No. 19- _____

IN THE SUPREME COURT OF THE UNITED STATES

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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

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

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 in non-capital cases, 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 under the highly deferential AEDPA standard?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Phillip Wayne Tomlin respectfully petitions this Court for a writ of certiorari to review the order of the United States Court of Appeals for the Eleventh Circuit denying a Certificate of Appealability ("COA") to review the denial of his petition for a writ of habeas corpus in his Alabama capital murder case.

OPINIONS BELOW

The District Court's decision denying Mr. Tomlin habeas corpus relief is available at *Tomlin v. Patterson*, No. 10-120-CG-C, 2018 BL 139823 (S.D. Ala. Apr. 19, 2018) (Appendix A). The District Court issued a short order denying reconsideration, *see Tomlin v. Patterson*, No. 10-120-CG-B, 2019 BL 35700, 2019 Us Dist Lexis 17349 (S.D. Ala. Feb. 04, 2019) (Appendix B), and another short order declining the issuance of a Certificate of Appealability. *Tomlin v. Patterson*, No. 10-120-CG-B (S.D. Ala. March 08, 2019) (Appendix C). The Eleventh Circuit denied a COA and a motion for reconsideration. *Tomlin v. Patterson*, No. 19-10494, 2019 BL 167305, 2019 Us App Lexis 13845 (11th Cir. May 08, 2019) (Appendix D); *Tomlin v. Patterson*, No. 19-10494 (11th Cir. July 30, 2019) (Appendix F). Mr. Tomlin filed a letter with supplemental authority to the Eleventh Circuit on August 16, 2019. *Tomlin v. Patterson*, No. 19-10494, filed on Aug. 16, 2019 (Appendix G); but the Clerk of the Court returned the letter unfiled. *Tomlin v. Patterson*, No. 19-

10494 (11th Cir. Aug. 22, 2019) (Appendix H).

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). This petition is timely filed. On October 15, 2019, Associate Justice and Circuit Justice for the Eleventh Circuit, the Honorable Clarence Thomas, extended the time for filing this petition to and including December 27, 2019.

RELEVANT PROVISIONS

This case involves a state criminal defendant's constitutional rights under the Sixth, Eighth, and Fourteenth Amendments, and is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), codified in relevant part at 28 U.S.C. § 2254.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> … nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This case also involves the application of 28 U.S.C. § 2253(c), which states:

> (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –
>
> > (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; . . .
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

STATEMENT OF THE CASE

Petitioner Phillip Wayne Tomlin spent twenty-seven years on Alabama's Death Row on a charge that everyone now agrees was not death-eligible. The actions for which he was accused did not give rise to any aggravating circumstance under the death penalty statute applicable in 1977, the 1975 Alabama Death Penalty Act (Appendix J), so he could not have been sentenced to death and did not fit within the death penalty statute.[1] Because he did not fit under the 1975 Alabama Death Penalty Act, which was also the only way to receive a sentence of LWOP in Alabama (as

[1] The capital offense in his case was double homicide, but there was no corresponding aggravating circumstance for multiple murder under the 1975 Act. As a result, there was no aggravating circumstance in his case to make him death-eligible. (Appendix J)

a downward judicial departure from a mandatory jury verdict of death), Mr. Tomlin could not be sentenced to LWOP either. As Petitioner set out fully and in great detail in his Motion for Reconsideration from the denial of a COA at the Eleventh Circuit (*see* Appendix E), the 1975 Alabama Death Penalty Act did not and does not apply to him. Despite that, Mr. Tomlin is now serving life imprisonment without parole under the 1975 Act and has been incarcerated for forty-one years, now with no possibility of parole.

Mr. Tomlin's case presents a question that involves a hair-splitting difference with the Eleventh Circuit's decision in *Magwood v. Warden, Alabama Department of Corrections*, 664 F.3d 1340 (11th Cir. 2011), in which the Eleventh Circuit declared unconstitutional, under the very stringent deference standard of the AEDPA, the state judicial rewritings of the 1975 Alabama Death Penalty Act, Ala. Code. §§ 13-11-1 *et seq* (Appendix J) and *explicitly left open* the question of whether its ruling extended to non-death cases such as Petitioner's. Because the legal question presented involves such a slight difference and the Eleventh Circuit chose to leave the question open, there is little doubt that reasonable jurists can debate whether the *Magwood* ruling should apply not only to sentences of death, but also to the only other possible sentence under the 1975 Alabama Death Penalty Act, namely life imprisonment without parole ("LWOP").

However, Petitioner was denied a Certificate of Appealability ("COA") to review this debatable legal question precisely because his sentence is non-

capital rather than capital and because the Eleventh Circuit, by contrast to some other circuits, virtually never grants COAs in non-capital habeas cases; and even more so, because his application for a COA was assigned to a single Circuit Judge on the Eleventh Circuit whose rate of granting COAs is markedly smaller than that of fellow judges on the same court. The Eleventh Circuit's failure to carry out the limited COA review in non-capital cases with the requisite open-mindedness and even-handedness has resulted in a breakdown of the review process, which contravenes this Court's precedent, deepens a circuit split, is arbitrary, and denies Mr. Tomlin due process, fair punishment, and his right of access to the courts.

The Eleventh Circuit's refusal to grant Mr. Tomlin a COA represents a systemic breakdown of the COA process that effectively denied Mr. Tomlin due process and his constitutional rights to access the courts and to non-arbitrary punishment. It reflects a circuit split in the manner in which the Circuit Courts consider the standard for issuance of a COA in non-capital cases, with the Eleventh Circuit granting COAs in non-capital cases at a rate (8.44%) almost half that of another circuit, such as the First Circuit (14.29%). It reflects a circuit split and arbitrariness in the procedures implemented by the Circuit Courts to consider COAs: The Eleventh Circuit, in this case, did not empanel a three-judge panel at any point in the process, while other Circuit Courts require a three-judge panel on the first COA application, with the Fourth Circuit even emphasizing in its local rules that

the use of three-judge panels may be required by "Fed. R. App. P. 27(c), which provides that a single judge 'may not dismiss or otherwise determine an appeal or other proceeding.'" Local Rule 22(a)(3) of the U.S. Court of Appeals for the Fourth Circuit; *see also* Appendix L. The Eleventh Circuit's denial of a COA here also reflects arbitrariness because of the sharply different COA grant rates among judges in the same circuit, with the assignment of Mr. Tomlin to a circuit judge who has a grant rate of 2.68% in contrast to fellow judges on the same court with comparable caseloads who have grant rates as high as 26.6%. It also reflects an arbitrary distinction between capital and non-capital cases, with the COA grant rate in capital cases in the Eleventh Circuit at 58%, but only at 8% in non-capital cases, despite the fact that the same legal standard of whether the legal claim is debatable applies in all cases. The Eleventh Circuit's denial of a COA also deepens the circuit split this Court has decided to address this term in *McKinney v. Arizo*na, No. 18-1109, filed February 21, 2019—whether a court should apply the law applicable at the time a conviction first becomes final or as it exists today: Mr. Tomlin was resentenced in 2004 under the law as it applied in 2004, rather than under the sentencing law applicable at the time of his offense in 1977. The outcome of this last circuit split is critical to Mr. Tomlin's retroactivity claim.

For all these reasons, the refusal to grant Mr. Tomlin a COA represents the systemic breakdown of the COA process that effectively

denied Mr. Tomlin due process, results in cruel and unusual punishment, and continues to deny Mr. Tomlin his constitutional right of access to the courts, in violation of the Sixth, Eight, and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

Phillip Tomlin was charged with capital murder for a crime that was committed on January 2, 1977. As such, Mr. Tomlin was prosecuted under the 1975 Alabama Death Penalty Act ("the 1975 Act") . The 1975 Act, as written, required a mandatory jury verdict of death upon conviction. (See Appendix J, at 701 [145a], § 13-11-2(a), "If the jury finds the defendant guilty, it shall fix the punishment at death"). Mr. Tomlin was not death-eligible under the 1975 Act and could not be sentenced to death because there was no aggravating circumstance at the time corresponding to the offense of double homicide and no other aggravating circumstance applied to him.[2] Accordingly, his case should not have fallen under the 1975 Act because his jury could not return a mandatory death verdict.

Mr. Tomlin only became death-eligible four years later in April 1981 as a result of two judicial opinions written by the Alabama Supreme Court:

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[2] Originally, Mr. Tomlin was also charged with murder-for-hire and deemed to have engaged in conduct that was heinous, atrocious, and cruel ("HAC"); however, he received a judgment of acquittal on the murder-for-hire count and the HAC aggravator was dropped in light of this Court's opinion in *Godfrey v. Georgia*, 446 U.S. 420 (1980). *See Tomlin v. State*, 695 So.2d 157, 161 (Ala.Crim.App. 1996), *cert. denied* (Ala. 1997).

Ex parte Kyzer, 399 So.2d 330 (Ala. 1981) and *Beck v. State*, 396 So. 2d 645 (Ala. 1981). In 2006, the Alabama Supreme Court repudiated the *Beck* and *Kyzer* decisions, declaring those decisions to be "unexpected and indefensible." *Ex parte Stephens*, 982 So. 2d 1148 (Ala. 2006). The Alabama Supreme Court made it clear that its judicial expansion of the 1975 Act was erroneous, unexpected, and unprecedented. *Id*.

In 2012, the Eleventh Circuit held that the Alabama Supreme Court had engaged in "an unexpected and indefensible construction of narrow and precise statutory language" that violated fair notice under the Due Process Clause. *Magwood*, 664 F.3d at 1349. The Eleventh Circuit reached its decision in *Magwood* under the stringent AEDPA standard of review of unreasonableness. Its decision applied to Mr. Billy Joe Magwood, who had been sentenced to death under similar circumstances to Mr. Tomlin: there was no aggravating circumstance that matched Mr. Magwood's capital offense of homicide of a law enforcement officer. In Mr. Magwood's case, the Eleventh Circuit held that the fair notice violation applied to death sentences; however, it explicitly left open the question of whether the ruling extended to non-capital sentences such as LWOP.

Both Mr. Tomlin and the petitioner in *Magwood*, Mr. Billy Joe Magwood, were convicted of capital murder and sentenced to death under the same 1975 Alabama Death Penalty Act, which was the *only* statute under Alabama law that would have permitted a sentence of death *or* a

sentence of LWOP. Death and LWOP were the only two possible sentences under the 1975 Alabama Death Penalty Act, and that 1975 Act was the only statute that would have authorized either sentence. As a result of unconstitutional state judicial rewritings of the 1975 Alabama Death Penalty Act, Mr. Magwood was resentenced to death in 1986, and Mr. Tomlin, after being sentenced to death and serving 27 years on death row, was ultimately resentenced to LWOP in 2004. *See Tomlin v. State*, 909 So.2d 290 (Ala.Crim.App. 2004).

In Mr. Magwood's case, the Eleventh Circuit declared that the Alabama Supreme Court's judicial rewritings of the 1975 Alabama Death Penalty Act (which as originally written included a mandatory jury verdict of death in clear violation of *Woodson v. North Carolina*, 428 U.S. 280 (1976)) were unexpected and indefensible, and therefore that their retroactive implementation constituted an unreasonable application of clearly established federal law as determined by this Court.

Mr. 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. He originally received a COA on the legal claim from the Eleventh Circuit on June 2, 2014. Judge Adalberto Jordan of the Eleventh Circuit granted Mr. Tomlin a COA on the following legal question:

> Whether the Alabama court's decision—that Tomlin's sentence

> of life imprisonment without the possibility of parole did not violate the Ex Post Facto Clause—was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court.

Order of the United States Court of Appeals for the Eleventh Circuit granting COA, *Tomlin v. Patterson*, No. 13-13878 (11th Cir. June 02, 2014) (Appendix I, at 19 [142a]).

On remand, the United States District Court for the Southern District of Alabama denied Mr. Tomlin's claim on the merits. *See Tomlin v. Patterson,* 1:10-cv-00120-CG-B, Order dated April 19, 2018 (Appendix A); however, thereafter, he was denied a COA by the District Court. (Appendix C). In a cursory, one-paragraph order, a single judge of the Eleventh Circuit denied Mr. Tomlin a COA. (Appendix D). In a similarly cursory, one-paragraph order, that judge and another judge of the Eleventh Circuit, on a two-judge panel, denied Mr. Tomlin reconsideration. (Appendix F). Because the legal question was left open by the Eleventh Circuit, was debatable, and had previously received a COA, Mr. Tomlin applied for a COA to seek appellate review.[3]

[3] Mr. Tomlin originally argued that his case should receive appellate review under the previous COA since the case was on return from remand; in the alternative, Mr. Tomlin filed a renewed application for COA on the same question that Judge Jordan had granted a COA in 2014.

REASONS FOR GRANTING THE WRIT

I. Certiorari Should Be Granted Because the United States Court of Appeals for the Eleventh Circuit Imposed an Improper and Unduly Burdensome COA Standard that Contravenes This Court's Precedents, Reflects Deep Arbitrariness, and Deepens a Circuit Split

Mr. Tomlin's case illustrates a deeply troubling pattern within the Eleventh Circuit that reflects a breakdown of the COA review process. In the last year and a half, the Eleventh Circuit has denied most of the COA applications in non-capital cases at a disproportionate rate compared to other circuit courts. The Eleventh Circuit tends to receive more COA petitions than its sister circuits, yet denies most applicants their ability to appeal and thus deprives them of their due process rights. (See Appendix K). This trend has persisted over the past decade.[4] The Eleventh Circuit's interpretation of the COA standard continues to contravene this Court's guidance and furthers a circuit split regarding the application of the COA standard. This Court has previously corrected misapplications of the COA standard within the Eleventh Circuit on a case-by-case basis to maintain uniformity. This Court should grant certiorari to address this breakdown in the COA review process.

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[4] *See* Nancy J. King, Non-Capital Habeas Cases After Appellate Review: An Empirical Analysis 308–10 (Vanderbilt University Law School, Working Paper No. 12-3, 2011) (discussing the varied COA grant rates across circuits from 2003 through 2011).

A. The Empirical Evidence Demonstrates that the Eleventh Circuit's COA Review Process Has Deepened a Pre-Existing Circuit Split, Is Arbitrary, and Results in Cruel and Unusual Punishment.

Mr. Tomlin's case reveals a deepening circuit split and significant arbitrariness in the COA review process of the Eleventh Circuit along a number of dimensions.

1. Circuit Split in the COA Standard

The Eleventh Circuit grants COAs in non-capital cases at a significantly lower rate than other circuits. An empirical study of COA grant rates, titled "Certificates of Appealability in Habeas Cases in the United States Court of Appeals for the Eleventh Circuit: A Study," details COA grants and denials in the Eleventh Circuit over the past year and a half, from January 1, 2018 until September 30, 2019. (Appendix K). The Eleventh Circuit granted approximately 8.44% of non-capital COAs; by contrast, the First Circuit granted 14.29% of the COAs presented. (Appendix K, Table 2, at 7 [157a]). In other words, applicants in the First Circuit were 69% more likely to receive a COA grant than in the Eleventh Circuit. This difference demonstrates a "stark disparity" in the grant rates across circuits. Brief for Petitioner at 26, *Buck v. Davis*, 137 S. Ct. 759 (2017) (No. 15-8049). This disparity further demonstrates that there is an inconsistent application of the COA standard for similarly situated petitioners across circuits.

This circuit split has been previously observed. In 2011, a study found that approximately 6% of COAs in non-capital habeas cases were granted in the Eleventh Circuit between 2003 and 2007. *See* Nancy J. King, *Non-Capital Habeas Cases After Appellate Review: An Empirical Analysis* 310 tbl.3 (Vanderbilt University Law School, Working Paper No. 12-3, 2011). During this time period, the Eleventh Circuit reviewed approximately 300 non-capital petitions, but only granted COAs for five of those petitions. *Id*. The only two circuits that received a higher volume of COA petitions—the Fifth and Ninth Circuits—had significantly different grant rates. *See id*. at 308 ("In the Ninth Circuit, district judges granted more than 14% and the court of appeals granted more than 13% of COAs sought, while in the Fifth Circuit, every COA sought from a district judge was denied, and only 7% were granted by the court of appeals.").

The King study also demonstrated that non-capital COA grant rates varied from zero percent to a high of approximately thirteen percent during that time period. *See id*. at 308, 310 tbl.3 ("Rulings on COAs varied greatly between circuits."). The results of the study show that the inequitable application of the COA standard has existed for a considerable amount of time, and makes a petitioner's geographic location a significant determining factor in their likelihood of receiving a COA.

2. Arbitrariness in the COA Review Processes Across Circuits

The local rules regarding the review of COAs deviate significantly between the different circuits, reflecting further arbitrariness in the COA review process. Specifically, the variation in what constitutes panel review illustrates these disparities. (See Appendix L). The Third Circuit, for instance, requires a three-judge panel for *all* reviews of COA applications, and it provides that, if *at least* one of the three judges "is of the opinion that the applicant has made the showing required by 28 U.S.C. § 2253", then the Third Circuit will grant the COA. 3d Cir. R. 22.3. The Fourth Circuit also mandates the use of three-judge panels and emphasizes that three-judge panels are necessary to conform with the Federal Rules of Appellate Procedures' guidance on appeals. According to the Fourth Circuit, Fed. R. App. P. 27(c) "provides that a single judge 'may not dismiss or otherwise determine an appeal or other proceeding.'" 4th Cir. R. 22(a)(3). The Fourth Circuit views the use of a single-judge panel as a contradiction to the federal appellate rules.

On the other hand, the Eleventh Circuit explicitly allows the consideration of COA applications "by a single circuit judge." 11th Cir. R. 22-1(3). The Fifth Circuit similarly allows single-judge COA rulings, but requires a three-judge panel for COAs in death penalty cases. 5th Cir. R. 27.2. (These are the circuits that tend to have the lowest COA grant rates).

According to its published rules, the First Circuit conforms with Fed. R. App. P. 22(b) for non-capital cases, but mandates the use of three-judge panels in capital cases, *see* 1st Cir. IOP VII(E)(2); however, in practice, the First Circuit used a three-judge panel for all COAs from January 1, 2018 through September 30, 2019, regardless of whether the case was capital. (See Appendix K, at 11 [161a]).

Each circuit has implemented different procedures for COA review, some arguing that a single judge cannot terminate a case, others assigning a single judge, perhaps to limit the use of judicial resources. The resulting variety in approaches to COA review injects arbitrariness and randomness into the COA process. A petitioner applying for a COA in a circuit that requires the use of a three-judge panel for all COA petitions will undoubtedly have a greater opportunity to be heard than a petitioner in a single-judge circuit. These extreme differences in procedure result in petitioners being treated differently depending on which circuit they are appealing to and result in the arbitrary imposition of punishment.

The local rules for reconsideration of COA denials also vary by circuit. The Ninth Circuit limits motions of reconsideration to instances in which a circuit court denies a COA "in full". 9th Cir. R. 22(1)(d). The Eleventh Circuit limits petitioners to motions for reconsideration and prohibits COA denials as subjects for panel rehearings or rehearings en banc. 11th Cir. R. 22-1(3).

3. Arbitrariness within the Eleventh Circuit

Within the Eleventh Circuit, there are also significant disparities in the COA grant rates depending on the circuit judge reviewing the case. Over the study period from January 1, 2018, to September 30, 2019, the grant rates of circuit judges ranged from a low of zero percent to a median of 5.29%. Charles R. Wilson, the circuit judge who reviewed Mr. Tomlin's COA application, has one of the lowest grant rates within the circuit despite reviewing a significant share of the COA petitions presented to the Eleventh Circuit. Judge Wilson grants at a rate of 2.68%. By contrast, two of the circuit judges granted over 20% of the COAs before them. (See Appendix K, Table 4 [159a]).

Table 4 of Appendix K reveals significant disparities in grant rates between judges with similar caseloads. Judge 06, for instance, granted 25.81% of their 93 non-capital COA applications, while Judge 07 granted only 5.49% of their 91 non-capital applications. Even more striking is the difference between Judge 06 and Judge 02, as Judge 02 ruled on 19 more COAs than did Judge 06, and yet granted only 2.68%. Judge 06 and Judge 09, with non-capital COA grant rates of 25.81% and 20.51% respectively, granted COAs at a much higher rate than their fellow judges.

In other words, within the Eleventh Circuit, some judges grant COAs in non-capital cases at rates as low as 2.33%, while others grant at a rate as high as 25.81%—*more than 10 times higher*. This arbitrariness is reflected

in Mr. Tomlin's case: he previously received a COA on this same legal claim by a circuit judge who has a high rate of non-capital COA grants (25.81%) and was denied a COA on the same issue by a circuit judge who has one of the lowest COA grant rates (2.68% grant rate).

4. Arbitrary Distinction between Capital and Non-Capital COAs

Further, the limited instances in which the Eleventh Circuit *does* grant a COA are primarily capital habeas cases. As Table 1 of Appendix K demonstrates, the Eleventh Circuit granted 58.3% of the capital COAs, but only 8.44% of the non-capital COAs. (Appendix K, at 7 [157a]). These grant rates for capital versus non-capital COAs are strikingly different, despite the fact that the standard of review for both is the same: whether reasonable jurists could debate the legal claim. The COA statute makes no mention of a different standard for capital versus non-capital habeas cases, yet there is a significant difference in grant rates depending on the nature of the case. *See* 28 U.S.C. § 2253(c) (2012) These internal discrepancies are not justified by the COA standard and further exemplify disparities in the application of the COA standard.

5. An Ongoing History Leading to a Current Breakdown

This Court has previously corrected misapplications of the COA standard by the Eleventh Circuit and other circuits on a case-by-case basis. In *Tharpe v. Sellers* for instance, this Court recently found that the Eleventh Court erroneously denied a COA and failed to apply the proper standard

whether jurists of reason could debate the question presented. 138 S. Ct. 545, 546 (2018). In another recent case questioning the retroactive applicability of a new rule, this Court reversed the Eleventh Circuit's decision to deny a COA on the basis that the debatable question "implicate[d] a broader legal issue." *Welch v. United States*, 136 S. Ct. 1257, 1264 (2016).

Several of this Court's decisions have also reexamined COA denials in other circuits, such as the Fifth Circuit. As mentioned previously, the Fifth Circuit typically grants only 7% of COAs. *See* Nancy J. King, *Non-Capital Habeas Cases After Appellate Review: An Empirical Analysis*, 308. In *Miller-El v. Cockrell*, this Court found that the Fifth Circuit used "too demanding a standard" in denying a COA. 537 U.S. 322, 341 (2003). This Court further reiterated that the COA standard is meant as a "threshold" determination and only requires a showing of a debatable issue among jurists. *Id*. at 327. A year after *Miller-El*, this Court reversed two Fifth Circuit COA denials because the petitioners made "substantial showing[s] of the denial of a constitutional right" and that their issues presented were debatable. *See Tennard v. Dretke*, 542 U.S. 274, 282 (2004) (quoting 28 U.S.C. § 2253(c)(2) (2012)); *Banks v. Dretke*, 540 U.S. 668, 674 (2004). In 2017, this Court applied reasoning from *Miller-El* to find that the petitioner met the threshold for receiving a COA and reversed the decision of the lower court. *See Buck*, 137 S. Ct. at 773–74.

This Court has emphasized the importance of maintaining uniformity in upholding the COA standard when granting certificates of appealability. In *McGee v. McFadden*, Justice Sotomayor acknowledged that "[u]nless judges take care to carry out the limited COA review with the requisite open mind, the process breaks down." 139 S. Ct. 2608, 2611 (Mem) (2019) (Sotomayor, J., dissenting from denial of certiorari) ("[A]ny given filing—though it may feel routine to the judge who plucks it from the top of a large stack—could be the petitioner's last, best shot at relief from an unconstitutionally imposed sentence"). Justice Sotomayor also warned against using the COA standard as a "rubber stamp." *Id*. ("[T]he large volume of COA requests, the small chance that any particular petition will lead to further review, and the press of competing priorities may turn the circumscribed COA standard of review into a rubber stamp"). Justices of this Court have also emphasized that the COA standard is meant only as a threshold inquiry for appellate review. *Jordan v. Fisher*, 135 S. Ct. 2647, 2652 (Mem) (2015) (Sotomayor, J., joined by Ginsburg and Kagan, JJ. dissenting from denial of certiorari) ("In cases where a habeas petitioner makes a threshold showing that his constitutional rights were violated, a COA should issue").

Since the Eleventh Circuit rejects the vast majority of COA applications, petitioners such as Mr. Tomlin are improperly prohibited from challenging violations of their constitutional rights. The Eleventh Circuit

has "unduly restrict[ed] [the] pathway to appellate review" for Mr. Tomlin by denying his COA application and the reconsideration of that denial. *Id.* Mr. Tomlin's case exemplifies the breakdown of the COA process within the Eleventh Circuit that this Court has previously remedied on a case-by-case basis but should now address more systematically.

B. Reasonable Jurists Could Unquestionably Debate the Extension of *Magwood* to LWOP Sentences Given That This Case Involves the Exact Same Interpretation of the Exact Same Statute Which Was Held to Be Impermissibly Retroactive Under the AEDPA

Mr. Tomlin's case is virtually identical to that of the petitioner in *Magwood*, where the Eleventh Circuit held that Mr. Magwood was entitled to habeas relief under the AEDPA "because his death sentence violated the fair-warning requirement of the Due Process Clause" as it was based on an "unforeseeable and retroactive judicial expansion of narrow and precise statutory language." *Magwood*, 664 F.3d at 1342–43. The *only* significant difference between the two cases is that while Mr. Magwood was sentenced to death, Mr. Tomlin is sentenced to LWOP—a difference that the court in *Magwood* expressly acknowledged and *intentionally* left open to be decided in future cases. *Id.* at 1348.

The Eleventh Circuit in *Magwood* explicitly stated that it was expressing "no opinion in the context of non-capital cases," making it clear that *that was still a question to be debated*. *Id.* By leaving open whether *Magwood* extends to non-capital cases, the Eleventh Circuit

acknowledged that reasonable jurists could debate this question—the very question for which the Eleventh Circuit denied Mr. Tomlin a COA. Mr. Tomlin's case makes it clear that the Eleventh Circuit is imposing an unduly burdensome and improper standard beyond what is mandated by this Court, and therefore, certiorari is warranted.

In *Magwood*, the petitioner was found to not be death-eligible because there was no aggravating circumstance in his case under § 13-11-6 that would allow the judge to sentence him to death. Ala.Code §13-11-6 (Appendix J); *Magwood*, 664 F.3d at 1348–49.

Mr. Magwood was convicted and sentenced to death for the murder of a sheriff in June 1981, and the Alabama Court of Criminal Appeals and the Alabama Supreme Court affirmed his conviction and death sentence. At the time of his alleged offense, the Alabama Death Penalty Act of 1975 was in effect, but Mr. Magwood's crime, the murder of a law enforcement officer, was not listed as an aggravating circumstance for sentencing. In March 1985, following Mr. Magwood's petition for writ of habeas corpus, the United States District Court for the Middle District of Alabama upheld his conviction, but conditionally granted the writ as to the sentence because of a failure of the sentencing court to find two mitigating circumstances. *Magwood v. Smith*, 608 F.Supp. 218, 225–26 (M.D. Ala. 1985) Mr. Magwood was then resentenced to death in 1986.

The Eleventh Circuit found that Mr. Magwood was entitled to

habeas relief regarding his resentencing because his sentence of death on resentencing was based on *Kyzer*, 399 So.2d 330, which was decided after he committed his alleged offense and was retroactively applied to his case. Mr. Magwood only became death-eligible when the Alabama Supreme Court in *Kyzer* interpreted the statute to allow the charge in § 13-11-2 to be used in lieu of a § 13-11-6 aggravating circumstance—allowing the charge of murder of a police officer to be used as an aggravating factor. *Magwood*, 664 F.3d at 1349 (citing *Kyzer*, 399 So.2d at 337). The Alabama Supreme Court even admitted in *Kyzer* that a "literal and technical reading of the statute" would not allow a defendant to be sentenced to death without an aggravating circumstance as provided in § 13-11-6. *Id.* The Eleventh Circuit concluded that Mr. Magwood "did not have fair warning that a court, when faced with an unambiguous statute, would reject the literal interpretation" and thus "*Kyzer*'s interpretation of the Alabama death penalty statute was an unexpected and indefensible construction of narrow and precise statutory language." *Magwood*, 664 F.3d at 1349. Additionally, the Court held that the violation of Due Process was supported by the fact that *Kyzer*, the case that was retroactively applied to Mr. Magwood, had since been held to not only be dicta, but incorrectly decided by the Alabama Supreme Court in *Ex parte Stephens*. *Id.* The Eleventh Circuit thus granted Mr. Magwood habeas relief under the strict AEDPA standard of review.

Similarly to Mr. Magwood, at the time of Mr. Tomlin's alleged offense in 1977, the 1975 Act was in effect and double homicide was not an aggravating factor for sentencing. All parties agree that no aggravating circumstance under the 1975 Act is present in Mr. Tomlin's case to make him death-eligible. But the fact is, the 1975 Act *only applied to those who are death-eligible*. The 1975 Act, by its own terms, required a mandatory jury verdict of death. The 1975 Act further made clear that Mr. Tomlin could not be reindicted for a capital offense under the 1975 Act, as he was in 1993, and could not receive a sentence of LWOP, given the plain language of the text of the 1975 Act:

> If the Defendant is re-indicted for an offense wherein the indictment does not allege an aggravated circumstance, the punishment upon conviction shall be as heretofore or hereafter provided by law, *however the punishment shall not be death or life imprisonment without parole.*

§13-11-2 of 1975 Act (Appendix J, at 703 [147a], emphasis added) .

At the time of Mr. Tomlin's resentencing in 2004, the same judicial rewriting of the 1975 Act that allowed Mr. Magwood to be sentenced to death allowed Mr. Tomlin to be sentenced to LWOP. Thus, if Mr. Magwood "did not have fair warning that a court, when faced with an unambiguous statute, would reject the literal interpretation," then neither did Mr. Tomlin. *Magwood*, 664 F.3d at 1349.

Due process prohibits the retroactive application of *any* "unexpected and indefensible" judicial rewriting of the 1975 Act. Under

the Due Process Clause of the United States Constitution, judicial interpretations of criminal statutes that are "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue" cannot be given retroactive effect. *Rogers v. Tennessee*, 532 U.S. 451, 461 (2001) (quoting *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964)).

In *Rogers*, this Court found the Constitution's Ex Post Facto Clause to be relevant, despite the petitioner's claim being one of due process. 532 U.S. at 467. Even though the Ex Post Facto Clause deals with legislative action, according to this Court, "limitations on ex post facto judicial decision making are inherent in the notion of due process." *Magwood*, 664 F.3d at 1349 (quoting *Rogers*, 532 U.S. at 456). This Clause prohibits laws that (1) make innocent conduct criminal, (2) aggravate a crime or make it greater than it was when committed, (3) change the punishment and inflict a greater punishment, and (4) alter the legal rules of evidence in order to convict the offender. *Calder v. Bull*, 3 Dall. 386, 390 (1798).

Although this Court has not explicitly incorporated the third category—retroactive increase of punishment—into the Due Process Clause, the Eleventh Circuit did so in *Magwood*, 664 F.3d at 1348:

> Thus, while we express no opinion in the context of non-capital cases, we conclude that a capital defendant can raise a *Bouie* fair-warning challenge to a judicial interpretation of a statute

that increases his punishment from life to death.

By expressing "no opinion in the context of non-capital cases," the Eleventh Circuit made it clear that the logical outgrowth of answering the question of retroactivity for death sentences in *Magwood* is answering the same question for LWOP sentences. That is the question that Mr. Tomlin asked the Eleventh Circuit to answer when he applied for a COA, and that is the question two judges of the Eleventh Circuit decided to foreclose *despite the Eleventh Circuit leaving it open a few years earlier*.

The precedent of this Court is clear that a COA involves only a threshold analysis and preserves full appellate review of potentially meritorious claims. This threshold inquiry is satisfied so long as reasonable jurists could either disagree with the district court's decision or "conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 336. Under this standard, a claim can be debatable regardless of whether jurists would grant or deny the petition for habeas corpus once the case has received full consideration. *Id*. at 338. The key is "the debatability of the underlying constitutional claim, not the resolution of that debate." *Id*. at 342; *see also id*. at 348 (Scalia, J., concurring) (recognizing that a COA is required when the district court's denial of relief is not "undebatable"). This Court clarified more recently that a case need not show "extraordinary circumstances" in the habeas context to be granted a COA. *Buck*, 137 S.

Ct. at 774 (No. 15-8049).

In both its order denying Mr. Tomlin's motion for a COA and its order denying the motion for reconsideration, the Eleventh Circuit provided no explanation, opting instead to provide a single paragraph stating the denials in a conclusory manner. As in *Buck*, 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." *Buck*, 137 S. Ct. at 773 (No. 15-8049); *Tomlin v. Patterson*, No. 19-10494, 2019 BL 167305, 2019 Us App Lexis 13845 (11th Cir. May 08, 2019) (Appendix D). However, as in *Buck*, it reached its conclusion after effectively, and improperly, deciding the case on the merits. It is evident based on the facts of Mr. Tomlin's case and the Eleventh Circuit's precedent in *Magwood* that reasonable jurists could in fact disagree on his claim.

The Eleventh Circuit in *Magwood* additionally recognized that Mr. Magwood was in a unique situation: He was the sole person on Alabama's death row without an aggravating circumstance for his crime. Mr. Tomlin, too, is in a unique situation. The 1975 Act did not provide for an independent sentence of LWOP, but rather *only* allowed LWOP as a discretionary downward departure by the sentencing judge from a jury's mandatory verdict of death. Mr. Tomlin needed to be death-eligible to receive an LWOP sentence, and to be death-eligible, there needed to exist

an aggravated circumstance under § 13-11-6 that the sentencing court could find at the sentencing hearing. (Appendix J; Ala.Code §13-11-6) . Because such an aggravating circumstance did not exist at the time of Mr. Tomlin's alleged offense, 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. Mr. Tomlin is in the unique position of serving an LWOP sentence without ever being *eligible* for an LWOP sentence.

The Eleventh Circuit clearly and intentionally left open the question of whether *Magwood* extended to LWOP sentences. It recognized that the application of *Magwood* to non-capital sentences was the logical next step—the next issue to be addressed after *Magwood*—and expressly declined to rule on the issue at the time. It is time for that question to be answered. Reasonable jurists could debate the extension of *Magwood* from death sentences to LWOP sentences—the Eleventh Circuit recognized that when it stated that it was expressing "no opinion in the context of non-capital cases," indicating that it was debatable. Now, the Eleventh Circuit is imposing an improper and unduly burdensome COA standard upon Mr. Tomlin rather than allowing a question that *it left open* to be answered. This Court should grant certiorari.

C. Reasonable Jurists Could Debate the Retroactivity Claim Given It Raises the Same Question at Issue in *McKinney v. Arizona* Regarding Whether a Capital Defendant Must Be Resentenced under the Capital Statute as Interpreted at the Time of the Offense or at the Time of Sentencing.

On June 10, 2019, this Court granted certiorari in *McKinney v. Arizona* to decide whether a court must apply the law as it exists today, rather than as it existed at the time a defendant's conviction first became final, when correcting a defendant's sentence or conducting a resentencing. Petition for a Writ of Certiorari, *McKinney v. Arizona*, No. 18-1109, filed February 21, 2019. Specifically, this Court will decide whether the Arizona Supreme Court was required to apply current law in resentencing a capital defendant. *Id.*

McKinney will have implications for Mr. Tomlin's case because it raises the same question about retroactivity and will likely resolve a circuit split. Given that Mr. Tomlin's case is also caught in this circuit split, given that circuits are unresolved over which law to apply in resentencing a capital defendant, *and* given that this Court has granted certiorari to resolve this issue, it is only logical that reasonable jurists could debate the claim as well. This Court should grant certiorari because it is clear that the Eleventh Circuit imposed an improper and unduly burdensome COA standard when it denied Mr. Tomlin a COA over an issue that *this Court* deemed debatable enough to answer in *McKinney*.

In the Seventh Circuit and the Supreme Court of Arizona, once a

defendant's conviction becomes final, the federal law that is applicable to the defendant's case freezes and cases decided after that point cannot help the defendant. Petition for a Writ of Certiorari, *McKinney v. Arizona*, No. 18-1109, filed February 21, 2019; *Richardson v. Gramley*, 998 F.2d 463, 467 (7th Cir. 1993). Meanwhile, in the First, Second, and Fourth Circuit along with the Supreme Courts of Florida and Washington, the current law applies in resentencing proceedings unless the sentence correction is entirely ministerial. Petition for a Writ of Certiorari, *McKinney v. Arizona*, No. 18-1109, filed February 21, 2019; *State v. Fleming*, 61 So.3d 399, 406 (Fla. 2011); *State v. Kilgore*, 216 P.3d 393, 396–401 (Wash. 2009); *United States v. Pizarro*, 772 F.3d 284, 289–91 (1st Cir. 2014); *Burrell v. United States*, 467 F.3d 160, 165–66 (2nd Cir. 2006); *United States v. Hadden*, 475 F.3d 652, 664, 670–71 (4th Cir. 2007). The outcome of this circuit split is central to Mr. Tomlin's retroactivity claim here.

Mr. Tomlin was sentenced to LWOP on May 10, 2004 under the sentencing law at that time, which included the 1981 decisions of *Kyzer* and *Beck*, which were later overruled by the Alabama Supreme Court as "unexpected and indefensible." *Stephens*, 982 So. 2d 1148. This decision reverted Alabama capital sentencing law to where it was in 1977—at the time of Mr. Tomlin's alleged offense. The retroactivity claim made by Mr. Tomlin asks the same question as *McKinney*: whether Mr. Tomlin should

have been resentenced under the capital sentencing law in 2004, which included the "unexpected and indefensible" (and later overruled) judicial rewritings of the 1975 Act, *or* whether he should have been resentenced under the 1975 Act as it existed at the time of his alleged offense in 1977. The answer to this question drastically changes Mr. Tomlin's fate. If he were to be resentenced under the law in effect in 1977, at the time of his offense, he would not have fallen in the scope of 1975 Act at all. Rather, he could only have been sentenced under the regular homicide statute and received a maximum sentence of life imprisonment *with* the possibility of parole.

Whether a resentencing court must apply the law as it exists now or as it existed at the time a defendant's conviction first became final is clearly a question that has not only divided circuits but is of such importance that certiorari was granted by this Court. Mr. Tomlin's case raises the same question, and yet the Eleventh Circuit denied a COA to consider the issue. Reasonable jurists could undeniably debate Mr. Tomlin's retroactivity claim, the Eleventh Circuit acted improperly in denying a COA, and this Court should grant certiorari.

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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