district attorney have been deemed essentially unimpeachable in every single detail, every evidentiary ruling, and every credibility assessment, never mind this Court's admonition almost 50 years ago: it would be wrong to engage "in only cursory or rubber-stamp review of death penalty cases." *Proffitt v. Florida*, 428 U.S. 242, 259 (1976).

It is true that, under 28 U.S.C. § 2254(d), a federal habeas court must defer to the outcome of claims "adjudicated on the merits in State court proceedings." But the premise here is that the "adjudication" was not in fact that of a judicial officer, but rather that of the office of the state attorney general. Where it is undeniable, as it is here, that the factual findings and legal conclusions expressed in a paper signed by a judge are not his, that deference is manifestly unwarranted.

As we noted, Cert. Pet. at pp. 17-19, a number of Circuits – including the Eleventh – have concluded that the practice of rubber-stamping, especially in capital cases, is not acceptable.:

> 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.

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, 841 (11th Cir. 2019), the Eleventh Circuit again "caution[ed] district courts against this practice."

Petitioner respectfully urges this Court now to take this opportunity once and for all to repudiate the systematic denial of due process that invariably attends the endorsement by a state habeas judge of the prosecution's version of the facts and law.

II. The Eleventh Circuit Erred When It Denied a Certificate of Appealability on the Rubber-Stamping Issue.

Respondents candidly acknowledge that, in his initial COA denial, Judge Edward Carnes of the Eleventh Circuit misapplied the law, and misconstrued precedents of this Court (notably *Miller-El* and *Buck*). Op Cert. at pp. 15-16. But when the Circuit reconsidered and corrected Judge Carnes's error, it did not include any discussion at all of the rubber-stamping. It held that Petitioner met the standards required by *Miller-El* and *Buck* with respect to the claim of ineffective assistance of counsel at the punishment phase of his trial, but it was utterly silent on the other issues raised, including the one set out in Part One of this Reply. The Circuit Court did not say that the argument against rubber-stamping as a constitutional violation was not "debatable." Rather, it left Judge Carnes's admittedly incorrect interpretation of the law as the last word on the subject.

And there should be no mistake: the denial of the COA on rubber-stamping was not only erroneous insofar as it applied the wrong standard. It was also blatantly wrong on the merits. Judge Carnes wrote that the issue was beyond "debate" because the practice was in effect endorsed by this Court in *Anderson*, when in fact that case "criticized" courts for engaging in it. Petitioner respectfully suggests that, in failing to revisit the appealability of

the lower court's disposition of this question when it corrected Judge Carnes's misapplication of the law, the Circuit Court reinforced and perpetuated the error. For that reason, the denial of a COA was itself inconsistent with the binding teachings of this Court.

As noted, the Court has denied Petitioner's renewed application to this Court for a COA that would have permitted him to bring this issue before the Circuit. That denial, however, does not foreclose the Court from determining, as a matter of law, that the Court of Appeals erred in applying incorrect standards to its COA denial, and that the question of whether a rubber-stamped prosecution brief is entitled to AEDPA deference should be remanded to the appellate tribunal.

III. When Capital Defense Counsel Conducts No Investigation and Presents No Meaningful Mitigation Case, *Strickland* Prejudice Is Inevitable.

In attempting to defend the indefensible and to pretend that counsel in Petitioner's trial was constitutionally effective, Respondents rely entirely on, and quote liberally from, the rubber-stamped brief that their agent wrote and presented to the habeas judge.[7] They do not cite the actual record: they cite what they got the judge to say the record was. And they go so far as to deny, before this Court, the testimony and documentary evidence of the Rule 32 witness whom they most effusively embrace: defense counsel himself.

So, for example, Respondents now tell this Court that ten factual statements submitted by Petitioner are "contradicted by the record." Op. Cert., p. 6, n.6. This is a remarkably transparent misrepresentation by officers of this Court. The list contains such statements as: "(2) Goggins [*sic*] [trial counsel] did not interview any witnesses other than the ones he called." But Mr. Goggans's time records, which he swore under oath were

[7] The "facts" that they say the habeas judge "learned" or "found," Op. Cert., pp. 4-6, were neither "learned" or "found" by the court: they were presented to it by the prosecution.

accurate, show definitively that this statement is true. The same may be said of "(4) Goggins [*sic*] did not investigate Barksdale's prior conviction for robbery": Mr. Goggans testified under oath that he did not so much as obtain the court records of that conviction.[8] And while they deny the statement "(5) Goggins [*sic*] did not address the State's aggravators in his closing argument": the closing argument is in the record, and there is not a word to be found in it about aggravators

But the most astonishing submission in this context by Respondents is their claim that the statement "(6) Goggins [*sic*] spoke only twenty-one words in the 'whole mitigation case'" is "contradicted by the record." The transcript of trial, excerpted in relevant part in the Petition for Certiorari, is available to the Court. Here is what Mr. Goggans said in front of the jury, immediately after the trial judge invited him to present a case in mitigation: "Defense offers Exhibit No. 11, a certified copy of Tony Barksdale's birth certificate from the State of North Carolina. … Defense rests." *See* Cert. Pet. at 7. That is 21 words, no more and no less. The reasons Respondents might want to deny this are unfathomable.

The facts constituting the ineffective assistance of defense counsel at trial are incontrovertible. Counsel spent no more than 36 minutes on the phone with Petitioner's parents. He interviewed no other potential mitigation witness and reviewed no other evidence. Knowing that the state would rely on Petitioner's conviction for involvement in an armed robbery, at age 16, as an aggravator, counsel did not investigate the facts of that crime,

[8] In *Rompilla v. Beard*, 545 U.S. 374 (2005), this Court addressed a similar failure. And the Court, observed, "With every effort to view the facts as a defense lawyer would have done at the time, it is difficult to see how counsel could have failed to realize that without examining the readily available file they were seriously compromising their opportunity to respond to a case for aggravation. The prosecution was going to use the dramatic facts of a similar prior offense, and [defense] counsel had a duty to make all reasonable efforts to learn what they could about the offense." 545 U.S. 374, 385.

and permitted the state to mislead the jury about his client's role in it. The mitigation case presented to the jury consisted of no more than the 21 words cited above. Defense counsel relied on nothing more than age, and even the relevance of that was not explained. Closing argument at the punishment phase took no more than five minutes, and included not one word about the state's aggravators (which were, by contrast, developed in elaborate detail by the district attorney).

The failure to investigate was by itself sufficient to constitute ineffective assistance. This Court, in *Wiggins v. Smith*, 539 U.S. 510, 523 (2003), set out the rule: *Strickland* and its progeny require the reviewing court to focus on "whether the investigation supporting counsel's decision not to introduce mitigating evidence of [his client's] background was itself reasonable." Here, it was manifestly not.

The Eleventh Circuit Panel concluded, however, that it did not need to determine whether the first *Strickland* prong – deficiency of performance – was satisfied, because the second – prejudice – was not. But here, the appellate court committed constitutional error.

Petitioner does not allege that the facts of his childhood match the horrific accounts of others whose names have come to be attached to important decisions of this and other Courts. He was not psychotic or schizophrenic, as was Terence Andrus, in *Andrus v. Texas*, 590 U.S. 806 (2020) (*per curiam*). There is no evidence that he was sexually abused, starved, or enslaved as a child. But comparing his own violent, drug-addled, and dysfunctional family to those others, to assess whether his was "as bad as" theirs or "not so bad," is not the applicable constitutional measure, and is certainly not the province of an appellate court.

Respondent is correct: Petitioner does argue that the Circuit Court applied "a new standard of review." Op. Cert., at p. 23. The Panel held that, to overcome the presumption

that even the most egregious deficiencies of defense counsel in a capital case may not have caused "prejudice," a habeas applicant must demonstrate "overwhelming" proof. And that standard is simply incorrect, and inconsistent with this Court's teachings.

Here, Petitioner relies on the Circuit's own words. It dismissed the prejudice arguments **not** according to precedents of this Court and its own prior decisions, but because it found Petitioner's evidence to be "not overwhelming." Cert. Pet. App. 5, p. 19. But as the Panel itself acknowledged, *id*., at p. 16, this Court has never required that such evidence be "overwhelming." The question of proper concern to a reviewing court 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" does **not** require "overwhelming" evidence, or even proof "that counsel's deficient conduct more likely than not altered the outcome of [Petitioner's] penalty proceeding." *Id*., citing *Porter v. McCollum*, 558 U.S. 30, 44 (2005), quoting *Strickland*, 466 U.S. at 693-94.

The problem here is exacerbated, and the Circuit's constitutional error brought into starker relief, because the Panel relied not on the facts in the record, not on the actual testimony of Petitioner's Rule 32 witnesses, but on the document written by the prosecution, signed by the hearing judge, and parroted in the decision of the Court of Criminal Appeals. Thus, for example, because the state's brief made light of Petitioner's mother's drug addiction and its impact on her sons, so did the Eleventh Circuit. Because the state ignored the evidence of psychological mistreatment, detachment, and abandonment by his parents, so did the Eleventh Circuit. Because the state did not make reference to the violence in the Barksdale home while young Tony was growing up, neither did the Eleventh Circuit.

But even if it were incumbent on Petitioner to show that his dysfunctional family compared by some unspecified metric to the family backgrounds of others, a review of the record, rather than of the prosecution's brief, would provide that evidence. Before this Court, Respondents graciously concede that there are what they call "a few factual similarities" between the facts in the case at bar and those in, for example, *Andrus*. Op. Cert., at p. 24. The similarities are, however, more than "a few." In *Andrus*, this Court found that the mitigating evidence withheld from the jury thanks to counsel's ineffectiveness was sufficient to undermine confidence in the outcome, and to render the capital sentence unreliable. That evidence consisted of such facts as: "his mother sold drugs and engaged in prostitution." 590 U.S. 806, 811. So did Tony Barksdale's mother. Andrus's mother was "high more often than not, and would leave her children for weekends and weeks when she was high." Tony Barksdale's mother too was "high more often than not," and as a result was unaware that her younger son had left the family home for weeks, during which time she made no effort to find him. Those facts were set out in the Rule 32 hearing testimony, but because the state's brief omitted them, they make no appearance in the "decisions" of the appellate tribunal.

The issue here is whether Petitioner had a constitutional right to have his own history and his own humanity presented to his sentencing jury, so that it could decide whether there were enough mitigating circumstances, enough context for the awful deed he was convicted of having committed, to weigh against the state's aggravators and, on that basis, to make a fair determination whether Tony Barksdale should live or die. But they were deprived of that chance, because defense counsel neither presented any mitigators (other than age), nor said anything at all to them about the aggravators.

In *Gregg v. Georgia*, 428 U.S. 153 (1976), this Court conclusively explained why a writ of certiorari should be granted in this case. The Court wrote that a constitutionally acceptable sentencing process must "focus the jury's attention on the particularized nature of the crime and the **particularized characteristics of the individual defendant**." The jury must be "permitted **to consider any aggravating or mitigating circumstances ...** before it may impose a penalty of death." 428 U.S. at 206-07 (emphasis added). Here, defense counsel presented nothing about the characteristics of his client, and nothing by way of mitigation, except to remind the jury that Mr. Barksdale was 18 years old when he killed Julia Rhodes. And he said nothing about the aggravators put before the jury by the prosecution.

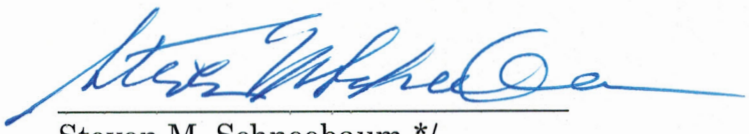
Despite Respondents' denials, the simple facts here are that counsel knew, and therefore presented, nothing about his client's past. His investigation of potential mitigation witnesses consisted of 36 unproductive minutes on the telephone with his client's parents. He did not interview anyone else. He spoke 21 words in the entirety of his mitigation case before the jury, calling no witnesses. His closing argument made no reference to the aggravators on which the State had relied for a capital sentence.

In such a case, the *Strickland* prejudice prong – the question whether the sentence is reliable, because the jury might well have come to a different conclusion had all of the mitigating evidence been before it – is met. If what happened in this case does not amount to constitutionally ineffective assistance of counsel, then there is no such thing.

Conclusion

For all of the foregoing reasons, and those set out in the original Petition in this case, this Court should grant a writ of certiorari, and vacate and reverse the decision of the court below.

Respectfully submitted,



Steven M. Schneebaum */
D.C. Bar No, 956250
STEVEN M. SCHNEEBAUM, P.C.
1750 K Street, N.W.; Suite #1210
Washington, D.C. 20006
Tel.: (202) 742-5900
Email: sms@smslawdc.com

*/ *Counsel of Record*
for Petitioner Tony Barksdale

Dated: April 8, 2025