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

REPLY BRIEF OF PETITIONER

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QUESTIONS PRESENTED

1. Phillip Tomlin's sentence of life imprisonment without parole reflects a breakdown of the Certificate of Appealability ("COA") review process and raises a pressing matter of national importance: whether non-capital habeas corpus petitioners in the Eleventh Circuit are being treated so fundamentally differently than similarly situated prisoners in other circuits that they are effectively being denied due process, fair punishment, and their right of access to the courts. Specifically, did the Eleventh Circuit impose an improper, too demanding, and unduly burdensome COA standard that contravenes this Court's precedents, deepens a circuit split in the COA standard, and is deeply arbitrary, when it denied Mr. Tomlin a COA on a legal question that it had explicitly left open a few years earlier and that involves a hair-splitting difference from a 2011 decision of the Eleventh Circuit in *Magwood v. Warden,* 664 F.3d 1340 (11th Cir. 2011) holding that the judicial rewritings of the 1975 Alabama Death Penalty Act violated the fair notice provision of the Due Process Clause?

2. Whether a statute that requires the jury to "fix the punishment at death" upon conviction of a non-death-eligible crime, for which the accused could never be sentenced to death, would violate the Due Process Clause?

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Through a sleight of hand, the state of Alabama conceals from the Court the single most important fact about Alabama's 1975 Death Penalty Act: *the mandatory jury verdict of death for any conviction under that statute*. *See* Appendix J, at 701 [145a], § 13-11-2(a), 1975 Alabama Death Penalty Act ("If the jury finds the Defendant guilty, they shall fix the punishment at death").

Yet the jury's mandatory death verdict is the crux of Mr. Tomlin's due process claim: Mr. Tomlin *did not have fair notice* that the alleged crime was subject to the 1975 Alabama Death Penalty Act because *no jury in his case* constitutionally could "fix the punishment at death" given that *Mr. Tomlin is not death-eligible*. As the state of Alabama concedes, "Because his conduct did not satisfy any of the aggravating factors in Section 6, Tomlin cannot constitutionally be sentenced to death." *See* Brief in Opposition ("BIO") at p. 1.

It is elementary due process that no juror in this country could be required to sentence a man to death who could *never be sentenced to death*. As a result, Mr. Tomlin was never supposed to be subject to the 1975 Act, but instead to the ordinary murder statute in effect in Alabama at the time, which carried a maximum sentence of life imprisonment *with the possibility of parole*. Mr. Tomlin did not have fair notice that he could be sentenced to life imprisonment without parole ("LWOP") because the conduct alleged did not fit under the 1975 Act, and the 1975 Act was the *only* statutory provision in Alabama that carried a possible sentence of LWOP.

By vanishing the mandatory jury verdict of death and only revealing that the 1975 Act "carried a punishment of either life without parole or death" (BIO at pp. i, 1)—while concealing that this applied only to the *judge's sentence*, but not to the *jury* sentencing—the state of Alabama misdirects this Court. In the spirit of the Court's Rule 15.2, the state of Alabama repeatedly misstates the facts:

- "Tomlin unquestionably committed capital murder under the 1975 Act." (BIO at p. 1)
- "And no one here contests that Tomlin was properly convicted of an offense enumerated in Section 2." (BIO at p. 3)
- "[N]o one contests that his crime was one of the aggravated felonies listed in Section 2." (BIO at p. 19)

Not so. On the contrary, whether the crime fit under the 1975 Act is *precisely what is at issue in this case*. The state of Alabama misrepresents the legal issue. Mr. Tomlin was *not* properly convicted of an offense enumerated in the 1975 Act and *could not* have been convicted of an offense enumerated in the 1975 Act, because then his jury would have been required by law to impose a sentence of death on a man who could not be sentenced to death. Mr. Tomlin thus had *no fair notice* that his alleged conduct fell under the 1975 Act. In effect, an alternative way to pose the issue properly before the Court, if certiorari were granted, is as follows:

> Whether a statute that requires the jury to "fix the punishment at death" upon conviction of a non-death-eligible crime, for which the accused could never be sentenced to death, would violate the Due Process Clause?

The state of Alabama responds "no" to this question in its Brief in Opposition. It argues that under the 1975 Act, a juror could be placed in the position of having to sentence a man to death who cannot be sentenced to death. But that defies

elementary due process.

And that is in fact precisely what happened here. Under the fair notice statute—the statute as written that gave Mr. Tomlin fair warning at the time of the alleged offense in January 1977—Mr. Tomlin's jury, on March 25, 1978, convicted him and "*fixed his punishment at death*," as it was required to by the 1975 Act:

> THE COURT: All right, Mr. McPeek, you have been elected as foreman of the jury, is that correct, sir?
>
> FOREMAN: Yes, sir.
>
> THE COURT: Has the jury reached a unanimous verdict?
>
> FOREMAN: Yes, sir.
>
> THE COURT: I want the Defendant to stand and face the jury. Now, Mr. McPeek, I want you to stand and read the unanimous verdict of the jury into the record.
>
> FOREMAN: We, the jury, find the Defendant guilty of murder as charged in the indictment *and fix his punishment at death*.

See Appendix R-A, p. 1 (1978 Tomlin Trial Transcript at p. 988) (emphasis added).

In other words, in a case for which the state of Alabama concedes Mr. Tomlin *could never* receive a death sentence, the jury is mandated to—and did and would have to in the future—return a death sentence. *See also* Appendix R-B, p. 1 (Docket Entry for Jury Fixing Punishment at Death); *Ex parte Tomlin*, 516 So.2d 797, 797 (Ala. 1987) ("The jury fixed Tomlin's punishment at death.").

The state of Alabama, again with a sleight of hand, conceals from the Court the jury's real verdict of death. Respondent only tells the Court that "[t]he unanimous jury recommended life without parole." (BIO at p. 7) But that recommendation of

LWOP only occurred at the retrial in 1990[1] *after* the Alabama Supreme Court rewrote the 1975 Act to allow for a jury sentence of LWOP and an upward judicial override in *Beck v. State*, 396 So. 2d 645 (Ala. 1981), *Ex parte Kyzer*, 399 So.2d 330 (Ala. 1981), and *Ex parte Hays*, 518 So. 2d 768 (Ala. 1986)—which were later repudiated as "unexpected and indefensible" in *Ex parte Stephens*, 982 So. 2d 1148 (Ala. 2006).

In point of fact, Mr. Tomlin's first jury did return, as it had to, a mandatory death verdict, landing Mr. Tomlin on Alabama's Death Row for a crime the state concedes is not death-eligible.[2] The same process would be required at any trial or retrial pursuant to the 1975 Act under the state's reading: the jury first would be required to "fix the punishment at death" (for a non-death-eligible defendant) and then, second, be told by the judge "just joking" because the defendant could never be sentenced to death. This *non sequitur* demonstrates (1) that the 1975 Alabama Death Penalty Act did not apply to Mr. Tomlin, but even more importantly (2) that Mr. Tomlin *did not have fair warning* his alleged conduct fell under the 1975 Act.

Therein lies the crux of the due process violation in Mr. Tomlin's case. In its Brief in Opposition, Respondent fundamentally misconstrues Mr. Tomlin's due process fair warning challenge. For this reason and several new points raised in the Brief in Opposition, Mr. Tomlin respectfully submits this reply.

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[1] *See Tomlin v. State*, 591 So.2d 550, 552 (Ala.Cr.App, 1991) (at a "subsequent trial, which occurred in 1990 … the jury … recommended a sentence of life without the possibility of parole.").

[2] As a combined result of his first mandatory jury verdict of death in 1978 and three subsequent judicial overrides of a unanimous jury recommendation of LWOP, Mr. Tomlin spent a total of twenty-seven (27) years on Alabama's Death Row for a crime that the state concedes is not death-eligible.

I. REASONABLE JURISTS COULD SURELY DEBATE WHETHER THE CONDUCT CHARGED IN THE INDICTMENT FELL WITHIN THE PURVIEW OF THE 1975 ALABAMA DEATH PENALTY ACT

To dispel any confusion and state as clearly as possible Mr. Tomlin's due process claim: Mr. Tomlin *did not have fair warning—and still does not have fair notice—that the alleged conduct fell within the parameters of the 1975 Alabama Death Penalty Act* (the only statute that allowed for an LWOP sentence), *because that statute requires a mandatory jury verdict of death and Mr. Tomlin is not death-eligible*.

Respondent further misleads this Court by arguing that Billy Joe Magwood's sentence of LWOP justifies Mr. Tomlin's LWOP sentence. (BIO at p. 1) The fact is, Mr. Magwood *never challenged his LWOP sentence*. That another similarly situated individual did not raise a similar due process challenge has no bearing on this case.

Originally, the Honorable Judge Myron Thompson of the Middle District of Alabama granted Mr. Magwood habeas relief from his death sentence on both fair-warning and ineffective assistance of counsel grounds. *Magwood v. Culliver*, 481 F.Supp.2d 1262 (M.D. Ala. 2007). The Eleventh Circuit reversed Judge Thompson's ruling, holding that Mr. Magwood's challenge to his death sentence was an unreviewable second or successive petition. *Magwood v. Culliver*, 555 F.3d 968 (11th Cir. 2009). This Court granted certiorari and reversed the judgment of the Eleventh Circuit in *Magwood v. Patterson*, 561 U.S. 320 (2010), declaring that the state of Alabama was proposing rules that would "close [this Court's] doors to a class of habeas petitioners seeking review without any clear indication that such was Congress' intent." *Id*. at 341. On remand, the Eleventh Circuit granted Mr. Magwood

relief from his death sentence on fair notice grounds, concluding that the Alabama Supreme Court's rewriting of the 1975 Alabama Death Penalty Act in *Beck* and *Kyzer* was an "unexpected and indefensible construction of narrow and precise statutory language," and thus the application of *Kyzer* to Mr. Magwood's case violated the fair-warning requirement of the Due Process Clause. *Magwood v. Warden, Alabama Department of Corrections*, 664 F.3d 1340, 1349 (11th Cir. 2011).

Subsequently, Mr. Magwood was resentenced to LWOP by the Circuit Court of Coffee County. *See Magwood v. Warden,* No. 2:97-cv-629-MHT, Doc. 162 ("Respondents' Notice of Filing") (July 31, 2012). However, neither in his previous federal habeas petition, nor since his resentencing to LWOP, has Mr. Magwood ever raised a claim that his sentence of LWOP, too, violates due process.[3] That Mr. Magwood never challenged his sentence of LWOP should not reflect in any way on whether Mr. Tomlin is entitled to relief; if anything, it underscores that there is an open and compelling legal question that needs to be addressed, one that the Eleventh Circuit in *Magwood* expressly and deliberately left open. *Id*. at 1348 ("we express no opinion in the context of non-capital cases.").

II. MR. TOMLIN'S PETITION FOR WRIT OF CERTIORARI DOES NOT FALL PREY TO THE STATE OF ALABAMA'S CATCH-22

The state of Alabama tries to trap Mr. Tomlin in a Catch-22: as a substantive matter, the state contends, he must show that *no reasonable jurist* could have decided

[3] Mr. Magwood is the only other Alabama prisoner (to counsel's knowledge) who would be affected by a favorable ruling in Mr. Tomlin's case; but that has no bearing on Mr. Tomlin's due process challenge.

the merits as the last state court did; but at the same time, as a procedural matter for purposes of a COA, the petitioner must show that *reasonable jurists could debate* the merits of the claim. Respondent leverages this apparent tension into a Catch-22, arguing throughout its brief that: "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. Yet Tomlin admits that the issue before the state court was a 'debatable legal question,' Pet.4, that courts have left 'open,' Pet.i." (BIO at p. i)

Mr. Tomlin, however, does not fall prey to this Catch-22 for two reasons. First, Mr. Tomlin has consistently argued that he is entitled to *de novo* review under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). *See* Appendix E, pp. 106-112 (Petitioner's Motion for Reconsideration of the Denial of a Certificate of Appealability, *Tomlin v. Patterson*, No. 19-10494, filed June 17, 2019).[4] Respondent contends that the "state courts rejected the [Due Process] claim." (BIO at p. i, 2) That is inaccurate. The last state court did not properly address the merits of the due process challenge, but rather affirmed the denial of relief for a purported reason that predated Mr. Tomlin's due process claim, namely that the Alabama Supreme Court

[4] Incidentally, Mr. Magwood also received *de novo* review at the Eleventh Circuit. The state of Alabama is correct. (BIO at p. i n1) Insofar as anything that Petitioner wrote in his petition suggests otherwise, he stands corrected. Petitioner was trying to emphasize that Mr. Magwood obtained relief under AEDPA and not on direct appeal from a state court conviction or on appeal from a federal conviction. That is noteworthy, because AEDPA substantially restricted federal habeas corpus. Petitioner was trying to emphasize that Mr. Magwood prevailed under AEDPA review, which increases the debatability of Mr. Tomlin's due process challenge for purposes of a COA.

ordered a sentence of LWOP. Therefore Mr. Tomlin is entitled to *de novo* review. *See* Appendix E, pp. 106-112. Under that standard, Mr. Tomlin should prevail on the merits of his challenge. This is an open question and thus debatable, even if Mr. Tomlin has the better argument. This eliminates any possible Catch-22.

The second reason Mr. Tomlin does not fall prey to Respondent's Catch-22 is that the two distinct standards set forth in AEDPA must be understood sequentially. Throughout the BIO, the state confuses and conflates § 2254(d)(1), which pertains to the merits of a petitioner's habeas claims, with § 2253(c)(2), which pertains to the issuance of a COA, inverting the statutory order of operations set forth in AEDPA. *Buck v. Davis*, 137 S. Ct. 759, 774 (2017). This Court has consistently held that the two inquiries are not coextensive. *See, e.g., Buck*, 137 S. Ct. at 773; *Miller-El v. Cockrell*, 537 U.S. 322, 348 (2003).

At this stage, Mr. Tomlin is challenging the Eleventh Circuit's denial of a COA, not the merits of his habeas claim. Therefore, "the *only* question is whether [Mr. Tomlin] has shown that jurists of reason could disagree with the district court's resolution" of his claim. *Buck*, 137 S. Ct. at 773 (emphasis added). And, as this Court has emphasized, the district court's resolution of Mr. Tomlin's claim "can be debatable *even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail*." *Miller-El*, 537 U.S. at 338 (emphasis added). Mr. Tomlin has unquestionably met that burden.

Rather than engaging strictly with Mr. Tomlin's contention that the district

court's resolution of his claim was debatable, the state answers a question that was neither raised by Mr. Tomlin, nor at issue at this juncture of the case—namely, that Mr. Tomlin's claim fails on the merits. In *Buck*, this Court stated "[t]hat a prisoner has failed to make the ultimate showing that his claim is meritorious does not logically mean he failed to make a preliminary showing that his claim was debatable." 137 S. Ct. 774. Indeed, "when a COA is sought, the whole premise is that the prisoner 'has already failed in that endeavor.'" *Buck*, 137 S. Ct. at 774 (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893, n.4 (1983)). Thus, the State's contention that Mr. Tomlin "is likely to fail on the merits" is of no moment at the COA stage. *See* BIO, p. 16.

At bottom, the state in its BIO—and the Eleventh Circuit in denying a COA—"inverts the statutory order of operations" set forth in AEDPA and thereby "places too heavy a burden on [Mr. Tomlin] at the COA stage." *Buck*, 137 S. Ct. at 774.

III. THE STUDY ON COAs IS THE GOLD-STANDARD OF SOCIAL SCIENCE: OPEN DATA, OPEN METHODS, OPEN REVIEW

The state of Alabama questions the evidence in the study *Certificates of Appealability in Habeas Cases in the United States Court of Appeals for the Eleventh Circuit: A Study*, by Julia Udell of Columbia University, writing that it is nothing more than a "college student's unpublished research paper," "quasi-social science," or, even more, "half-baked social science." (BIO at p. 4, 27) The state argues that "the paper has not been peer-reviewed or tested in any recognized way." (BIO at p. 27)

Quite to the contrary, this study represents the gold-standard of social science today: it is open data, open method, open access, and open review. The study openly

shares its database (Westlaw's docket database), its method, search terms, and queries ((c.o.a. (cert! /2 appeal!) /7 deny! denied denial grant!) /20 2018 2019), and all of its data with full case citations. It improves on the research conducted both in the *Buck* petition for writ of certiorari and by Nancy King in "Non-Capital Habeas Cases after Appellate Review: An Empirical Analysis." It is all readily available on an open access publication venue, the Social Science Research Network ("SSRN"), here: https://ssrn.com/abstract=3506320. The study on SSRN contains an appendix with all of the names and docket numbers of all of the cases reviewed in the study. And it is entirely open to peer-review and assessment. Any researcher, any lawyer at the Alabama Attorney General's Office, and any member of this Court can replicate, test, and review the data, methods, and findings.

This quality of open research is the cutting-edge of social science today. Contrary to Respondent's suggestion, peer-review does not guarantee validity. In fact, it is likely that most published peer-reviewed studies are false, in large part because the data are rarely open access.[5] For this reason, leading scientists increasingly are moving toward open access, open data, open review standards, which are now becoming the highest benchmark for scientific research. *See* B. A. Nosek, et al., "Promoting an open research culture," *Science*, vol. 348,6242 (2015): 1422-5, available at https://doi.org/10.1126/science.aab2374.[6]

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[5] *See* John P. A. Ioannidis, "Why most published research findings are false," *PLoS medicine*, vol. 2,8 (2005): e124, available at https://doi.org/10.1371/journal.pmed.0020124.

[6] *See also* M. R. Munafò, et al., "A manifesto for reproducible science," *Nature Human Behavior* 1, article 0021 (2017), available at https://www.nature.com/articles/s41562-016-0021; John P. A.

Rather than lazily impugn the research, the state of Alabama could have reviewed the data, methods, findings, and conclusions of the study, which are all available and open access. Failing to have done so, Respondent has raised no valid objection to the data and findings.

The state of Alabama also disregards the gross disparities between judges on the Eleventh Circuit, writing that "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." BIO at p. 30 (emphasis added). The key word here is "purporting." The study demonstrates that judges with similar caseloads grant wildly different numbers of COAs. The judge who denied Mr. Tomlin's COA, Judge Charles R. Wilson (Judge 02), granted only 2.68% of COA orders, or 3 of 112, while Judge Adalberto Jordan (Judge 06) and Judge Beverly B. Martin (Judge 09) granted 25.81% (24 of 93) and 20.51% (16 of 78) respectively. Judge Wilson ruled on 19 more COAs than did Judge Jordan and 34 more COAs than did Judge Martin, and yet his total number of COAs granted was much lower.[7] These numbers indicate that while the judges might "purport" to apply the same COA standard, they are not actually doing so in practice.

IV. A NEW STUDY TITLED "CERTIFICATES OF APPEALABILITY AS RUBBER STAMPS" FURTHER SUPPORTS REVIEW IN THIS CASE.

Ioannidis, "How to Make More Published Research True," *PLoS Med* 11(10): e1001747 (2014), available at https://doi.org/10.1371/journal.pmed.1001747. One example of cutting-edge open access, open data, open review efforts is the PEERS Press at https://peers.press.

[7] The individual judge grant rates can be identified using the initials of judges listed in the appendix to the study published on SSRN.

The claim that some judges on the Eleventh Circuit are failing to apply the appropriate standard of review is further supported by the length and content of the COA orders. A new study, *Certificates of Appealability as Rubber Stamps*, conducted by Luis Angel Valle of Columbia Law School, supports Mr. Tomlin's claim that COAs are being denied capriciously.[8] This study as well is open data, open method, open access, and open review. Any member of this Court or of the Alabama Attorney General's Office can test and replicate its findings.

Reviewing all Eleventh Circuit COA orders available on Westlaw between January 2018 and September 2019, the study finds that many orders denying COAs are short in length and limited in content: 43% of the 258 COA denials reviewed are fewer than three paragraphs long. *See COAs as Rubber Stamps*, at p. 26. Separating out these orders by judge, one can ascertain that 100% of the 25 single-judge COA orders issued by Mr. Tomlin's judge, Charles R. Wilson, are fewer than three paragraphs long. These short orders are troubling as they conceal the reasoning a judge might have for denying a COA.

The study reviews the content of COA orders in addition to their length. It finds most orders in the Eleventh Circuit cite few cases, noting that "70% of the orders cite only *Slack,* 18% cite the statutory language alone, and the remaining 3% solely cite *Miller-El*." *Id*. It further explains that most of the orders "typically consist of a citation to § 2253, the Slack/Miller-El standard of review, [and] a brief procedural

[8] Luis Angel Valle, *Certificates of Appealability as Rubber Stamps* (Apr. 14, 2020) [hereinafter, *COAs as Rubber Stamps*], https://ssrn.com/abstract=3576026.

history." *Id.* These short and limited orders raise a curtain that prevents us from determining whether a judge properly applied the COA standard of review.

When judges, albeit infrequently, do write longer orders that enable us to peek behind this curtain, they often overreach—considering the merits of a case rather than merely evaluating the debatability of a district court's determination. *See, e.g.*, *id.* at 30 n.182 (collecting cases demonstrating this overreach). Thus it seems there are two trends in Eleventh Circuit COA orders: the first is short orders that contain almost no reasoning (like 97.32% of Judge Wilson's orders, including that of Mr. Tomlin), and the second is the interpretation of §§ 2254(d) and (e) as incorrectly calling for merits analysis at the COA stage. *Id.* at 27. Taken together, we can infer that many of the short orders must also be applying an improper standard.

Finally, this study compares the COA grant rate in capital cases in the Fifth and Eleventh Circuits. The analysis suggests that grant rates in both circuits have decreased markedly since 2016 when counsel in *Buck* filed their petition for certiorari, which included a study measuring capital COA grant rates. Grant rates for capital cases "dropp[ed] from 41% to 13.33% in the Fifth Circuit and from 93.7% to 58.3% in the Eleventh." *Id.* at 25. The study notes that the circuit split identified in *Buck*—which this Court denounced in its ruling for Mr. Buck—persists despite the extreme decrease in the number of COAs granted in the Eleventh Circuit. *Id.* at 25. The decline indicates the Eleventh Circuit is imposing an improper and excessively burdensome standard of review to all COAs.

V. THIS COURT'S RECENT RULING IN *McKINNEY v. ARIZONA* IS FURTHER REASON TO GRANT CERTIORARI

When Mr. Tomlin filed his petition on December 27, 2019, *McKinney v. Arizona*, 140 S.Ct. 702 (2020), had yet to be decided. One of the questions presented in the *McKinney* petition pertinently asked "whether a court must apply the law as it exists today, rather than as it existed at the time a defendant's conviction became final." Petition for a Writ of Certiorari, *McKinney v. Arizona*, No. 18-1109, filed February 21, 2019. Respondent now argues that this Court's recent resolution and its opinion in *McKinney* "has no bearing on [Mr. Tomlin's] case." (BIO at p.12) Quite to the contrary, however, this Court's opinion in *McKinney* demonstrates that Mr. Tomlin was improperly resentenced to LWOP in 2004, making it clear that reasonable jurists could debate the merits of his due process challenge.

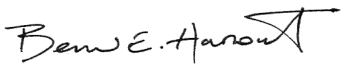
In *McKinney*, this Court found that new laws in effect at the time of Mr. McKinney's resentencing did not apply retroactively to his case because his case was on collateral review at the time. *Id*. at 708. The Court ruled that *Ring v. Arizona*, 536 U.S. 584 (2002), and *Hurst v. Florida*, 577 U.S. __ (2016) did not apply to Mr. McKinney's case at the time of his resentencing. The Court's ruling in *McKinney*, though, does not dissolve the question raised in Mr. Tomlin's petition, since neither the interpretation of the 1975 Act in effect at the time of Mr. Tomlin's alleged offense in 1977, nor a correct interpretation today following *Ex parte Stephens* and *Magwood*, would result in an LWOP sentence.

To the contrary, under *McKinney*, a court must sentence Mr. Tomlin either under the 1975 Act as it existed in 1977 before the judicial rewritings of the 1975 Act in *Ex parte Kyzer* and *Beck v. State* (both decided on March 6, 1981), or as it exists today, after *Ex parte Stephens* (decided on July 28, 2006). It would violate due process for a court to sentence Mr. Tomlin based on a fleeting moment in the middle—a brief interlude during which he was unconstitutionally death-eligible from March 6, 1981 to July 28, 2006. Thus, based on *McKinney*, Mr. Tomlin is entitled to relief; however, this Court need not reach the merits of Mr. Tomlin's case. This Court need only find that reasonable jurists could disagree on the claim at issue in Mr. Tomlin's case, and the decision in *McKinney* makes clear that they can.

CONCLUSION

For the foregoing reasons, Mr. Phillip Tomlin prays that this Court grant a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,



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