

## **But Does He Deserve the Death Penalty?**

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Many of the facts about the crime are not in dispute.

At around 5:45 p.m. on December 1, 1995, Julie Rhodes was returning from dinner with her grandmother to her cashier's job at the Dollar General Store at the Alexander City Mall, in east-central Alabama. Julie was 19, the only child of a lower-middle-class couple that managed to keep their heads above water in a slow, and some said dying, town. She was driving her boxy old Nissan, with loud rap music playing on its tape deck. The town's annual Christmas parade was starting to draw spectators, and to close some roads.

In the mall's lot, as she was parking her car, Julie was approached by Tony Barksdale, a gregarious and handsome 18-year-old black man originally from the Washington, D.C., area. Tony was looking for someone to drive him and his two white buddies, Jonathan David Garrison and Kevin Hilburn, back to their home in Guntersville, Alabama, some two hours to the north.

Julie had just a few minutes before she had to be back at work. The request for the long trip was preposterous. But Tony persisted. Would she take the three of them to the Knollwood Apartments on the other side of town? She did not have time for that either. How about half way? She relented. The three young men got into her car, and they set out for the drive that should have taken no more than a few minutes, even if it required detouring around the parade.

Tony Barksdale gave directions from the back seat. He had Julie turn right off the Sixth Avenue Extension into Charlotte Lane, a cul-de-sac. She stopped the car to let her three new friends out. At that point Tony produced the 9-millimeter Saturday night special, stolen from a car in Guntersville the night before. David and Kevin ran away into the night, hiding behind a garden shed 50 feet off Charlotte Lane.

What happened next is very much in dispute. The only witnesses to the events were Julie, who was found all but dead later that evening with two bullet wounds in her face and neck, and Tony, who was accused, tried, and convicted of killing her.

There is no doubt that Tony Barksdale fired the fatal shots with the 9-mm. semi-automatic. She lived long enough to be found by a neighbor couple, and to be able to say, "A black man shot me." There is no doubt that as Julie, mortally wounded and bleeding, was attempting to get to help and safety, David and Kevin emerged from the shadows, got back into Julie's car, and the three drove back to Guntersville.

There is no doubt that the three showed off their new car, and offered various and inconsistent explanations for the bullet hole in the driver's-side window. Tony, relatively new to Guntersville, continued to play with his gun, and even the collection of young hooligans with whom the three spent the next few days were uncomfortable about the casual way in which this big-city newcomer was flaunting a dangerous weapon. None of these kids was an angel, and all had had trouble with the law, but a gun wielded by a black guy you just met meant potentially bigger trouble than any of them knew.

It was only a few days before someone's curiosity was sufficiently piqued to mention this strange set of circumstances to a parole officer, who happened to have heard about the unsolved murder in Alexander City of a teenaged girl, whose stolen car looked very much like the one now being driven around Guntersville. The trio were arrested, and it took little intense interrogation to get them to confess to the crime.

Tony Barksdale admitted that he was the triggerman. He told the police that he had removed the semiautomatic from his pocket as Julie stopped her car in Charlotte Lane. But he said that the shooting was an accident. He was trying to unload the gun, he said, and it jammed. Trying to force the slide back, he hit it with the flat of his hand, and the gun went off. Julie was shot. Tony said he had no idea how the second round came to be fired.

All three were arrested, and the Alexander City Police went about gathering their evidence and talking to their witnesses. The three were locked up in Dadeville, the Tallapoosa County seat. Within a few days of their transfer to Dadeville, a fight in the lockup resulted in Kevin Hilburn being strangled to death by a cellmate.

Both of the surviving defendants were charged with capital murder. Neither could afford a lawyer, and Thomas Goggans, Esq., of Montgomery was appointed to represent Barksdale. Goggans was a capital trial veteran. His track record was decent, for Alabama, and his reputation was good. It seemed as if Tony Barksdale had caught a break, for once.

I say "for once" because many of the facts concerning Tony Barksdale are also not in dispute. Born in Washington and raised – if it can be said that he was raised – in the Virginia suburbs, Tony had a violent, abusive father and a drug-addicted mother. Their marriage did not last much beyond Tony's birth. For the first ten years of his life he was shuttled between their homes, although he was wanted in neither. He witnessed acts of violence, and learned the law and the lore of the streets.

When he was 15, Tony was an unarmed participant in the robbery of a pizza deliveryman in Alexandria. His brother Tyrone was the gunman, and a third boy was also involved. All three were tried and sentenced as adults. Tony served nearly three years in adult prison in Virginia, where he earned not one but two GEDs. After his release, he decided to try for a new start, following a friend who had moved to Alabama.

Tony Barksdale was tried and convicted for the murder of Julie Rhodes in 1996, and was sentenced to death. His lawyer put on a single witness during the guilt stage of the trial, and none at the penalty stage. The entire defense presentation to the jury on punishment, including the closing argument – that is, the entirety of the case asking the jury to spare the defendant's life – takes up some three pages of transcript, and lasted no more than five or six minutes.

What, one might well wonder at this stage, was there to say? There was plenty to say, and it went unsaid. The principal witness against Tony Barksdale was David Garrison, his accomplice on December 1, 1995. Garrison took a plea in exchange for his testimony, and he proceeded to tell the jury, among other things, about how Tony had made Julie beg for her life before killing her in cold blood.

The only problem with Garrison's account is that it cannot be true. According to his own statement to the police, at the time of the supposed "begging," Garrison was 50 feet away from the road, and some 100 feet from the car. The windows were rolled up, and the

rap cassette was still on the player. There is no way Garrison could have seen what he said he saw, or heard what he said he heard. Yet the jury never knew any of this, because Tommy Goggans failed to ask the witness these questions.

It gets worse. The one witness the defense did call was a weapons expert, who reported in writing that, in one of his tests the slide of the semiautomatic jammed in precisely the way that Tony had said it did. Yet the jury never knew this either, since, incredibly, defense counsel failed to ask his own witness about it, much less to introduce his report into evidence.

And this: the State went to the jury asking for the death penalty largely based on the statutory “aggravator” of the earlier conviction of a violent crime, the robbery in Alexandria. Yet the jury never learned that Tony had not been armed during that crime. The files, readily available from the Alexandria Public Defender, made clear that Tony’s role was as the “lure,” who committed no act of violence. Yet the jury never knew this, because his counsel did not bother to obtain those files.

I began representing Tony Barksdale pro bono in 2002, just after his State habeas petition had been filed by the Equal Justice Institute. I was then a partner at Patton Boggs, which had been tremendously supportive of my work in a number of other death penalty cases over the previous decade. In the fall of last year, I moved to Greenberg Traurig, and brought with me some paying clients, . . . and Tony Barksdale. Greenberg’s commitment to the case has been as enthusiastic as one would expect of the great national and international firms. The firm has permitted me to bring on board a litigation associate, Ross Eisenberg, and Willa Perlmutter, of counsel to Patton Boggs, remains second chair.

In June of this year, the three of us presented our habeas evidence to Judge Tom Young in Tallapoosa County. We met the State’s usual arguments about procedural waivers and defaults. But just as we were getting ready to try our case, the Supreme Court announced its decision in *Rompilla v. Beard*. In that case, from Pennsylvania, the Court reinforced the obligation of defense counsel in capital cases to do everything possible to develop theories and facts in mitigation of sentence. They must investigate, even if their client cannot or will not help them. In particular, where the State’s proposed aggravator is an earlier conviction, they must delve into the facts of that case. And their assistance is constitutionally ineffective if they fail to do these things.

The Supreme Court has given us hope that Tony Barksdale’s life may be spared, despite his own lawyer’s failure to do anything to help him at trial. His is, of course, only one story among hundreds of how poorly served by the legal system have been the residents of our nation’s death rows.

Our proposed findings of fact and conclusions of law are due in September, after which our team is resolved to take the case to whatever level we must to ensure that Tony Barksdale is treated fairly by the legal system, at last.

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