No. 08-9156

IN THE

Supreme Court of the United States

HOLLY WOOD,

Petitioner,

v.

RICHARD F. ALLEN, COMMISSIONER,
ALABAMA DEPARTMENT OF CORRECTIONS, ET AL.,

Respondents.

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

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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Interest Of *Amicus Curiae*

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct.[1] Founded in 1958, NACDL has a membership of more than 12,000 and affiliate memberships of almost 40,000. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. The American Bar Association recognizes NACDL as an affiliated organization and awards it full representation in its House of Delegates.

NACDL has an interest in ensuring the integrity of the administration of justice in criminal cases, including in post-conviction proceedings in capital cases, and believes that this case presents important issues relating to how federal courts should review state court decisions for reasonableness under the Antiterrorism and Effective Death Penalty Act.

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[1] Each party has consented to the filing of this brief. Pursuant to Rule 37.6, counsel for *amicus curiae* states that no party's counsel authored this brief in whole or in part and that no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

Summary Of Argument

This Court and other state and federal appellate courts have repeatedly noted that the practice by a trial court of adopting party-drafted orders wholesale often leads to significant errors and, at best, creates the appearance of unfairness. Yet this practice is common in postconviction proceedings in Alabama capital cases such as this one. Alabama prosecutors typically submit lengthy proposed orders even before the postconviction court has issued an oral decision and before the defendant has submitted a brief. Trial courts adopt these prosecutor-drafted orders verbatim even when they contain flagrant errors and inconsistencies, sometimes within days of their submission by the State. Often the court makes only one, superficial change: the addition of a boilerplate phrase—asserting that the court independently considered the State's assertions—which itself is incorporated verbatim from the State's cover letter at the State's request.

The Alabama post-conviction court ("Rule 32 court") issued two orders in this case that reflect this deplorable practice. The first order adopted the State's submission verbatim, less than two weeks after the State submitted its order and Petitioner Wood submitted a 157-page brief, which the order does not address at all. The court adopted the State's proposed order notwithstanding significant errors of fact relating to trial counsel's failure to investigate a potential mental capacity defense at sentencing. To insulate itself from the claim that it did not conduct an independent review, the court added a boilerplate phrase—that "the Court adopted the proposed order

only after considering all of the evidence [and] the arguments of both parties"—proposed by the State in its cover letter. The second order, following a remand by the state appellate court, adopted the State's proposed factual findings and legal conclusions nearly verbatim, repeating key misstatements from the proposed order asserting that trial counsel investigated a mental health mitigation defense. This prosecutor-drafted order was then adopted in full by the Alabama Court of Criminal Appeals, "[w]ithout any specific discussion or analysis of the findings in the trial court's order." J.A. 610 (Cobb., J., concurring in the judgment).

In light of the erroneous factual assertions in the State's proposed orders and their verbatim adoption by the Rule 32 court, the Eleventh Circuit erred in concluding under 28 U.S.C. § 2254(d) that the state court's determination of the facts was reasonable. The review for reasonableness under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, requires consideration not only of the substance of the state court orders, but also of the procedures by which they were adopted. In this case, the state court orders deserved greater scrutiny than they received in the Eleventh Circuit because they were written by a zealous advocate, not a neutral adjudicator.

Argument

This Court has "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 statements to the record." *Anderson v. City of Bessemer*, 470 U.S. 564, 572 (1985). Federal and state appellate courts have likewise "repeatedly condemned the ghostwriting of judicial orders." *In re Colony Square Co.*, 819 F.2d 272, 275 (11th Cir. 1987).[2] Courts recognize that when judges adopt verbatim proposed findings by litigants, the "quality of

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[2] *See also, e.g.*, *Dole Fresh Fruit Co. v. United Banana Co.*, 821 F.2d 106, 109 n. 2 (2d Cir. 1987) (ghostwritten opinions are "frowned upon"); *Cuthberton v. Biggers Bros., Inc.*, 702 F.2d 454, 458 (4th Cir. 1983) (repeating a previous "admonition" against the practice of adopting proposed orders verbatim); *Ramey Const. Co. v. Apache Tribe of Mescalero Reservation*, 616 F.2d 464, 469 (10th Cir. 1980) ("almost never desirable"); *Amstar Corp. v. Domino's Pizza, Inc.*, 615 F.2d 252, 258 (5th Cir. 1980) ("discouraged"); *In re Las Colinas, Inc.*, 426 F.2d 1005, 1009 & n.4 (1st Cir. 1970) ("courts have not looked with favor upon the practice"); *Bradley v. Md. Cas. Co.*, 382 F.2d 415, 424 (8th Cir. 1967) ("severely criticized"); *Roberts v. Ross*, 344 F.2d 747, 752 (3rd Cir. 1965) ("flies in the face of the spirit and purpose [of the federal rules]"); *Louis Dreyfus & Cie. v. Panama Canal Co.*, 298 F.2d 733, 737 (5th Cir. 1962) ("unfortunate"); *In re Marriage of Nikolaisen,* 847 P.2d 287, 289 (Mont. 1993) ("discourage[d]"); *South Side Lumber Co. v. Stone Const. Co.*, 152 S.E. 2d 721, 724 (W.Va. 1967) (trial court "should not surrender or delegate [its] important function by a mechanical adoption of findings proposed by counsel"); *Pollock v. Ramirez*, 870 P.2d 149, 154 (N.M. Ct. App. 1994) (should be "avoid[ed]").

the judicial decisionmaking suffers." *Id.*[3] And the adoption of prosecutor-drafted orders leads not only to errors, but also to the "utter lack of an appearance of impartiality." *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1373 n.46 (11th Cir. 1997).[4]

Nevertheless, the practice is virtually the norm in Alabama capital postconviction cases and is conducted in a manner that is especially likely to generate errors. Moreover, because the practice affected the state postconviction orders in Wood's case, the

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[3] *See also, e.g.*, *United States v. Forness*, 125 F.2d 928, 942 (2d Cir. 1942) (practice leads to "findings made by the district court [that] are not supported by the evidence and not substantially in accord with the opinion"); *Harrigan v. Glichrist*, 99 N.W. 909, 993 (Wis. 1904) ("quite liable to lead to bad results"); *E.L.S. v. F.M.S.*, 829 S.W.2d 19, 21 (Mo. Ct. App. 1992) ("Even the most conscientious advocate cannot reasonably be expected to prepare a document which would reflect precisely the trial court's view of the evidence.") (quotations and citations omitted); *Kaechele v. Kaechele*, 594 N.E.2d 641, 647 (Ohio Ct. App. 1991) ("breeds error and reversal").

[4] *See also, e.g.*, *Schmidkunz v. Schmidkunz*, 529 N.W.2d 857, 858 (N.D. 1995) ("fail[s] to foster the appearance of fairness and impartiality"); *Safety Natural Cas. Co. v. Cinergy Corp.*, 829 N.E.2d 986, 993 n. 6 (Ind. App. 2005) ("weaken[s] our confidence . . . that the findings are the result of considered judgment by the trial court"); *Schallinger v. Schallinger*, 699 N.W.2d 15, 23 (Minn. Ct. App. 2005) ("raises the question of whether the court independently evaluated the evidence"); *Makino, U.S.A., Inc. v. Metlife Capital Credit Corp.*, 518 N.E.2d 519, 526 (Mass. App. Ct. 1988) (raises "a gnawing doubt . . . about how much the judge injected his own intelligence into the process"); *Krupp v. Krupp*, 236 A.2d 653, 655 (Vt. 1967) (may cause court to be "charged with overlooking the proper performance of its judicial function").

Eleventh Circuit should have taken it into account in evaluating under AEDPA the reasonableness of the state court's findings.

I. The Verbatim Adoption of Proposed Orders is Typical in Alabama Capital Postconviction Cases and Produces Serious Flaws in the Resulting Orders.

Like other courts, the Alabama Court of Criminal Appeals has cautioned that "courts 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). Indeed, the court has warned that "[i]n a capital case," "wholesale adoption of a draft prepared by the state gives rise to a legal issue of whether the findings and conclusions are in fact those of the court." *Williams v. State*, 627 So. 2d 985, 993 (Ala. Crim. App. 1991).

Despite these warnings, the verbatim adoption of proposed orders is common practice in postconviction proceedings in Alabama capital cases.[5] Moreover, the

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[5] *See Slaton v. State*, 902 So. 2d 102, 107 (Ala. Crim. App. 2003) (trial court "adopt[ed] the State's proposed order as its own"); *McGahee v. State*, 885 So. 2d 191, 229 (Ala. Crim. App. 2003) (trial court adopted the State's proposed order "without making significant modifications"); *Hamm v. State*, 913 So. 2d 460, 475 (Ala. Crim. App. 2002) ("the [trial] judge adopted the order drafted by the State"); *Dobyne v. State*, 805 So. 2d 733, 741 (Ala. Crim. App. 2000) (the findings of fact and conclusions of law of the trial court were "initially drafted by the State"), *aff'd*, 805 So. 2d 763 (Ala. 2001); *Lawhorn v. State*, 756 So. 2d 971, 977 (Ala. Crim. App. 1999) (trial court "adopt[ed] verbatim the state's findings of fact and conclusions in its order"); *Jones*

process by which proposed orders are adopted raises even greater concerns that they do not reflect independent judgment or analysis by the courts.

A. Comparison of proposed and actual orders in Alabama capital postconviction proceedings suggests that trial courts do not meaningfully review the State's proposed orders before adopting them verbatim. When proposed orders have been adopted by a trial court, the Alabama Court of Criminal Appeals has looked for "enough differences to convince [it] that the opinion and order represent[ed] the true findings of the [trial] court." *Grayson v. State*, 675 So. 2d 516, 519 (Ala. Crim. App. 1995). The court has distinguished such cases from those "where the judge merely 'uncritically accepted' and acquiesced in the findings of the prevailing party." *Thompson v. State*, 615 So. 2d 129, 132 (Ala. Crim. App. 1992) (quotations omitted).

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v. State, 753 So. 2d 1174, 1180 (Ala. Crim. App. 1999) (the "findings and conclusions of the trial court . . . were initially drafted by the State"); *Grayson v. State*, 675 So. 2d 516, 519 (Ala. Crim. App. 1995) (trial court "adopt[ed] the State's brief almost verbatim as the court's opinion and order"); *Hallford v. State*, 629 So. 2d 6, 8 (Ala. Crim. App. 1992) (trial court "adopted the state's opinion and order"); *Bell v. State*, 593 So. 2d 123, 126 (Ala. Crim. App. 1991) (trial court "adopt[ed] verbatim the proposed order tendered by the state"); *Hubbard v. State*, 584 So. 2d 895, 900 (Ala. Crim. App. 1991) (trial court's order was "substantially similar" to the State's proposed order); *Morrison v. State*, 551 So. 2d 435, 436 (Ala. Crim. App. 1989) (trial court's order was a "wholesale adoption of the State's proposed findings of fact and conclusions of law").

But the norm in Alabama capital postconviction cases is for the trial court to adopt the proposed order verbatim or nearly verbatim. According to an analysis conducted by Alabama's Equal Justice Initiative in 2003, in seventeen of the most twenty recent capital postconviction cases (as of 2003), "the trial judge adopted verbatim or almost verbatim an order denying or dismissing the Rule 32 petition which was written by the State." Decl. of Aaryn M. Urell ¶ 4, *Barbour v. Campbell*, No. 01-S-1530-N (M.D. Ala. Aug. 28, 2003). Since then, the practice has continued unabated. *See, e.g.*, *Broadnax v. State*, No. CC-96-5162.60 (June 14, 2005); *Barksdale v. State*, No. CC-96-03 (Oct. 6, 2005); *Ferguson v. State*, No. CC-97-343.61 (Oct. 18, 2006); *Dunaway v. State,* Nos. CC-97-75.60, 76.60 (Dec. 14, 2006); *Jackson v. State*, No. CC-1997-2300.60 (Jan. 26, 2007); *Scott v. State*, Nos. CC-00-840.60, 841.60, 842.60 (July 30, 2007); *Borden v. State*, No. CC-93-228.60 (Jan. 20 2009); *Miller v. State*, No. CC-99-792.60 (May 5, 2009).[6]

These proposed orders are typically submitted by the State *before* the court has issued even a preliminary ruling and before the defendant has submitted a brief. In some cases, the State's proposed order is adopted verbatim before the defendant has filed any brief at all. *See, e.g.*, *Borden v. State*, No. CC-93-228.60; *Broadnax v. State*, No. CC-96-5162.60; *Ferguson v. State*, No. CC-97-343.61.

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[6] All proposed and final orders and related documents from other Alabama cases cited in this brief are on file with counsel for amicus.

These proposed orders typically exceed 50 pages and sometimes approach or exceed 100 pages. *See, e.g.*, *Hamm v. State*, No. CC-87-121.60 (89 pages); *Guthrie v. State*, No. CC-88-112.60 (97 pages); *Grayson v. State*, No. CC-94-3700.60 (156 pages). Yet they are often adopted verbatim less than two weeks after submission and have been adopted in as little as one day. *See, e.g.*, *Kuenzel v. State*, No. CV-93-351 (one day); *Maxwell v. State*, No. CC-97-342.60 (five days); *Broadnax v. State* (six days); *Ferguson v. State*, No. CC-97-343.61 (eight days); *Borden v. State*, No. CC-93-228.60 (eleven days); *Flowers v. State*, No. CC-97-20.60-EWR (two weeks).

Although drafted by State prosecutors, these proposed orders frequently invoke the trial court's unique experience or "events within the [court's] personal knowledge." *Flowers v. State*, No. CC-97-20.60-EWR, at 1. In one case, the proposed and final orders invoke the trial judge's personal experience as a practicing attorney as a basis for rejecting the testimony of the defendant's expert witness: "Prior to service on the bench, this Court also had been a practicing attorney for a number of years in Alabama. Whereas Mr. Conner [the defendant's expert] has not been involved in the trial of any case, including capital cases, in Alabama, this Court has, both as an attorney and on the bench." *Barksdale v. State*, No. CC-96-03, at 9.[7]

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[7] *See also, e.g.*, *Maxwell v. State*, No. CC-97-342.60, at 19 (rejecting contention about the content of the prosecutor's closing statement on the ground that the judge "has reviewed the entire record at trial, including all closing arguments of counsel")

In other cases, the verbatim-adopted orders contain personal attacks against defense counsel. In *Grayson*, for instance, the trial court adopted verbatim the prosecutor's assertion that the petitioner "wastes this Court's time" with a claim that is "frivolous" and "misleading"—and also adopted verbatim the prosecutor's warning that "[c]ounsel for petitioner is admonished to refrain from such conduct when appearing before this Court in the future." *Grayson v. State*, No. CC-94-3700.60, at 141–42 (proposed and final orders).[8]

Moreover, it sometimes unclear whether the trial court has reviewed the proposed orders at all. The trial courts' orders sometimes contain dozens of typographical errors identical to those found in the proposed orders submitted by the State. *See, e.g.*, *Dunaway v. State*, Nos. CC-97-75.60, CC-97-76.60

(proposed and final orders); *Melson v. State*, No. CC-1994-925.60, at 11, 43 (dismissing ineffective assistance of counsel claim "[b]ased on the court's observation of trial counsel"—and acknowledging that "[t]his judgment was submitted to this Court by the State of Alabama as a proposed Order");

[8] The State in *Grayson* appears to have recognized that the trial court might not meaningfully review the proposed order, specifically alerting the trial court to delete portions of the order that it did not agree with: "Finally, the State calls this Court's attention to the language on pages 141–42 of the proposed order dismissing Claim VI(A). The admonishment directed towards opposing counsel is appropriate only if this Court takes the same offense at this type of incomplete, misleading pleading as taken by the State. If not, this language should be struck from the proposed order." Letter from James R. Houts, Asst. Att'y Gen., to Michael W. McCormick, Circuit Judge (Feb. 5, 2004).

(proposed and final orders). In several cases, the trial court's final order is called a "Proposed" order. *Hamm v. State*, No. CC-87-121.60 (proposed and final orders); *Borden v. State*, No. CC-93-228.60 (proposed and final orders); *Maxwell v. State*, No. CC 97-342.60 (proposed and final orders). In *Grayson*, the court adopted verbatim an order that included an erroneous reference to a different petitioner in a case from a different county. *Grayson v. State*, No. CC-94-3700.60, at 10 (proposed and final orders). And in *Dunaway*, the trial judge signed a proposed order over a misspelling of his own name. *Dunaway v. State*, Nos. CC-97-75.60, CC-97-76.60, at 110 (proposed and final orders).

B. Efforts by state prosecutors to create the appearance of more searching review by the Alabama postconviction courts have elevated form over substance. In *Hallford v. State*, 629 So. 2d 6 (Ala. Crim. App. 1992), the trial court adopted the State's proposed order but included in its opinion the following statement: "The adoption of this order is based on the Court's own evaluation of the evidence and law in the case." *Id.* at 8 (quotations and emphasis omitted). The Court of Criminal Appeals distinguished *Hallford* from "a situation . . . where the trial court merely adopted verbatim the proposed order of the State." *Id.*[9]

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[9] *See also, e.g.*, *Cade v. State*, 629 So. 2d 38, 40 (Ala. Crim. App. 1993) ("In his order, the trial judge stated that he had independently evaluated each of the appellant's allegations; and that he had specifically addressed the ineffective assistance of counsel claim in the order.").

The State has responded to these decisions by suggesting, in its cover letter, that the Rule 32 court add a boilerplate statement that "the Court adopted the proposed order only after considering all of the evidence" and "the arguments of both parties." In *Borden v. State*, No. CC-93-228.60, for instance, the State advised the Rule 32 judge: "Should the Court adopt the State's proposed order dismissing the Rule 32 petition in substantially the same form as it was submitted, the State respectfully requests that the Court add a paragraph at the conclusion of the order that establishes that the Court adopted the proposed order only after reviewing the record, the supporting affidavits [sic] and finding that the State's proposed order correctly represents the findings and conclusions of the Court." Letter from David Clark, Asst. Att'y Gen., to Hon. Philip Reich (Jan. 17, 2002). The addition of this boilerplate disclaimer is often the only change that the Rule 32 court makes to the State's proposed order.

In some cases the State goes to even greater lengths to create the appearance of independent review. In *Grayson*, the State specifically advised the trial court "to strike the word 'proposed' from the title before adopting the State's proposed order." "Such a change," suggested the State, "will allow any reviewing courts to determine that this Court reviewed this order and had an opportunity to make any changes deemed necessary by the Court." Letter from James R. Houts, Asst. Att'y Gen., to Judge Michael W. McCormick (Feb. 5, 2004).

Boilerplate language, however, cannot change the actual circumstances underlying the adoption of

these orders: a judge adopts a lengthy order verbatim, within days of its submission, and without addressing the defendant's written arguments. In these circumstances, a reviewing court must "stretch nearly to the breaking point the presumption that the findings entered by the court were in fact the court's own findings." *Phillips v. Phillips*, 464 P.2d 876, 878 (Colo. 1970).

II. The Eleventh Circuit Erred in Accepting as Reasonable Erroneous Factual Determinations In The Trial Court's Orders That Were Adopted Verbatim From The Proposed Orders Drafted by State Prosecutors.

The state-court orders to which the Eleventh Circuit deferred were drafted almost entirely by the State, and these orders appear to have received little consideration by the state courts themselves. The orders adopted verbatim erroneous factual assertions in the State's proposed orders relating to trial counsel's failure to investigate a mental capacity defense at sentencing. In evaluating, under 28 U.S.C. § 2254(d), whether the state court's determination of the facts and application of the law was unreasonable, the Eleventh Circuit should have considered not only the substance of the state court's findings, but also the process by which they were made. Under the appropriate level of scrutiny, the state-court orders cannot stand.

A. On November 30, 1999, Wood filed a timely petition, under Alabama Rule of Criminal Procedure 32, challenging his conviction and death sentence.

Among other things, Wood argued that trial counsel rendered ineffective assistance during sentencing because counsel failed to investigate and present evidence of his impaired mental functioning. *See* J.A. 212–54.

The Rule 32 court rejected Wood's ineffective-assistance claim in orders drafted by the State prosecutor. The orders' key findings on that claim were adopted nearly verbatim from the State's proposed orders. The Alabama Court of Criminal Appeals ultimately adopted those findings in full.

1. *The First Order*. After an evidentiary hearing, the State submitted a 73-page proposed order. *See* Pet'r Objection to This Court's Adoption of the State's Proposed Final Order (Dec. 13, 2001) ¶ 3. Wood subsequently filed a 157-page brief. Br. in Support of the Claims Raised in Pet'r Second Amended Petition (Nov. 16, 2001).

The state's proposed order was accompanied by a diskette and accompanying letter. In that letter, the State advised: "There are several places in the proposed order where the State asks the Court to make findings based on personal knowledge or experience. Obviously the State of Alabama can only guess as to what personal knowledge or experience the Court has to draw from." Letter from James R. Houts, Asst. Att'y Gen., to Hon. Thomas E. Head, III (Nov. 14, 2001).

At the time the State submitted its proposed order, the trial court had not yet made even an oral ruling, Wood had not yet submitted a brief, and the

trial judge had provided no insight into the extent of his "personal knowledge." Yet the State's letter recognized the likelihood that the trial court would adopt the State's proposed order verbatim, and sought to create the appearance that the trial court had conducted independent review. The State's letter suggested: "[I]f the Court should adopt the State's final order in substantially the same form as it is submitted, the State of Alabama respectfully requests that the Court add a section in the order that notes that the Court adopted the proposed order only after considering all of the evidence, the arguments of both parties, and finding that the State's proposed order correctly represents the findings and conclusions of the Court." *Id.*

On November 27, 2001, the trial court adopted the State's proposed order—verbatim—less than two weeks after receiving the parties' submissions. Pet. App. 154a–226a; *see also* Pet'r Objection to This Court's Adoption of the State's Proposed Final Order (Dec. 13, 2001) (objecting on the ground that "[t]his Court's order was identical to the State's proposed order"). The judge did not elaborate on the basis for the "personal knowledge" or "experience" that the State invoked. And neither the proposed order nor the identical final order addressed any of the specific arguments raised in Wood's 157-page brief.

The final order did add, however, the boilerplate language proposed by the State in its cover letter to create the appearance of independent review. *See* Pet. App. 226a ("The Court adopts the State's proposed final order as submitted only after having considered the pleadings, all of the evidence, the

arguments of both parties, and finding that same correctly represents the findings and conclusions of the Court.").

The trial court's order, adopted verbatim from the State's submission, contained significant erroneous factual assertions. For instance, the trial court erroneously stated that "the record also shows that trial counsel investigated a potential mental health defense, but decided against presenting it." Pet. App. 201a. Yet the evidence presented during the hearing established that beyond an initial evaluation of Wood's competency to stand trial—which found that Wood was "functioning, at most, in the borderline range of intellectual functioning," J.A. 328—trial counsel did not investigate Wood's mental impairment or his mental capacity more generally.[10] To the contrary, Wood's trial counsel informed the trial court on the morning of the sentencing hearing that beyond the competency report, "[n]o further investigation ha[d] been done" and that Wood's mental impairments "need[ed] further assessment." J.A. 12.

2. *The Second Order.* On April 25, 2003, the Alabama Court of Criminal Appeals vacated the first order and remanded for additional testimony. J.A.

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[10] *See* J.A. 284–85 (trial counsel did not request further psychological evaluation from competency expert); Tr. 121, Aug. 22, 2001 (Wood's sister did not meet with trial counsel until immediately before sentencing hearing); Tr. 171-72, Sept. 18, 2000 (Wood's other sister not contacted by trial counsel until the date that Wood was convicted, and was not asked to testify on his behalf at sentencing); J.A. 267-68 (trial counsel did not speak with Wood's teachers and failed to obtain his academic records).

369–90. After the hearing on remand, both the State and Wood submitted proposed orders to the trial court. *See* State's Proposed Final Order (Sept. 12, 2003); Pet'r Proposed Final Order (Sept. 15, 2003). Less than two weeks later, the trial court issued a final order. *See* Pet. App. 227a–275a. Although the trial court deleted twenty pages of background information from the State's proposed order, the State's proposed factual findings and legal conclusions were adopted nearly verbatim. *See id.*

In adopting the State's proposed order, the trial court again made erroneous statements—drafted by the State—about trial counsel's investigation of a mental capacity defense. Adopting the State's proposed language verbatim, the court stated: "Based on their investigation and the detailed information they had in their possession, Wood's counsel made a reasonable judgment that another mental evaluation was not necessary." Pet. App. 271a. Not only did the testimony from the first evidentiary hearing refute this assertion (as discussed above), but the second hearing featured two additional witnesses who *confirmed* that Wood's trial counsel had not conducted the investigation necessary to make such a judgment. *See* J.A. 405-06 (Wood's special education teacher never contacted by Wood's trial counsel); J.A. 416-17 (another of Wood's special education teachers never contacted by Wood's trial counsel).

3. *The Decision of the Court of Criminal Appeals.* The findings, drafted by the State and adopted nearly-verbatim by the trial court, were then adopted in turn by the Alabama Court of Criminal Appeals. The Court of Criminal Appeals stated that

the trial court "made extensive findings concerning the appellant's contentions that he is mentally retarded and that his attorneys rendered ineffective assistance by not developing and presenting evidence that he is mentally retarded." J.A. 593. Without any further analysis or discussion, the Court of Criminal Appeals stated that "[t]he record supports those findings, and we adopt them as part of this opinion." J.A. 593–94; *see also* J.A. 605 ("We agree with the circuit court's findings, conclude that they are supported by the record, and adopt them as part of this opinion."); J.A. 607 ("As set forth above, the [trial] court found that the appellant's attorneys rendered effective assistance at trial and on direct appeal."). The Court of Criminal appeals also rejected Wood's argument that the trial court "improperly adopted verbatim the State's proposed order." J.A. 608–09.

Judge Cobb, concurring in the result, observed that the majority had adopted the trial court's findings without any independent discussion and analysis: "[I]n a case involving review of post-conviction proceedings in a capital murder case in which the death penalty was imposed, discussion and analysis of the trial court's findings of fact and conclusions of law are necessary." J.A. 610. Judge Cobb faulted the majority for affirming "[w]ithout any specific discussion or analysis of the findings in the trial court's order" and "without quotation to any of the relevant portions it says the Court adopts." *Id.*

B. The State prosecutors' factual findings and legal conclusions as to Wood's ineffective-assistance claim thus came to the Eleventh Circuit virtually unmodified by any Alabama court. The Eleventh Cir-

cuit nonetheless ignored the "potential for overreaching and exaggeration on the part of attorneys preparing findings of fact," *Anderson*, 470 U.S. at 572, and "[t]he natural tendency of counsel given an opportunity free of adversary constraints to shore up weak points, to gloss over evidence or credibility problems at odds with necessary findings, and to argue inferences in the guise of 'findings,'" *Miller v. Mercy Hosp., Inc.*, 720 F.2d 356, 369 (4th Cir. 1983). Instead, the Eleventh Circuit deferred to the State-drafted findings, including the erroneous assertion that "counsel investigated a potential mental health defense, but decided against presenting it." Pet. App. 41a (quoting first Rule 32 order).

As this Court has previously observed, "[e]ven in the context of federal habeas, deference does not imply abandonment or abdication of judicial review." *Miller-El v. Cockrell*, 537 U.S. 322, 340–41 (2003). Especially given the manner in which the state court orders were prepared, they deserved greater scrutiny than the Eleventh Circuit gave them. This Court has observed that a trial court's failure to craft its own findings of fact "add[s] considerably" to the task of reviewing of the record. *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 616 n. 13 (1974). Federal and state appellate courts have similarly recognized that when a trial judge "abdicate[s] to a party his duty to provide a reasoned explanation for his decision and merely copies submitted proposals," the court should "check the adopted findings against the record with particular, even painstaking care." *Berger v. Iron Workers Reinforced Rodmen Local 201*,

843 F.2d 1395, 1404, 1408 (D.C. Cir. 1988) (internal citation and quotation marks omitted).[11]

Meaningful review of party-drafted findings is required even under the deferential standards of AEDPA. Section 2254(d) requires reviewing courts to assess whether the state court's decision "involved an unreasonable application of[] clearly established Fed-

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[11] *See also, e.g.*, *Sealy, Inc. v. Easy Living, Inc.*, 743 F.2d 1378, 1385 n. 3 (9th Cir. 1984) ("special scrutiny"); *Cuthbertson*, 702 F.2d at 459 (4th Cir. 1983) ("less weight and dignity" (internal citation and quotation marks omitted)); *EEOC v. Fed. Reserve Bank*, 698 F.2d 633, 639-42 (4th Cir. 1983) ("careful scrutiny"), *rev'd on other grounds sub nom. Cooper v. Fed. Reserve Bank*, 467 U.S. 867 (1984); *Domino's Pizza,* 615 F.2d at 258 (district court's "lack of personal attention to the factual findings" will be taken "into account"); *Photo Elecs. Corp. v. England*, 581 F.2d 772, 777 (9th Cir. 1978) ("more careful scrutiny"); *James v. Stockham Valves & Fittings Co.*, 559 F.2d 310, 314 n.1 (5th Cir. 1977) ("more confident in concluding that important evidence has been overlooked or inadequately considered when factual findings were not the product of personal analysis and determination by the trial judge"); *Flowers v. Crouch-Walker Corp*., 552 F.2d 1277, 1284 (7th Cir. 1977) ("critical view"); *Las Colinas,* 426 F.2d at 1010 ("most searching examination for error"); *Louis Dreyfus*, 298 F.2d at 739 ("doubt is cast"); *In re Sabrina M.*, 460 A.2d 1009, 1013 (Me. 1983) (when a trial court adopts proposed findings verbatim, the Supreme Court of Maine will "closely scrutinize such findings to determine whether the trial court has adequately performed its judicial function"); *Cormier v. Carty*, 408 N.E.2d 860, 863 (Mass. 1980) ("findings which fail to evidence a 'badge of personal analysis' by the trial judge must be subjected to stricter scrutiny" and courts "will be more likely in a close case to disregard a finding, or remand for further findings where the judge has neither personally prepared the findings, nor 'so reworded a submission by counsel that it is clear that the findings are the product of his independent judgment'" (citations omitted)).

eral law" and whether the state court's decision was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). Both in the context of AEDPA and in other types of criminal proceedings, a determination of "reasonableness" depends not only on the substance of the underlying ruling or finding, but also on the adequacy of the process that produced it. *See, e.g.*, *Gall v. United States*, 552 U.S. 38, 128 S. Ct. 586, 597 (2007) (review of sentence for reasonableness includes determination that sentencing decision was "procedurally sound"); *Drake v. Portuondo*, 321 F.3d 338, 345 (2d Cir. 2003) (because the petitioner's motion was "summarily denied" without a hearing, Section 2254(e)(1)'s presumption of correctness did not apply).[12]

The findings of the Alabama courts in this case were the work not of the courts themselves but of the prosecutors, whose proposed orders squarely contradicted the record yet were adopted virtually automatically. Given the factual errors in the state court

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[12] *See also, e.g.*, *Taylor v. Maddox*, 366 F.3d 992, 999 (9th Cir. 2004) (habeas petitioner may challenge a conviction under Section 2254(d)(2) on the grounds that "the process employed by the state court is defective"); *Mayes v. Gibson*, 210 F.3d 1284, 1289 (10th Cir. 2000) (if there was no "full, fair, and adequate hearing in the state court," the presumption of correctness does not apply); *see also Valdez v. Cockrell*, 274 F.3d 941, 968 (5th Cir. 2001) (Dennis, J., dissenting) (Because "the state habeas judge did not read the trial transcript, thus depriving [petitioner] of a full and fair hearing," the state court did not "render[] a decision that was based on a reasonable 'determination of the facts in light of the evidence presented.'") (citations omitted).

orders and the circumstances under which those orders were drafted and adopted, this Court should hold that the state court's determination—that trial counsel investigated a mental capacity defense at sentencing and made a reasonable judgment not to pursue it further—was unreasonable.

Conclusion

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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