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.

APPLICATION FOR A CERTIFICATE OF APPEALABILITY
Addressed to
HONORABLE CLARENCE THOMAS, J.
In his Capacity as Circuit Justice for the Eleventh Circuit

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

To the Honorable Justice Clarence Thomas, Associate Justice of the Supreme Court of the United States and Circuit Justice for the United States Court of Appeals for the Eleventh Circuit:

Petitioner Tony Barksdale, a prisoner currently incarcerated at the Holman Correctional Facility in Atmore, Alabama, under sentence of death, by undersigned counsel and pursuant to 28 U.S.C. § 2253(c)(1), respectfully requests the issuance of a Certificate of Appealability (COA) permitting him to raise before the Court of Appeals for the Eleventh Circuit the following question:

> Whether the state judge who presided over his post-conviction collateral review violated Petitioner's constitutional right to the due process of law by consistently and unfailingly adopting verbatim the submissions of the state prosecutor, and them labeling them as his judicial opinions.

Simultaneously herewith, Mr. Barksdale has respectfully submitted a petition to the Supreme Court for a writ of certiorari ("Barksdale Cert. Pet.). Among the Questions Presented, he has included this issue. If the Court sees fit to grant the requested writ, then this Application will be moot. But if the Justices conclude that the claim that "rubber-stamping" of prosecution briefs by state judges deserves their review, they may wish to have the views of the Circuit Court on the subject before they address it. As is discussed below, the Eleventh Circuit denied a COA on this claim on the basis of standards that a panel of that court later conceded were incorrect as a matter of law.

THE UNDERLYING FACTS

The facts of the crime for which Mr. Barksdale was convicted and sentenced to death are set out in the Barksdale Cert. Pet. at pp. 2-11. Petitioner sought a writ of

habeas corpus in the U.S. District Court for the Middle District of Alabama, which denied the petition, and also refused to grant a COA (Barksdale Cert. Pet, Appendix 1), and declined to reconsider its decision (*id.*, Appendix 2).

REASONS FOR GRANTING THE APPLICATION

Petitioner then sought a COA from the Eleventh Circuit, raising four issues. One of them was ineffective assistance of counsel at both the guilt and the penalty phases of his trial, and another was the consistent "rubber-stamping" of prosecution submissions by the Rule 32 (state habeas) court in Tallapoosa County, Alabama. Judge Carnes, sitting alone pursuant to the unique Eleventh Circuit procedure, denied the request as to all counts. *Id.*, Appendix 3. But he did so without regard to this Court's guidance in *Buck v. Davis*, 580 U.S. 100, 115 (2017), concluding that the disposition by the district court could be appealable only if no reasonable jurist could agree with it. Yet this Court had ruled that the proper standard is whether the correctness of the lower court decision is debatable: that is, whether reasonable jurists could consider it to be worth higher court review:

> 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).

In response to a motion for reconsideration of Judge Carnes's denial of the

COA, a panel of the Circuit Court, Barksdale Cert. Pet., Appendix 4, conceded that it was in error, writing that "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.

Yet when the court then applied the proper criteria, it did so (and granted a COA) on only one single issue, ineffective assistance of counsel at the penalty phase of Petitioner's trial. It said nothing about the other claims, although all of them had been denied on the same obviously flawed interpretation of the law and of this Court's teachings.

The Eleventh Circuit did not say that, applying the methodology of *Buck*, *Miller-El v. Cockrell*, 537 U. S. 322, 327 (2003), 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 judge could conclude that "the issue presented was adequate to deserve encouragement to proceed further." It did not discuss the claim at all.

This Court has never addressed the specific question presented here – whether a "rubber-stamped" opinion of a state habeas corpus court, adopted verbatim (in relevant part) by the highest state court to review the case, is entitled to "AEDPA deference" under 28 U.S.C. § 2254. But the Court has "criticized" the practice in two decisions, *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 572-73 (1985), a civil case,[1] and *Jefferson v. Upton*, 560 U.S. 284 (2010), a criminal case applying pre-

[1] In his original denial of the COA, Judge Carnes relied upon an Eleventh Circuit decision, *Rhode v. Hall*, 582 F.3d 1273, 1281 n.4 (11th Cir. 2009), which treated this Court's holding in *Anderson* as having put the question of

AEDPA standards. And the Eleventh Circuit itself has observed that:

> 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.[2]

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.

Surely all of the "criticism" and "condemnation" of the practice by this Court and a number of circuit courts suggests that whether rubber-stamping of prosecution briefs in capital habeas cases violated constitutional guarantees of due process is "debatable."

Nor should the "debatability" of the practice in the instant case be called into question by the fact that Judge Tom Young, the state habeas judge, requested proposed findings of fact and conclusions of law from both parties. As the record shows, he did that routinely, and just as routinely signed the prosecution's

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constitutionality of the practice in criminal cases beyond "debate." Barksdale Cert. Pet., Appendix 3, at 46-48. But surely that does not follow, not least because *Anderson* was not a criminal case, did not discuss AEDPA deference, and in any event, there the lower court judgment that this Court was reviewing was not in fact a verbatim reproduction of a single party's submission. 470 U.S. 564, 572-73.

[2] 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.

submissions without changing a word, and without even having them retyped. And he did this on two occasions when the state's proposed order contained the names of other individuals, once in the caption and once in the body of the text. The regularity of his response to contested issues, and the fact that he accepted them with only one exception (and then only in response to a motion from Mr. Barksdale's counsel pointing out that the order he signed was in direct contradiction to what he had said in open court), strongly suggest – indeed, they compel the conclusion – that he was not acting as an impartial adjudicator of the claims of a death-sentenced inmate.

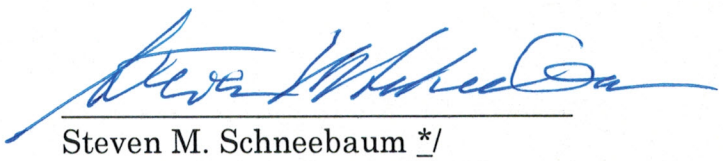
It is at least debatable that the Eleventh Circuit's denial of the COA, which would have permitted Petitioner to argue that the consistent rubber-stamping of prosecution briefs during his state habeas corpus proceedings was an unconstitutional denial of due process, was inconsistent with this Court's precedent, and therefore deprived the "opinions" of the deference to which the AEDPA entitles genuine judgments of state courts.

Petitioner respectfully requests of the Circuit Justice for the Eleventh Circuit the issuance of a Certificate of Appealability, which would effectively remand this case to the Circuit Court for a review of this significant constitutional question.

CONCLUSION

For all of the foregoing reasons, the instant Application should be granted, and a Certificate of Appealability should be granted to Petitioner.

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

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