No. 19-7127

IN THE SUPREME COURT OF THE UNITED STATES

PHILLIP WAYNE TOMLIN,
Petitioner,

v.

TONY PATTERSON, Warden,
Holman Correctional Facility,
Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Under Alabama's 1975 capital murder statute, a defendant was guilty of capital murder if he committed a murder that included one of the aggravating factors listed in Section 2 of the act. A conviction carried a punishment of either life without parole or death. Before a defendant could receive the death penalty, the trial court had to find at least one aggravating factor from Section 6 of the act.

Phillip Tomlin was indicted and convicted of a crime that included one of the Section 2 aggravating factors, but not a Section 6 factor. Tomlin thus received a sentence of life without parole. Tomlin argued that this sentence violated the Due Process Clause, but state courts rejected the claim. Under AEDPA review, the district court held that the final state court's determination was not an unreasonable application of clearly established federal law.

Relief for Tomlin under AEDPA would be appropriate only if there could be "no 'fairminded disagreement' on the question" of the state court's application of clearly established Supreme Court precedent. *White v. Woodall*, 572 U.S. 415, 427 (2014). Yet Tomlin admits that the issue before the state court was a "debatable legal question," Pet.4, that courts have left "open," Pet.i. Both the district court and Eleventh Circuit denied Tomlin's request for a certificate of appealability. Did they err?[1]

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[1] In accordance with this Court's Rule 15.2, the State notes that Tomlin's question presented states that *Magwood v. Warden*, 664 F.3d 1340 (11th Cir. 2011), was decided "under the highly deferential AEDPA standard." That is incorrect. *Magwood* was decided under a *de novo* standard of review. *Magwood*, 664 F.3d at 1347 (noting "the claim is reviewed *de novo*"). Tomlin incorrectly asserts that *Magwood* was decided under the AEDPA standard at least six other times. *See* Pet.ii, 4, 8, 9, 20, 22.

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INTRODUCTION

Tomlin's petition presents only a narrow request for error correction, and his petition confirms that the Eleventh Circuit did not err in denying his request for a certificate of appealability. Tomlin's claim relates to Alabama's now-superseded 1975 capital punishment statute. The 1975 Act contained two sets of aggravating factors. Section 2 listed aggravating factors that made a defendant eligible to be convicted of capital murder, which carried a penalty of either life without parole or death. Section 6 listed aggravating factors, at least one of which the trial court needed to find to impose the death penalty. In violation of Section 2(j), Tomlin intentionally killed two victims by one act or a series of acts, and thus, under the 1975 Act, he was found guilty of capital murder. Because his conduct did not satisfy any of the aggravating factors in Section 6, Tomlin cannot constitutionally be sentenced to death. But Tomlin is serving a life sentence, not a death sentence. And because Tomlin unquestionably committed capital murder under the 1975 Act, that life-without-parole sentence is constitutional.

Tomlin argues that his sentence is unconstitutional because a different defendant, Billy Joe Magwood, also committed a "capital offense" that was listed in Section 2, but had no corresponding aggravator in Section 6, and the Eleventh Circuit held that Magwood could not be sentenced to death under the 1975 Act because the Act conditioned death sentences on a finding of a Section 6 aggravator. Pet.8. But again, Tomlin's sentence is not similarly flawed; there is no death sentence. And Tomlin neglects to mention the relief that Magwood received—a sentence of life without parole, which was proper because Magwood committed capital murder under the 1975

Act. Tomlin did too. And his life sentence is proper too. Tomlin was on notice when he killed his victims in 1977 that he could be convicted of capital murder and that, if convicted, the minimum punishment would be life without parole. That sentence does not violate due process.

State courts rejected Tomlin's claim on the merits, and the district court concluded that their determination was not contrary to, nor an unreasonable application of, clearly established precedent of this Court. The district court and Eleventh Circuit then denied Tomlin a COA to further pursue his claim.

That is where this petition comes in. Tomlin admits that the Eleventh Circuit "properly stated [the] rule of law." Sup. Ct. R. 10; *see* Pet.26. He argues only that the court's decision to deny his request for a COA was a "misapplication of [that] properly stated rule of law." Sup. Ct. R. 10. That is not the stuff of cert grants.

But Tomlin's case is weaker still, as he inadvertently admits in his petition that the Eleventh Circuit's decision was correct. A COA should have been granted only if "the District Court's application of AEDPA to petitioner's constitutional claims … was debatable amongst jurists of reason." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). Tomlin argues that a judicial interpretation unexpectedly and retroactively increased his punishment to life without parole and was thus unconstitutional under *Bouie v. City of Columbia*, 378 U.S. 347 (1964). But the Eleventh Circuit case upon which Tomlin almost exclusively relies, *Magwood v. Warden*, 664 F.3d 1340 (11th Cir. 2011), found that "the Supreme Court has not explicitly incorporated the retroactive increase of punishment into its *Bouie* holding." 664 F.3d at 1345. And Tomlin argues

that the law he seeks to apply is still not clearly established even by the Eleventh Circuit. *See* Pet.4, 8, 20, 25, 27. No reasonable jurist could conclude that the state court's decision was contrary to clearly established Supreme Court precedent when, by Tomlin's own admission, the Supreme Court has not clearly spoken to the issue.

And even if Tomlin's proposed rule were clearly established, reasonable jurist would conclude that there is at least "fairminded disagreement" on the question of whether Tomlin's sentence violated due process. *White*, 572 U.S. at 427. Tomlin asserts his due process rights were violated by the retroactive application of an unforeseeable judicial interpretation. But no such judicial interpretation was applied to Tomlin; the plain text of the 1975 Act authorized his sentence of life without parole. The 1975 Act allowed a sentence of life without parole in cases "enumerated and described in Section 2" as long as "the aggravated circumstances enumerated in Section 2 [were] expressly averred in the indictment." Ala. Code §13-11-1. And no one here contests that Tomlin was properly convicted of an offense enumerated in Section 2. Tomlin should have seen this sentence coming when he shot the two victims he found on the side of an interstate exit ramp. No reasonable jurist could find the state court's rejection of Tomlin's due process claim to be beyond fairminded disagreement.

Tomlin's attempt to create a cert-worthy issue through social science is more creative, but no less flawed. Tomlin does not identify any decisions in which courts of appeals have applied different formulations of the COA standard, or a case the suggests that another circuit would have granted his fair notice claim. Yet he claims to have discovered "a breakdown in the COA review process" that "reveals a deepening

circuit split and significant arbitrariness in the COA review process of the Eleventh Circuit along a number of dimensions." Pet.11-12. His primary evidence? A college student's unpublished research paper that compares the COA grant rate of the Eleventh Circuit to that of the First Circuit. *See* Pet.12 (citing App.K). But quasi-social science does not a circuit split make. And even if Tomlin could cite rigorous, peer-reviewed studies showing the Eleventh Circuit to be an outlier in its grant rates, that would not establish that the court is misapplying the COA standard, least of all in this specific case.

Finally, Tomlin's argument (at 28) that his case "[r]aises the [s]ame [q]uestion at [i]ssue in *McKinney*" merits little discussion. In *McKinney* everyone agreed that new rules of constitutional law apply on direct review; the only question was whether McKinney's case was on direct or collateral review. *Compare McKinney v. Arizona*, 140 S. Ct. 702, 708 (2020), *with id.* at 710 (Ginsburg, J., dissenting). Tomlin, however, asks what interpretations of state statutes should have applied to his 2004 resentencing, which everyone agrees happened during direct review. Pet.29-30. Nothing in *McKinney* changes the conclusion that the Eleventh Circuit properly denied Tomlin a COA.

STATEMENT OF THE CASE

A. The Alabama Death Penalty Act of 1975

Tomlin was indicted, tried, and convicted under the 1975 Act.[2] That statute has two types of aggravators: those in Section 2 and those in Section 6 (previously codified at §13-11-2 and §13-11-6, respectively). The "aggravated circumstances enumerated in Section 2" must be "expressly averred in the indictment." Ala. Code §13-11-1. And "the death penalty or a life sentence without parole shall be fixed as punishment only in the cases and in the manner herein enumerated and described in Section 2." *Id.*

While a §13-11-2 aggravator makes the crime capital murder under the 1975 Act, a death sentence requires a corresponding §13-11-6 aggravator. *Id.* at §13-11-4 (requiring the court to find at least "[o]ne or more of the aggravating circumstances enumerated in [§13-11-6]" before imposing a death sentence). Relevant here, committing multiple murders in a single act or series of acts is a §13-11-2 aggravator, §13-11-2(j), but has no corresponding §13-11-6 aggravator.

Two Alabama Supreme Court interpretations of the 1975 Act are relevant here: *Beck v. State*, 396 So. 2d 645 (Ala. 1980), and *Ex parte Kyzer*, 399 So. 2d 330 (Ala. 1981). *Beck* "decided the [1975 Act] required jury participation in the sentencing process, and created the necessary procedures by adding an additional stage to the trial of a capital case." *Magwood*, 664 F.3d at 1345 n.5. *Beck*'s "procedural changes only

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[2] The text of the 1975 Act is found at Appendix J, and all citations to the 1975 Act correspond with that Appendix.

'altered the methods employed in determining whether the death penalty was to be imposed; there was no change in the quantum of punishment attached to the crime.'" App.A at 46 (quoting *Dobbert v. Florida*, 432 U.S. 282, 293-94 (1977)).

Kyzer, on the other hand, did change the "quantum of punishment attached to the crime." In *Kyzer*, the Alabama Supreme Court interpreted the 1975 Act as allowing judges to impose the death penalty if the defendant's crime involved either a §13-11-2 aggravator *or* a §13-11-6 aggravating circumstance. *Kyzer*, 399 So. 2d at 338-39. Thus, under *Kyzer*'s interpretation, a judge could impose a sentence of death for a crime that had a §13-11-2 aggravator but lacked a corresponding §13-11-6 aggravating circumstance. That interpretation contradicted the plain text of the statute, which allowed only a sentence of life without parole for such defendants. Ala. Code §13-11-4 ("[T]he court … may … sentence the Defendant to life imprisonment without parole … [or] death. If the court imposes a sentence of death, … [its] findings … shall at least include the following: (a) One or more of the aggravating circumstances enumerated in Section 6.").

Indeed, the *Kyzer* court admitted as much. *Kyzer*, 399 So. 2d at 337 ("[I]f the trial judge cannot find the existence of an aggravating circumstance other than the [§13-11-2] 'aggravation' averred in the indictment[] [m]ust the trial judge 'refuse to [impose] the death penalty … ?' A literal and technical reading of the statute would answer this inquiry in the affirmative."). And the Alabama Supreme Court later repudiated that interpretation. *Ex parte Stephens*, 982 So. 2d 1148, 1153 (Ala. 2006) ("*Kyzer* conflicts with the plain language of the Alabama Criminal Code. … The

statutory scheme clearly permits the trial court … to consider only those aggravating circumstances listed in [§13-11-6]. … *Kyzer* was incorrect.").

B. The Current Case

Kyzer, however, did not apply to Tomlin's case. His case began on January 2, 1977, when Tomlin shot and killed a man and a woman on the side of an interstate exit ramp in Alabama. App.A at 3. Eventually, he was convicted under the 1975 Act of murdering two people in "one or a series of acts." *Id.* at 4-5; *see* Ala. Code §13-11-2(j). The unanimous jury recommended life without parole, but the judge overrode that recommendation and sentenced Tomlin to death. App.A at 5. In 2003—on direct appeal—the Alabama Supreme Court affirmed Tomlin's conviction but overturned his death sentence, instructing the judge to impose a sentence of life without parole. *Ex parte Tomlin*, 909 So. 2d 283, 287 (Ala. 2003).

In ordering that sentence, the majority did not mention *Kyzer*, much less rely on it. In fact, one judge filed a concurrence that rejected *Kyzer*'s reasoning and stated that the lack of a §13-11-6 aggravating circumstances was an independently sufficient reason why life without parole was the proper sentence. *Id.* at 289 (Johnstone, J., concurring) (explaining that "this death sentence is illegal for the absence of an 'aggravating circumstance[] enumerated in section § 13-11-6'" and concluding that life without parole was, therefore, the appropriate sentence).

After the trial court resentenced Tomlin to life without parole based on the 2003 Alabama Supreme Court opinion, his conviction and sentence became final. Tomlin then filed a state habeas petition, arguing in relevant part that his life-

without-parole sentence violated his right to the due process under the United States Constitution. App.A at 5. The final state-court decision found that argument to be "without merit." *See id.* at 6, 20.

In March 2010, Tomlin filed a 30-claim federal habeas petition. DE1. In his reply brief, he for the first time argued that his sentence violated ex post facto principles. *See* DE19-2:75-81; DE40:3. More than two years later, Tomlin moved to supplement his ex post facto claim, arguing that his sentence violated his right to fair notice under the due process clause. *See* DE22; DE40:3. The State did not respond, and the district court "failed to take into account [Tomlin's] motion to supplement" his claim before dismissing his habeas petition. App.A at 2. Tomlin sought a COA on the unexamined and only partially briefed issue, the Eleventh Circuit granted a COA, and then vacated and remanded so the district court could: "(1) determine whether the ex post facto issues raised in Tomlin's §2254 reply brief were properly before the judge; (2) if so, decide those issues; (3) issue a decision on Tomlin's motion to supplement his §2254 petition; and (4) if the judge grants that motion, decide the ex post facto and due process, fair warning claims raised in Tomlin's proposed supplement." DE40:5-6.

Tomlin's argument relied primarily on *Magwood*, which held—applying a *de novo* standard of review—that *Kyzer* was an unexpected and retroactive judicial rewriting of the 1975 Act. Although the Supreme Court had not explicitly spoken to the issue, the Eleventh Circuit extended *Bouie*'s holding to allow a "fair-warning challenge to a judicial interpretation of a statute that increases [a] punishment from life

to death." *Magwood*, 664 F.3d at 1348. Because "Magwood[] was convicted of an aggravated offense in §13-11-2," his conviction under the 1975 Act stood. *See id.* at 1345. The *Magwood* court, however, held that Magwood's "death sentence violated the fair-warning requirement of the Due Process Clause as it was based on *Kyzer*." *Id.* at 1342-43. It remanded the case, conditionally granting the writ while giving the state court time to cure the constitutional error by resentencing Magwood to life without parole. App.A at 35.

After receiving supplemental briefing on the *Magwood* opinion and Tomlin's fair-notice due-process claim, the district court denied federal habeas relief under AEDPA. *Id.* at 6-7, 46. The district court explained that "the holding in *Magwood* … supported a capital conviction and sentence of life imprisonment without parole in the absence of an identifiable or corresponding §13-11-6 aggravating circumstance." *Id.* at 36. And the district court rejected Tomlin's argument that only *Kyzer* made him eligible for conviction under the 1975 Act. *Id.* at 35-36, 43 ("[T]he plain language of the 1975 Act does not require the application of *Kyzer* for [Tomlin] to be indicted or tried for a capital felony" because a sentence of life without parole "does not require a judge to consider §13-11-6 aggravating circumstances."). Returning to the relevant AEDPA standard, the district court denied relief, holding that at the very least one fair-minded jurist "could agree that the state-court's denial of relief based on the due process right to fair warning is neither contrary to or an unreasonable refusal to extend clearly established Federal law." *Id.* at 46 (citation omitted).

Tomlin then sought a COA from the district court, which the district court denied. App.C at 55. Tomlin then petitioned the Eleventh Circuit for a COA, "challeng[ing] his sentence as an improper retroactive judicial reinterpretation of the 1975 [Act] in violation of his right to fair notice protected by the Due Process Clause of the United States Constitution." App. for an Ext. of Time at 2. The Eleventh Circuit denied that motion "because [Tomlin] ha[d] failed to make a substantial showing of the denial of a constitutional right." App.D. The Eleventh Circuit also denied his motion for reconsideration. App.F.

Tomlin has now petitioned this Court for a writ of certiorari to determine whether the Eleventh Circuit should have granted a COA.

REASONS FOR DENYING THE WRIT

I. The Eleventh Circuit correctly applied the COA standard.

Tomlin's petition asks only that this Court correct a purported misapplication of the COA standard over an exceedingly narrow question of law. Indeed, Tomlin admits that "the Eleventh Circuit in Mr. Tomlin's case phrased its determination that the COA was denied in accordance with the standard—that Mr. Tomlin 'failed to make a substantial showing of the denial of a constitutional right.'" Pet.26 (citations omitted). Tomlin thus is objecting only to an alleged "misapplication of a properly stated rule of law." Sup. Ct. R. 10. But this Court "rarely grant[s]" a cert petition to correct an error. *Id.*

And the Court never grants when, as here, there is no error. To obtain a COA, a prisoner must show that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that

the issues presented were 'adequate to deserve encourage to proceed further.'" *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). That standard "should not be misconstrued as directing that a COA always must issue." *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003). Indeed, "Congress established a threshold prerequisite to appealability … in large part because it was 'concerned with the increasing number of frivolous habeas corpus petitions.'" *Id.*

In a case decided under AEDPA-deference, a court "look[s] to the District Court's application of AEDPA to petitioner's constitutional claims and ask[s] whether that resolution was debatable amongst jurists of reason." *Id.* at 336; *see also Tennard v. Dretke*, 542 U.S. 274, 288 (2004) (explaining that a COA determination in a §2254 case "ultimately must be assessed under the deferential standard required by" AEDPA and that the correct question is whether "[r]easonable jurists … could conclude that the [state-court's] application of [clearly established Supreme Court precedent] to the facts of [the defendant's] case was unreasonable"). This Court has held that the resolution would not be debatable among reasonable jurists if they would agree that at least one fair-minded jurist could agree with the state-court's determination of the petitioner's constitutional claim. *See White*, 572 U.S. at 427 ("The critical point is that relief is available under § 2254(d)(1)'s unreasonable-application clause if, and only if, it is so obvious that a clearly established rule applies to a given set of facts that there could be no 'fairminded disagreement' on the question.").

Thus to succeed on the merits of his claim, Tomlin must show that reasonable jurists could debate whether the district court correctly applied AEDPA in holding

that "fair-minded jurists could agree that the state court's denial of relief based on the due process right to fair warning is neither contrary to or an unreasonable refusal to extend clearly established Federal law to [Tomlin's] claim." App.A at 46 (citation omitted); *see Buck v. Davis*, 137 S. Ct. 759, 774 (2017) ("A 'court of appeals should limit its examination [at the COA stage]' … and ask 'only if the District Court's decision was debatable.'" (first alteration in original) (citation omitted)). But Tomlin does not even argue that reasonable jurists could debate that district-court holding.

Instead, he argues that reasonable jurists could debate the state-court decision, which *precludes* relief under AEDPA and *requires* the denial of a COA on that claim. Additionally, Tomlin argues that the Eleventh Circuit—in an opinion published a year after the final state-court's determination in Tomlin's case—explicitly left open the question of law relevant to his case, which further shows that the state court did not fail to apply any clearly established law as determined by this Court. Accordingly, Tomlin's own petition confirms that reasonable jurists could not debate whether AEDPA precludes relief and that the Eleventh Circuit correctly denied his request for a COA.

Finally, *McKinney v. Arizona*, 140 S. Ct. 702 (2020), has no bearing on this case. *McKinney* dealt with a new rule of constitutional law and asked whether the case was on direct or collateral review. This case deals with statutory interpretation of state law applied during what all agree was direct review. *McKinney* has no bearing on whether a COA should have been granted.

A. Reasonable jurists could not debate that the applicable law was not clearly established by this Court.

The clearly established federal law on which Tomlin focuses is *Bouie v. City of Columbia*, 378 U.S. 347 (1964), as clarified by *Rogers v. Tennessee*, 532 U.S. 451 (1964). In *Bouie*, two African American students who were conducting a sit-in refused to leave a restaurant after the owner posted a no trespassing sign. 378 U.S. at 348-49. They were arrested for and convicted of trespassing. *Id.* The criminal law defined trespass as "entry" into a place "after notice" not to enter. *Id.* at 349. The South Carolina Supreme Court, however, "construed the statute to cover not only the act of entry … but also the act of remaining." *Id.* at 350. This Court held that the state-court's application violated the defendants' due process rights because "a criminal statute must give fair warning of the conduct that it makes a crime." *Id.* This Court explained that "a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language." *Id.* at 352.

This Court analogized "an unforeseeable judicial enlargement of a criminal statute, applied retroactively" to an ex post facto law, which is forbidden by the Constitution's ex post facto clause. *Id.* at 353. That clause prohibits the *legislature* from passing a law that applies to past conduct if the law: (1) criminalizes new conduct; (2) "aggravates a crime, or makes it greater than it was, when committed"; (3) increases a crime's potential punishment; or (4) alters evidentiary rules to the defendant's detriment. *See Calder v. Bull*, 3 U.S. 386, 390 (1798). *Bouie* mentioned only the first two categories of ex post facto laws. 378 U.S. at 353. And it only clearly established that

the first category—making innocent conduct criminal—violates the fair-notice requirement of the due process clause. *Id.* at 363.

Since *Bouie*, this Court has clarified that the due process right to fair warning does not make all the ex post facto prohibitions on the legislature applicable against the judiciary. *Rogers*, 532 U.S. at 458-61. This Court explained that "[t]he *Ex Post Facto* Clause, by its terms, does not apply to courts. Extending the Clause to courts through the rubric of due process thus would circumvent the clear constitutional text. It also would evince too little regard for the important … differences between legislating … and common law decisionmaking." *Id.* at 460.

Discussing *Bouie*, the Court agreed that a judicial interpretation violated the due-process right to fair notice if it "attach[ed] criminal penalties to what previously had been innocent conduct," *id.* at 459, or "punish[ed] … conduct that cannot fairly be said to have been criminal at the time the conduct occurred," *id.* at 466. But it held that the argument "that the Due Process Clause incorporates the specific prohibitions of the *Ex Post Facto* Clause as identified in *Calder* … misreads *Bouie*." *Id.* at 458. This Court explained that *Bouie*'s "expansive language … was dicta" and made clear that *Bouie* rested on due process grounds, not its "*ex post facto*-related dicta." *Id.* at 458-59. Neither *Bouie* nor any subsequent decision of this Court went "so far as to incorporate jot-for-jot the specific categories of *Calder* into due process limitations on retroactive application of judicial decisions." *Id.* at 459. Indeed, such an incorporation would "place an unworkable and unacceptable restraint on normal judicial processes." *Id.* at 461.

Therefore, by the time the Eleventh Circuit decided *Magwood*, a year after the final, relevant state-court decision in Tomlin's case, "the Supreme Court ha[d] not explicitly incorporated the retroactive increase of punishment into its *Bouie* holding." *Magwood*, 664 F.3d at 1348. And Tomlin agrees that "this Court has not explicitly incorporated the third category—retroactive increase of punishment—into the Due Process Clause." Pet.24.[3] Thus, under Tomlin's argument, the unconstitutionality of a judicial interpretation that retroactively increases punishment is not clearly established by this Court. Because the law Tomlin seeks to apply to his case is not "clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. §2254(d)(1), Tomlin's claim necessarily fails under AEDPA. Reasonable jurists could not debate whether a lack of clearly established federal law as determined by this Court precludes relief under AEDPA. Therefore, his application for a COA was correctly denied.

Moreover, Tomlin argues that whether *Bouie* applies to punishment increased to less than death is an open question in the Eleventh Circuit.[4] Thus, by his own telling, the law Tomlin argues applies to his federal habeas petition is not clearly

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[3] His assertion that *Magwood* held that the relevant law was "clearly established federal law as determined by this Court," Pet.9, is thus false.

[4] *See, e.g.*, Pet.4 ("[T]he Eleventh Circuit … *explicitly left open* the question of whether its ruling extended to non-death cases such as Petitioner's."); 20 ("Magwood was sentenced to death, Mr. Tomlin [was] sentenced to LWOP—a difference that the court in *Magwood* expressly acknowledged and *intentionally* left open to be decided in future cases … making it clear that *that was still a question to be debated*."). It is important to note that the question that Tomlin asked the Eleventh Circuit to answer was not, as he argues, simply the question of whether *Magwood*'s reasoning extended to Tomlin's case. It was whether the district court had correctly denied relief under AEDPA. Because *Magwood* was decided on *de novo* review, other factors could change the outcome in Tomlin's case, such as the lack of clearly established federal law and the much stricter AEDPA standard of review.

established, not by the Eleventh Circuit, and not by this Court. That admitted lack of clearly established federal law precludes relief under AEDPA; reasonable jurists could not debate that preclusion.

B. Reasonable jurists could not debate that at least one fair-minded jurist could agree with the state-court determination that Tomlin's life-without-parole sentence did not violate due process.

Nevertheless, even if *Bouie* did clearly establish what Tomlin argues has not been clearly established, his COA claim is likely to fail on the merits. Even assuming the Supreme Court had clearly established that judicial interpretations increasing punishment (as opposed to criminalizing conduct) violated the right to fair notice under the due process clause, it is beyond reasonable debate that at least one fair-minded jurist could agree with the state-court's determination that Tomlin was properly sentenced to life without parole.

Although an in-depth discussion of the merits of Tomlin's underlying claim is premature at the COA stage, even a cursory consideration reveals that at least one fair-minded jurist could agree that there was no due process violation—the state-court decision was not unreasonable. *Harrington v. Richter*, 562 U.S. 86, 103 (2011). There can be no *Bouie* violation without an unforeseeable and retroactive judicial interpretation of the 1975 Act that increased Tomlin's punishment. And no such judicial interpretation applied in Tomlin's case. Indeed, he was convicted and sentenced under the plain text of the 1975 Act. No fair-minded jurist could disagree with that conclusion; but at the very least, one fair-minded jurist could agree. And that is enough.

Any criminal who committed an aggravated felony listed in Section 2 could be indicted and convicted under the 1975 Act if the aggravation "enumerated in Section 2 [was] expressly averred in the indictment." Ala. Code §13-11-1. Although the 1975 Act required that the crime meet other criteria before the defendant became death-eligible, *id.* at §13-11-4, the defendant was eligible for life without parole upon conviction, *id.* at §13-11-1 (listing no requirements besides Section 2 aggravation for a sentence of life without parole).

Tomlin admittedly committed an aggravated felony listed in Section 2 of the 1975 Act. *See id.* at §13-11-2(j) ("Murder in the first degree wherein two or more human beings are intentionally killed by the defendant by one or a series of acts."). He, however, was not death-eligible because his crime, like Magwood's, did not have a corresponding §13-11-6 aggravating circumstance. Tomlin, therefore, was sentenced to the only other punishment allowed by the 1975 Act under which he was properly indicted, tried, and convicted: life without parole. *Id.* at §13-11-1. Tomlin's entire argument, thus, fails.

Tomlin argues that "he could only be indicted under the ordinary homicide statute at the time, and the *maximum* sentence he could have received was life *with* the possibility of parole," Pet.27, and that "the same judicial rewriting of the 1975 Act that allowed Mr. Magwood to be sentenced to death allowed Mr. Tomlin to be sentenced to [life without parole]," Pet.23. He is flatly wrong. His first argument boils down to the simple claim that Tomlin's crime was not an aggravated offense under Section 2. But it was. At the time of Tomlin's crime, the "ordinary homicide statute"

covering Tomlin's murders was §13-1-70. Ala. Code §13-1-70 *superseded by* Alabama Criminal Code of 1977, Act No. 607, p.812, §2005 (current version at Ala. Code §13A-6-2) (defining first-degree murder, in part, as "willful, deliberate, malicious and premeditated killing"). A punishment of life without parole or death was authorized if a defendant committed any murder "with proof of its attendant aggravation." *Ex parte Julius*, 455 So. 2d 984, 986 (Ala. 1984). That qualifying "attendant aggravation" can be found at §13-11-2(j). *See* Ala. Code §13-1-1 (allowing "the death penalty or life imprisonment without parole [to] be given" if the "aggravated circumstances enumerated in Section 2 are expressly averred in the indictment"); *see also Baldwin v. Alabama*, 472 U.S. 372, 380 & n.6 (1985); *Julius*, 455 So. 2d at 986. Tomlin's "ordinary homicide"—which is not contested—involved a Section 2 aggravating circumstance, Ala. Code §13-11-2(j)—also not contested. He was thus eligible for a sentence of life without parole.

Tomlin's eligibility for life without parole stemmed from the plain text of the 1975 Act, not any judicial interpretation. His claim that "the same judicial rewriting of the 1975 Act that allowed Mr. Magwood to be sentenced to death allowed Mr. Tomlin to be sentenced to [life without parole]," Pet. 23, is both factually and legally incorrect. The unexpected and retroactive judicial interpretation that made Magwood death-eligible was *Ex parte Kyzer*, 399 So. 2d 330 (Ala. 1981). *Magwood* makes that clear, *see, e.g.*, 664 F.3d at 1342-43 ("Magwood is entitled to habeas relief because his death sentence violated the fair-warning requirement of the Due Process Clause as it was based on *Kyzer*, which was an 'unforeseeable and retroactive judicial

expansion."), and Tomlin's petition agrees, Pet.21-22 (explaining that "Magwood was entitled to habeas relief … because his sentence of death … was based on *Kyzer*").

Factually, the Alabama Supreme Court did not apply *Kyzer* to Tomlin. In fact, the majority never mentioned *Kyzer* in reversing Tomlin's death sentence and explaining why the circuit court must impose a sentence of life without parole. And one justice, in concurrence, expressly repudiated *Kyzer* and argued that "the nullification of [Tomlin's] death sentence [was] necessary for another, independent reason"—*Kyzer*'s illegitimacy. *Tomlin*, 909 So. 2d at 288-89 (Johnstone, J., concurring).

Legally, the Court could not have employed *Kyzer* to "allow[] Mr. Tomlin to be sentenced to [life without parole]," Pet.23. *Kyzer*'s rewriting made offenses death-eligible that were statutorily eligible only for life without parole. *Kyzer*, 399 So. 2d at 337, 339. The decision did not opine on life-without-parole sentences at all. Because Tomlin's argument boils down to a claim that his crime was not aggravated, yet no one contests that his crime was one of the aggravated felonies listed in Section 2, his claim fails. At the very least, no reasonable jurist could conclude that the district court erred in holding that "fair-minded jurists could agree that the state-court's denial is not contrary to *Bouie* or that it unreasonably declined to extend *Bouie* because the plain language of the 1975 Act does not require the application of *Kyzer* for Petitioner to be indicted or tried for a capital felony." App.A at 43.

Magwood supports that plain reading of the 1975 Act. It does not, as Tomlin argues, support the contention that "the 1975 Act *only applied to those who are death eligible*." Pet.23. The unanimous panel in *Magwood*—on *de novo* review, not under

AEDPA like Tomlin claims—found that Magwood was not death eligible under the 1975 Act. *Magwood*, 664 F.3d at 1348-50. The court, however, allowed Magwood's capital conviction under the 1975 Act to stand and found only his death sentence unconstitutional. *Id.* at 1342-43. The Eleventh Circuit explained that "Magwood was not eligible for the death penalty at the time of his conviction," *id.* at 1146, but "the judge could nonetheless have sentenced Magwood to life imprisonment without parole," *id.* at 1344-45; *see also id.* at 1345 (describing Magwood's argument that "because he indisputably did not have an aggravating circumstance [that would make him death-eligible], the judge was *required* to sentence him to life imprisonment." (emphasis added)). In fact, the remedy for the constitutional violation of imposing the death-penalty was to resentence Magwood to the only other sentence available under the 1975 Act: life without parole. App.A at 34. Even putting aside AEDPA versus *de novo* concerns, *Magwood* found that the 1975 Act constitutionally authorizes a life-without-parole sentence for defendants who, like Magwood and Tomlin, committed a Section 2 aggravated offense without a corresponding Section 6 aggravating circumstance.

And, of course, the AEDPA standard must be taken into account. In Tomlin's case, the State need show only that it is beyond reasonable debate that at least one fair-minded jurist could agree with that interpretation. If so, then reasonable jurists could not debate whether the district court correctly denied Tomlin's claim under AEDPA. And at least one fair-minded jurist undoubtedly could agree. Indeed, three Eleventh Circuit judges found that the 1975 Act authorized a life-without-parole

sentence for Magwood and allowed the state court to remedy the fair-notice violation caused by the death sentence by imposing a sentence of life without parole, *Magwood v. Culliver*, 481 F. Supp. 2d 1262, 1295 (M.D. Ala. 2007), *aff'd in relevant part*, 664 F.3d 1340 (11th Cir. 2011)—all a year after the state court determined that Tomlin's life-without-parole sentence under the 1975 Act did not violate due process. All reasonable jurists would agree that the state-court determination was not unreasonable: the Eleventh Circuit correctly denied Tomlin's application for a COA.

And Tomlin's own argument proves as much. If Tomlin were right that *Magwood* left open the question of whether his life-without-parole sentence violated due process and he were right that reasonable jurists could "[u]nquestionably [d]ebate" that question, then his claim fails under the COA standard. AEDPA only allows relief if there could be no fair-minded disagreement about the state-court decision. *Harrington v. Richter*, 562 U.S. 86, 103 (2011). By arguing that "[r]easonable [j]urists [c]ould [u]nquestionably [d]ebate the [e]xtension of *Magwood* to [life without parole] [s]entences," Tomlin argues that there could "[u]nquestionably" be fair-minded disagreement about his fair-notice claim. Pet.ii, 20, 27. But if the claim the state court rejected is a "debatable legal question," Pet.4, then it follows that at least one fair-minded jurist could agree with the state-court's determination that his sentence did not violate due process. The Eleventh Circuit, thus, properly denied Tomlin's request for a COA.

And Tomlin's heavy reliance on *Magwood* does not help. It is misplaced for at least two reasons: (1) he misunderstands *Magwood*, and (2) he misunderstands the

question that *Magwood* left open. First, Tomlin's argument is based on the demonstrably false premise that *Magwood* was decided "under the very stringent deference standard of the [sic] AEDPA." Pet.4; *see also id.* at i, ii, 8, 9, 20, 22.[5] But *Magwood* was decided on *de novo* review because there was no state-court determination on the merits. *See Magwood*, 664 F.3d at 1347 ("[W]e do not have a state-court adjudication of his fair-warning claim and our 'review is not subject to the deferential standard that applies under [AEDPA] to any claim that was adjudicated on the merits in State court proceedings.' 'Instead, the claim is reviewed *de novo*.'" (internal citations omitted)). And after conducting that *de novo* review, the Eleventh Circuit held that Magwood's "death sentence violated the fair-warning requirement of the Due Process Clause as it was based on *Kyzer*." *Id.* at 1342-43. Tomlin's claim, on the other hand, was adjudicated on the merits in the state court. App.A at 20. His case is, thus, governed by "the highly deferential AEDPA standard," Pet.i. Instead of bolstering his claim that a COA should have been granted on his AEDPA claim, *Magwood* undermines it.

Second, Tomlin misunderstands the question that *Magwood* left open. *Magwood* left open whether *Bouie* would also apply to judicial interpretations that increased a punishment to less than death. Thus, if Tomlin argued that the Eleventh

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[5] Tomlin also incorrectly states that the "*only* significant difference," Pet.20, between his case and *Magwood* is the sentence each defendant received without mentioning the radically different standards of review that govern the cases. *See, e.g.*, Pet.9 ("Tomlin raised the identical legal claim in practically the identical factual context in state-post conviction and federal habeas corpus—the only difference now being his sentence of LWOP, rather than death."); *see also* Pet.i ("a hair-splitting difference").

Circuit left open the question of whether a future, hypothetical judicial interpretation that unexpectedly and retroactively increased the punishment for a specific crime from life-with-the-possibility-of-parole to life without parole, he would be correct. But that is not his argument.

Tomlin argues instead that *Magwood* left open the question of whether *Kyzer's* interpretation of the 1975 Act unexpectedly and retroactively increased a sentence from life-with-the-possibility-of-parole to life without parole. But *Magwood* answered that question—and not in Tomlin's favor. The court did not question the constitutionality of Magwood's *conviction* under the 1975 Act, only his *sentence*. Thus, the court concluded that the remedy to the fair-notice, due-process violation of imposing a death sentence for a capital crime with no Section 6 aggravator was to impose instead a sentence of life without parole. *Magwood*, 481 F. Supp. 2d 1262, *aff'd in relevant part*, 664 F.3d 1340 (11th Cir. 2011). There is likewise no constitutional problem with leaving Tomlin's capital murder conviction and life-without-parole sentence intact.

Because Tomlin misunderstands *Magwood* and misconstrues the question it left open, he boxes against himself and loses. He contends that "[t]he Eleventh Circuit … ma[de] it clear that [Tomlin's fair-notice claim] *was still a question to be debated*." Pet.20. But if reasonable jurists could debate Tomlin's fair-notice claim, he necessarily loses under AEDPA. The Eleventh Circuit, thus, properly rejected his application for a COA, and this Court should deny his petition for cert.

C. Tomlin's fair-notice claim is not the same question at issue in *McKinney v. Arizona*.

Tomlin also argues that the Eleventh Circuit should have granted a COA because his case "[r]aises the [s]ame [q]uestion at [i]ssue in *McKinney v. Arizona*." Pet.28. He is wrong for two reasons. One, *McKinney* does not raise the same question. And two, even if it did, *McKinney* was decided under a different standard than was Tomlin's case.

First, the issue in *McKinney* is not the same issue that Tomlin raises. *McKinney* asked "[w]hether the [state] [c]ourt was required to apply current [constitutional] law when weighing mitigating and aggravating findings to determine whether a death sentence is warranted." Br. for Pet. at i, *McKinney v. Arizona*, 140 S. Ct. 702 (2020). Because new rules of constitutional law apply on direct review but do not apply after a defendant's conviction becomes final, the case boiled down to "the pivotal question: Is McKinney's case currently on direct review, in which case *Ring* applies, or on collateral review, in which case *Ring* does not apply?" *McKinney*, 140 S. Ct. at 710 (Ginsburg, J., dissenting) (footnote omitted); *see id.* at 708 ("Because this case comes to us on state collateral review, *Ring* and *Hurst* do not apply."). Tomlin, on the other hand, asks whether, at his 2004, direct-review resentencing, "Tomlin should have been resentenced under the capital sentencing law in 2004 … *or* whether he should have been resentenced under the 1975 Act as it existed at the time of his alleged offense." Pet.29-30. That is not the same question raised in *McKinney* for three reasons.

One, at Tomlin's 2004 resentencing, his case was still on direct review. *See Tomlin v. State*, 909 So. 2d 290, 290-91 (Ala. Crim. App. 2004); *see also* App.A at 5 (explaining the 2004 sentence occurred on direct appeal and before any "state post-conviction proceedings"). All parties and this Court in *McKinney* would thus agree that contemporaneous constitutional law applied to Tomlin's 2004 resentencing.[6] Two, *McKinney* compared law when the conviction first became final with contemporaneous law. Tomlin contrasts law "as it existed at the time of his alleged offense" with contemporaneous law. Pet.30. No precedent suggests that a sentencing (or resentencing) is constrained to legal interpretations as of the time of the offense. Indeed, the Court *requires* new law to apply as long as a case is still on direct review. *See, e.g.*, *Griffith v. Kentucky*, 479 U.S. 314, 322-23 (1987) ("But after we have decided a new rule in the case selected, the integrity of judicial review requires that we apply that rule to all similar cases pending on direct review."). Three, *McKinney* deals with new rules of constitutional law. Tomlin's claim deals with interpretations of state statutory law.

In short, Tomlin's claim that his "case … raises the same question about retroactivity" as *McKinney*, Pet.28, is wrong. *McKinney* addresses whether new

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[6] *See McKinney v. Arizona*, 140 S. Ct. 702, 708 (2020) ("The hurdle is that McKinney's case became final on direct review in 1996, long before *Ring* and *Hurst*. *Ring* and *Hurst* do not apply retroactively on collateral review."); *id.* at 709 (Ginsburg, J., dissenting) ("The Constitution, this Court has determined, requires the application of new rules of constitutional law to cases on direct review. Such rules, however, do not apply retroactively to cases on collateral review unless they fall within one of two exceptions." (internal citations omitted)); Pet's Br. at 29 ("New rules 'for the conduct of criminal prosecutions' are 'to be applied retroactively to all cases, state and federal, pending on direct review or not yet final."); Respondent's Br. at 17 ("This case was long ago final and never reopened, and so it falls within *Teague*'s bar on retroactive application of new criminal procedure rules.").

constitutional rules apply retroactively on collateral review. Tomlin raises a claim about whether retroactively applying a judicial interpretation of a state statute violates due process. That both claims use the word "retroactively" does not make them the same. The legal issues and analysis in Tomlin's case and in *McKinney* are materially different.

Second, Tomlin is wrong that *McKinney* necessitates a COA in his case because the cases require different standards of review. *McKinney* reached this Court on appeal from a state supreme court. *McKinney*, 140 S. Ct. at 706. AEDPA's deferential structure, therefore, did not apply. Tomlin's case, however, is analyzed under AEDPA deference. Pet.2. Because Tomlin's case must be decided under the "highly deferential" and "stringent" AEDPA standard, Pet.i, 8, reasonable jurists could not debate (or agree) that his claim could succeed.[7]

II. Tomlin identifies no conflict in how the circuits apply the COA standard.

Tomlin admits that the Eleventh Circuit "phrased its determination that the COA was denied in accordance with the" familiar standard. Pet.26. He identifies no court of appeals that applies any other standard. And he identifies no case like his in which another court granted a COA. In short, he identifies no split.

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[7] Tomlin argues that "*Beck* [*v. State*, 396 So. 2d 645 (1980)] [was] overruled by the Alabama Supreme Court as 'unexpected and indefensible.'" Pet.29 (quoting *Stephens*, 982 So. 2d 1148). That is incorrect. *Stephens* does not even mention *Beck*, much less overrule it. *Beck* remains good law. In fact, *Magwood* cites *Beck* positively, explaining that "[i]n *Beck* … [t]he Alabama Supreme Court … decided the [1975 Act] required jury participation in the sentencing process, and created the necessary procedures by adding an additional stage to the trial of a capital case." 664 F.3d at 1345 n.5. That change could not violate the due process right to fair notice because that "clearly procedural" change "simply altered the methods employed in determining whether the death penalty was to be imposed; there was no change in the quantum of punishment attached to the crime." *Dobbert v. Florida*, 432 U.S. 282, 293-94 (1977).

But he claims to have discovered a circuit split, not in the caselaw, but in the data. Tomlin attaches to his petition a college student's unpublished research paper that compares the COA grant rates in the First Circuit and the Eleventh Circuit for 2018 and most of 2019. *See* Pet.11; App.K. According to this paper, the First Circuit granted a COA in 14.29 percent of noncapital cases, while the Eleventh Circuit granted in 8.44 percent of such cases, App.K at 1—supposed proof of a "breakdown of the COA review process." Pet.11.

This half-baked social science does not reflect a circuit split for numerous reasons. First, a circuit split is when "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." Sup. Ct. R. 10(a). The fact that one court of appeals has denied a COA on one matter (or a hundred matters), while another court of appeals has granted a COA on a different matter (or a hundred different matters), is no evidence of a circuit split. After all, "judges are not automata," *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 489 (1951), and their decisions are not data that reveal the "true" standard a court has applied, especially regarding a specific case.

Moreover, even if the calculations Tomlin cites could be relevant to identifying a circuit split, the studies are unreliable and misrepresented. For starters, Tomlin's primary empirical support comes an unpublished paper written by a college student. The paper has not been peer-reviewed or tested in any recognized way.

And even assuming the paper's findings were reliable and relevant, they do not support Tomlin's conclusions. He argues that over "the last year-and-a-half the

Eleventh Circuit has denied most of the [sic] COA applications *in non-capital cases* at a disproportionate rate compared to *other circuit courts*." Pet.11 (emphasis added). But the Eleventh Circuit is compared to only *one* other circuit court in the last year-and-a-half: the First Circuit. And the First Circuit only heard non-capital cases. The purported distinction Tomlin makes between non-capital COA grants and all COA grants in comparing the two circuits is misleading at best.

Worse still, Tomlin discusses these percentages without once mentioning the stark disparity in the underlying numbers. Tomlin contrasts the Eleventh Circuit's COA grant rate in non-capital cases with that of the First Circuit's, but he fails to acknowledge that the Eleventh Circuit granted 3,166.67% more COAs than the First Circuit or that the Eleventh Circuit granted 2,933.33% more non-capital COAs than the First Circuit. How? Because during the year-and-a-half period to which Tomlin refers, the Eleventh Circuit received 1,091 petitions for COAs. The First Circuit received 21. The Eleventh Circuit granted 98. The First Circuit granted 3. The two circuits are not good comparators (again, assuming that such comparisons could be relevant). Tomlin fails to even allude to that fact.

But there is more. Tomlin relies on one published source when discussing COA grant rates. That source discusses the rates between 2003 and 2011[8] and concludes the opposite of Tomlin—that the Eleventh Circuit does *not* deny COA applications disproportionately more than other circuits. *See* King, *Non-Cap. Habeas Cases After*

[8] It is unclear why Tomlin cites the working paper instead of the published version. However, the relevant data and conclusions appear to be the same. *See* Nancy J. King, *Non-Cap. Habeas Cases After App. Rev.: An Empirical Analysis*, 24 Fed. Sent'g Rep. 308, 310 (2012).

App. Rev., 24 Fed. Sent'g Rep. at 310 tbl. 3. In fact, the Eleventh Circuit was the median circuit with a 6.0% COA grant rate.[9]

And if Tomlin had wanted to remain consistent and compare the Eleventh Circuit to only the First Circuit, in King's study the Eleventh Circuit granted COAs "at a disproportionate rate compared to" the First Circuit: 6.0% for the Eleventh versus 0.0% for the First (or 5 of 83 versus 0 of 6). *Id.* Of course, the State does not think those two circuits are good comparators or that empirics have any bearing on whether there is a circuit split. The Federal Sentencing Reporter study and Tomlin's petition do show, however, Tomlin's misunderstanding of the subject matter and the manipulability of the numbers. Tomlin's own proffered evidence—at least the published data—refutes his claim that the Eleventh Circuit denies COA applications disproportionately more than the other circuit courts, even if that were a proper consideration for a circuit split.

Tomlin's other attempts to construct a circuit split are easily dismissed. First, different procedures in different circuits do not create a circuit split, especially when both the Federal Rules of Appellate Procedure and this Court explicitly endorse the procedures. *See Gonzalez v. Thaler*, 565 U.S. 134, 143 (2012); Fed. R. App. P. 22(b)(1)-(2) ("(1) In a habeas corpus proceeding … the applicant cannot take an appeal unless

[9] Tomlin accurately states that the study found that the Eleventh Circuit had a 6.0% COA grant rate but then inaccurately asserts that "the Eleventh Circuit reviewed approximately 300 non-capital petitions, but only granted COAs for five of those petitions." Pet.13. According to the study, the Eleventh Circuit reviewed only 83 petitions—not 300. *See id.* at 310 tbl. 3. That number also comports with the 6.0% grant rate. If Tomlin were correct about the caseload, the grant rate would have been 1.7% not the 6.0% he accepts.

a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. §2253(c). … If the district judge has denied the certificate, the applicant may request a circuit judge to issue it. (2) A request addressed to the court of appeals may be considered by a circuit judge or judges, as the court prescribes.").[10]

And his assertion of intra-circuit splits based only on the grant rates of different Eleventh Circuit judges fails many times over. This Court is not in the business of resolving intra-circuit splits; data on a few dozen judicial decisions per judge does not evince different standards of review, particularly where all the judges are purporting to apply the same standard; and the data is of questionable reliability, as it comes from an unpublished, college research paper.

In any event, Tomlin's petition asks only that this Court correct a perceived "misapplication of a properly stated rule of law." Sup. Ct. R. 10. Such petitions are "rarely granted." *Id.* This petition—riddled with misstatements of law and fact and lacking any debatable legal question—should not be the rare exception.

[10] Tomlin asserts that "[t]he Fourth Circuit views the use of a single-judge panel as a contradiction to the federal appellate rules" and "emphasizes that three-judge panels are necessary to conform with the Federal Rules of Appellate Procedure[]." Pet.14; *see also id.* at 6. It does not. *See* 4th Cir. R. 22(a)(3) note ("Fed. R. App. P. 22(a) may afford the Court some flexibility in [deciding to use a three-judge panel for COAs]. … The authority for a single judge to issue a certificate derives from §2253.").

CONCLUSION

The petition should be denied.

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