No. 19-_____

IN THE SUPREME COURT OF THE UNITED STATES
October Term 2019

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

APPENDIX

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APPENDIX INDEX
Tomlin v. Patterson

Appendix A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

PHILLIP WAYNE TOMLIN,	)	
Petitioner,	)	
vs.	)	**CIVIL ACTION NO. 10-120-CG-C**
TONY PATTERSON, Warden, Holman Correctional Facility,	)	
Respondent.	)	

ORDER

This case is before the Court on Petitioner Phillip Wayne Tomlin's ("Petitioner") first habeas corpus petition, in which he raises thirty claims challenging his conviction and sentence for the murder of two people on January 2, 1977. (Doc. 1). This Court previously denied Petitioner habeas relief (Doc. 32), but in doing so it failed to take into account his motion to supplement claim number 30 in light of *Magwood v. Warden, Ala. Dept. of Corrections*, 664 F.3d 1340 (2011). (Doc. 22). Petitioner appealed, and the Eleventh Circuit Court of Appeals vacated this Court's order without prejudice to resolve the issues Petitioner raised in Claim 30. (Doc. 40). The Court of Appeals specifically directs this Court "to (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." (Doc. 40, pp. 5–6).

Upon due consideration, the Court granted Petitioner's Motion for Supplemental Pleading in regard to the above issues. (Doc. 43, 45). Petitioner filed his supplemental brief (Doc. 46), Respondent answered (Doc. 47), and Petitioner replied (Doc. 48). All three documents are presently before the Court and ripe for consideration. For the reasons set forth below, Petitioner's habeas corpus petition is denied as to his ex post facto and due process, fair-warning claim, and the petition is denied in all other aspects.

I. BACKGROUND

On January 2, 1977, the Mobile County police found the bodies of Richard Brune and Cheryl Moore along an Interstate 10 exit ramp in Mobile County, Alabama. Both victims suffered multiple gunshot wounds and died as a result. Police later arrested John Daniels and Tomlin for the murders of Brune and Moore.[1]

Tomlin was subsequently tried, convicted, and resentenced to death for the 1977 murders of Brune and Moore through four separate trials. Tomlin's first three convictions were reversed on direct appeal. *Tomlin v. Alabama*, 909 So. 2d 290, 290–91 (Ala. Crim. App. 2004). The courts reversed Tomlin's convictions following

[1] The facts are not in dispute, and Petitioner does not claim factual innocence. The Alabama Court of Criminal Appeals thoroughly recited the facts in *Tomlin v. Alabama*, 909 So. 2d 213, 224–25 (Ala. Crim. App. 2002) *rev'd in part sub nom. Ex parte Tomlin*, 909 So. 2d 283 (Ala. 2003).

his first and second capital murder trials, in 1978 and 1990 respectively[2], because of prosecutorial misconduct. *See Ex parte Tomlin*, 540 So. 2d 668, 671 (Ala. 1988); *Tomlin v. Alabama*, 591 So. 2d 550, 559 (Ala. Crim. App. 1991).

On May 28, 1993, before his third capital murder trial, a grand jury re-indicted Petitioner in a single count indictment charging him with violation of Code of Alabama § 13-11-2(a)(10). That indictment, which controls Petitioner's present sentence, reads as follows:

COUNT 1

> The GRAND JURY of [Mobile] County charge, that, before the finding of this indictment, Phillip Wayne Tomlin, whose name is to the Grand Jury otherwise unknown than as stated, did by one act or a series of acts, unlawfully, intentionally, and with malice aforethought, kill Richard Brune by shooting him with a gun, and unlawfully, intentionally and with malice aforethought, kill Cheryl Moore by shooting her with a gun, in violation of Code of Alabama 1975, § 13-11-2(10), against the peace and dignity of the State of Alabama.

(Doc. 9-1, p. 145). Petitioner was convicted of the capital murder charge, and the jury unanimously recommended life without parole. The trial judge, however, overrode the life verdict and sentenced Petitioner to death by electrocution on January 21, 1994. On June 21, 1996, The Alabama Court of Criminal Appeals reversed the conviction because of juror misconduct. *Tomlin v. Alabama*, 695 So. 2d 157, 174 (Ala. Crim. App. 1996), *on reh'g* (Sept. 27, 1996).

[2] Petitioner's original direct appeal remained pending until 1988 because of ongoing litigation concerning the constitutionality of Alabama's death penalty statutes. (Doc. 9, p. 5). During the appeal process, Tomlin sat on death row for roughly twenty-six years. *See Tomlin v. Alabama*, 909 So. 2d 290 (Ala. Crim. App. 2004).

In June 1999, Petitioner was again tried under the May 28, 1993 indictment. This is the conviction at issue in this case. On August 8, 2000, after a sentencing hearing, the trial judge overrode the unanimous jury verdict of life without parole and sentenced Petitioner to death. *See Tomlin v. Alabama*, 909 So. 2d 213, 275 (Ala. Crim. App. 2002), *rev'd in part sub nom. Ex parte Tomlin*, 909 So. 2d 283 (Ala. 2003). On appeal, the Alabama Supreme Court affirmed his conviction but reduced his sentence to life imprisonment without parole. *Ex parte Tomlin*, 909 So. 2d 283, 286 (Ala. 2003). The Alabama Supreme Court found Petitioner's death sentence "illegal for the absence of an aggravating circumstance enumerated in section § 13-11-6." *Ex parte Tomlin*, 909 So. 2d at 289.

During state post-conviction proceedings, Petitioner argued unsuccessfully that his life sentence without parole violated ex post facto and due process principles under the United States and Alabama Constitutions.[3] In his January

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[3] Petitioner raised similar ex post facto concerns on direct appeal. *See Tomlin v. Alabama*, 909 So. 2d 213, 277 (Ala. Crim. App. 2002), *rev'd in part sub nom. Ex parte Tomlin*, 909 So. 2d 283 (Ala. 2003). When addressing this claim, the Alabama Court of Criminal Appeals simply stated:

> "The appellant's argument that applying in his trial the procedures we set forth in *Beck v. [Alabama]*, 396 So. 2d 645 (Ala. 1980), violated the ex post facto clause of the United States Constitution is without merit. The United States Supreme Court in an analogous decision involving Florida's death penalty statute, found no violation of the ex post fact clause existed. *See Dobbert v. Florida*, 432 U.S. 282, 97 S. Ct. 2290, 53 L.Ed.2d 344 (1977)."

Tomlin, 909 So. 2d at 277. Additionally, the Alabama Supreme Court discussed ex post facto considerations only as they applied to Tomlin's death sentence. *Ex parte Tomlin*, 909 So. 2d 283, 288 (Ala. 2003) ("The constitutional prohibitions against applying ex post facto laws against criminal defendants foreclose the application of

2007 amended Rule 32 petition, Petitioner argued he is entitled to post-conviction relief because, as the Court of Criminal Appeals phrased it, "the trial court allegedly improperly sentenced him to imprisonment for life without the possibility of parole." (Doc. 12-10, p. 2). The Court of Criminal Appeals, affirming the circuit court's dismissal of the petition (Doc. 12-6, p. 15), concluded this claim is without merit because "the trial court complied with the Alabama Supreme Court's instructions and sentenced the appellant to imprisonment for life without the possibility of parole." (Doc. 12-10, p. 3). The state court complied with the Alabama Supreme Court's order to reduce Petitioner's sentence from death to life without parole. (Doc. 12-10).

In his habeas corpus petition, Petitioner argues that his sentence of life without parole is illegal because the state statutes applicable to his case require the finding of an aggravating circumstance before he could be charged with capital murder or such a sentence may be imposed. (Doc. 1 pp. 50–51). After filing his reply but before the magistrate judge issued her report and recommendation, Tomlin filed a motion for leave to file a supplemental pleading. (Doc. 22). His proposed supplemental pleading references the "Billy Joe Magwood Opinions," a series of cases scrutinizing the same Alabama statutes that appear in Tomlin's case, which reached the United States Supreme Court while his petition remained pending.[4] (Doc. 22-1, p. 16). Petitioner brought this line of cases to the Court's

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this new § 13A-5-49(9) aggravating circumstance against Tomlin.").

[4] "Where precedent that is binding in this circuit is overturned by an intervening

attention in his motion to supplement, but this Court failed to rule on the motion or fully address his ex post facto or fair-warning due process claims raised therein. The Court entered an order adopting the magistrate judge's report and recommendation denying the Petition. (Doc. 32). Petitioner appealed, and the 11th Circuit Court of Appeals reversed this Court's decision. (Doc. 40).

On remand from the Eleventh Circuit, this Court ordered supplemental briefing regarding the ex post facto and fair warning due process claims. (Doc. 43). In his supplemental brief, Petitioner asserts that his sentence violates the prohibition against ex post facto laws and the Fourteenth Amendment due process right to fair warning. (Doc. 46, p. 31). In support of this contention, Tomlin raises a two-pronged argument. First, he argues that a plain language interpretation of the Alabama Death Penalty Act of 1975 (the "1975 Act") precludes the state from charging him with capital murder or sentencing him to life imprisonment without parole because an Alabama Code § 13-11-6 aggravating circumstance was not and could not be averred in the indictment. *Id.* Second, he contends that such an indictment or sentence is possible only through the retroactive application of subsequent judicial decisions, which results in the constitutional violations specified above. *Id.* at 41. Respondent counters that Petitioner is precluded from presenting this claim in federal court because Petitioner "never presented [such arguments] to

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decision of the Supreme Court, we will permit an appellant to raise in a timely fashion thereafter an issue or theory based on that new decision while his direct appeal is still pending in this Court." *United States v. Durham*, 795 F.3d 1329, 1330 (11th Cir. 2015).

the Alabama courts." (Doc. 47, p. 7). Alternatively, Respondent contends that the constitutional claim is without merit for two reasons. First, Respondent argues that Petitioner's case is factually distinguishable from the line of cases finding the constitutional violation presently alleged. *Id.* at 9. And second, "[a]lthough not eligible to receive a death sentence based only on the offense charged, when Tomlin was charged with a capital offense under § 13-11-2, he was clearly given notice he was subject to a minimum sentence of life in prison without parole." *Id.* at 16. "If no post-verdict aggravating circumstances were found, the statute provided for life imprisonment without parole for conviction" of a capital felony. *Id.*

In accordance with the remand order, this Court must first determine which claims are properly before it. (Doc. 40, p. 5).

II. Whether Petitioner's Claims are Properly Before the Court

In order to be properly before this Court, Petitioner must have exhausted his claims and followed all procedural prescriptions. The Court evaluates each requirement in turn.

a. Exhaustion of Claims

Section 2254 generally requires petitioners to exhaust all available state-law remedies. 28 U.S.C. § 2254(b)(1)(A). In that regard, "[a] petitioner must alert state courts to any federal claims to allow the state courts an opportunity to review and correct the claimed violations of his federal rights . . .. Thus, to exhaust state remedies fully the petitioner must make the state court aware that the claims asserted present federal constitutional issues." *Lamarca v. Secretary, Dep't of*

Corrections, 568 F.3d 929, 936 (11th Cir. 2009) (citations omitted). A federal court should dismiss a state prisoner's federal habeas petition if the prisoner has not exhausted all available state remedies as to his federal claims. *See Roase v. Lundy*, 455 U.S. 509 (1982); 28 U.S.C. 2254(b) (codifying this rule). The exhaustion requirement is grounded in principles of comity; in a federal system, the States should have the first opportunity to address and correct alleged violations of a state prisoner's federal rights.

A key element to the exhaustion requirement is that a federal claim be "fairly presented" to a state's highest court, either on direct appeal or collateral review. *Picard v. Connor*, 404 U.S. 270, 275 (1971). "It is not sufficient merely that the federal habeas petitioner has been through the state courts . . . nor is it sufficient that all the facts necessary to support the claim were before the state courts or that a somewhat similar state-law claim was made." *Kelley v. Sec'y for Dept. of Corr.*, 377 F.3d 1317, 1343–44 (11th Cir. 2004) (citing *Picard*, 404 U.S. at 275–76 and *Anderson v. Harles*, 459 U.S. 4, 6 (1982)). Rather, to ensure state courts have the first opportunity to decide the federal issue, a state prisoner must "present the state courts with the same claim he urges upon the federal courts." *Picard*, 404 U.S. at 276 (citations omitted). A word-for-word recitation of the claim is not required, but the claim must be "such that the reasonable reader would understand each claim's particular legal basis and specific factual foundation." *Kelley*, 377 F. 3d at 1344–45. And a court should liberally construe *pro se* habeas corpus petitions. *Dupree v. Warden*, 715 F.3d 1295, 1299 (11th Cir. 2013). But that does not mean a court is

expected to infer a *pro se* petitioner's federal claim "out of thin air." *Landers v. Warden*, 776 F.3d 1288, 1296 (11th Cir. 2015) (finding *pro se* petitioner's claim not exhausted when no supporting cases were cited and no reference to the Fourteenth Amendment or Due Process was made).

Respondent does not contend that Petitioner failed to raise an argument before the Alabama courts. Instead, Respondent contends that what "Tomlin presented . . . to the Alabama courts was an allegation the trial court lacked jurisdiction to impose a sentence of life without parole on the indictment because of the language of the statute." (Doc. 47, p. 7). Thus, he made a state law claim to the Alabama courts and not the constitutional claim he now asserts. *Id.*

The record of this case is voluminous, and the procedural history is convoluted. Nonetheless, the Court is satisfied that Petitioner, acting *pro se*, fairly presented his ex post facto and due process claim to the Alabama courts. To be sure, in his Rule 32 post-conviction proceeding with the state trial court, Petitioner argued that the indictment charging him with capital murder failed to aver a "corresponding aggravating circumstance."[5] (Doc. 12-4, p. 93). Citing the relevant death penalty statute, ALA. CODE § 13-11-1 (1975), he argued that a capital murder indictment "devoid of aggravating circumstances" precluded a defendant from being sentenced to *either* death *or* life without the possibility of parole. *Id.* Petitioner cited the Alabama Constitutions Ex Post Facto Clause in support of this claim. *Id.*

[5] This particular argument is contained in Petitioner's Amended Rule 32 Petition. The state trial court considered the amended petition in its decision. See (Doc. 12-4, p. 18).

at 94. That fact that Petitioner failed to reference the United States Constitution Ex Post Facto Clause is not fatal. Petitioner averred that the state trial court's actions "violated [his] substantive [r]ight to due process" under the United States Constitution. *Id.* A reasonable reader would understand Petitioner's due process argument as including an ex post facto component. *See Rogers v. Tennessee*, 532 U.S. 451, 456 (2001) (reasoning that ex post facto protections are inherent in due process).

After the trial court denied his post-conviction action, Petitioner appealed to the Alabama Court of Criminal Appeals. See (Doc. 12-7, pp. 1–78). Although it was not word-for-word, Petitioner's appeal brief made an argument parallel to his trial court pleading in Claim VII-1. First, he argued that his sentence was illegal due to the indictment's absence of an "aggravating circumstance enumerated" in §13-11-6. *Id.* at 68. In making this argument, Petitioner specifically cited the Ex Post Facto Clause. *See id.* at 67 (citing U.S. Const. art. 1, § 10). Second, Petitioner specifically stated that his sentence of life imprisonment without parole violates the right to due process guaranteed by the United States Constitution. *Id.* at 62. He argued that he was acquitted of any § 13-11-2 capital felonies with corresponding § 13-11-6 aggravating circumstances. *Id.* at 68. He also argued that the indictment contained no § 13-11-6 aggravating circumstance. "As such," he argued, his "sentence is illegal." *Id.* at 68. A reasonable reader would understand Petitioner's *pro se* legal and factual basis to be constitutional and grounded in the prohibition of ex post facto laws and due process protections. His argument was not hidden

within the pleading, nor was it a moving target, shifting with the turn of each page. *See McNair v. Campbell*, 416 F.3d 1291, 1303 (11th Cir. 2005) (explaining that exhaustion requires more than scattering some makeshift needles of federal claims in the haystack of the state court record).

As a last point of potential relief in the Alabama court system, Petitioner filed a petition for writ of certiorari with the Alabama Supreme Court. (Doc. 12-12). He again argued that his sentence is invalid due to his ineligibility for life without the possibility of parole because no aggravating circumstance was averred in the indictment. *Id.* at 10. Although his foundation for potential review rested in the ex post facto application of law, Petitioner specifically referenced his argument in the appellate court that dealt with federal due process protections, too. *See Id.* at 9. Therefore, given the *pro se* nature of Petitioner's pleading, the Court is satisfied that a reasonable reader would have interpreted his argument to also contain a federal due process element.

In the instant matter, Claim XXX is the claim at issue. (Doc. 1, p. 50). Claim XXX alleges that a sentence of life without the possibility of parole violates Petitioner's right under the "Fourteenth Amendment[ ] (due process and equal protection of the law) as guaranteed in the United States Constitution." *Id.* at 51. This argument is grounded in a manner similar to that plead in state court: the indictment failed to expressly aver aggravating circumstances. *Id.* Although Petitioner does not argue the constitutional guarantee against the ex post facto application of law, it is not fatal for the same reason state above: such a limitation

is inherent in the principles of due process. *See Rogers*, 532 U.S. at 456. Thus, a common thread runs through Petitioner's pleadings that would lead a reasonable reader to understand the legal basis and factual foundation of his claim as constitutional. Moreover, Respondent conceded in his answer that "Tomlin's claims have been fully exhausted through available state remedies." (Doc. 9, p. 11). Therefore, the Court finds Petitioner fairly presented his claims to the Alabama courts and met the exhaustion requirement.

b. Procedural Bar

Respondent argues that Petitioner is procedurally barred from bringing the instant action because he filed his constitutional claims outside Alabama's one-year statute of limitation for post-conviction proceedings. (Doc. 47, p. 8). Respondent also argues that any claim Petitioner raised was jurisdictionally, not constitutionally based, Id at 7, and that therefore, the state court's denial rests on adequate and independent state grounds. Petitioner, however, argues that his claims were federal claims and not procedurally barred because the state courts failed to expressly assert such a bar. (Doc. 48, p. 14).

"The teeth of the exhaustion requirement comes from its handmaiden, the procedural default doctrine." *Smith v. Jones*, 256 F.3d 1135, 1138 (11th Cir. 2001). Under this doctrine, "[a] state court's rejection of a petitioner's constitutional claim on state procedural grounds will generally preclude any subsequent federal habeas review of that claim." *Judd v. Haley*, 250 F.3d 1308, 1313 (11th Cir. 2001). "[A]

procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case 'clearly and expressly' states that its judgment rests on a state procedural bar." *Harris v. Reed*, 489 U.S. 255, 263 (1989). Therefore, it is insufficient that the state court could have procedurally barred a federal claim. *Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985). It must actually do so. *Id.*

Even if a claim is procedurally barred, a federal court may reach the merits of a claim if the petitioner can show "cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). The Supreme Court has "not identified with precision exactly what constitutes 'cause' to excuse a procedural default." *Edwards v. Carpenter,* 529 U.S. 446, 451 (2000). Nonetheless, "the existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Murray v. Carrier*, 477 U.S. 478, 488 (1986). Actual prejudice goes beyond mere error and reaches a level that works to a defendant's "actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *United States v. Frady*, 456 U.S. 152, 172 (1982).

A fundamental miscarriage of justice occurs when a "constitutional violation probably has caused the conviction of one innocent of the crime." *McCleskey v. Zant*,

499 U.S. 467, 494 (1991). In order to show actual innocence, a petitioner must present "reliable evidence . . . not presented at trial" such that "it is more likely than not that no reasonable juror would have convicted him of the underlying offense." *Johnson v. Alabama*, 256 F.3d 1156, 1171 (11th Cir. 2001) (internal quotation marks omitted). Therefore, the "actual innocence" exception requires more than a showing that the petitioner is merely guilty of some lesser degree of wrongdoing. *Rozzelle v. Sec., Fla. Dept. of Corr.*, 672 F.3d 1000, 1017 (11th Cir. 2012).

Petitionr does not argue cause and prejudice or actual innocence, so the only question is whether the state court clearly invoked a procedural bar. In an Alabama post-conviction proceeding, a procedural bar applies to constitutional claims filed more than "one (1) year after the issuance of the certificate of judgment by the Court of Criminal Appeals . . . ." Ala. R. Crim. P. 32.2(c). On direct appeal of his conviction, Petitioner filed a writ of certiorari with the Alabama Supreme Court after the appellate court denied his claim. The Alabama Supreme Court denied certiorari on March 18, 2005. (Doc. 12-1). The Alabama Court of Criminal Appeals' decision became final on the same day. (Doc. 12-2). Therefore, Petitioner faced a March 18, 2006 deadline for post-conviction constitutional claims. Petitioner, however, waited until December 2006 to begin his post-conviction proceeding with the state court. Further, the argument at issue, amendment three of the amended post-conviction pleading, was not before the trial court until August 2007. (Doc. 12-4, p. 92-95). Nonetheless, the trial court considered all claims together. (Doc. 12-4,

p. 18.)

The state trial court's consideration of Petitioner's claims can be categorized in two ways: (1) claims denied for lack of proper specificity under Rules 32.6(b) and 33.3 (sic) of the Alabama Rules of Criminal Procedure (Doc. 12-4, pp.19–20), and (2) claims preluded by the statute of limitations under Rule 32.2(c) of the Alabama Rues of Criminal Procedure. *Id.* The trial court placed the claim at issue into the first category. The Court finds this important for several reasons. First, there is no doubt that the instant claim was not procedurally barred when eight other claims were unequivocally labeled as such and this one was not. *See* (Doc. 12-4, p. 20). Second, within the Eleventh Circuit, dismissal under Rule 32.6 of the Alabama Rules of Criminal Procedure is deemed a ruling on the merits in a federal habeas action and not a procedural bar. *See Boyd v. Alabama Dept. of Corr.*, 697 F.3d 1320, 1331 (11th Cir. 2012).

The Court of Criminal Appeals evaluated Petitioner's claims in a similar fashion.[6] That court divided Petitioner's claims into (1) those claims procedurally barred and (2) those claims found to be without merit. The instant claim fell into the latter. The appellate court found in relevant part:

> The appellant filled his petition more than one year after this court issued a certificate of judgment. Therefore, claims 1, 3, and 5 are precluded because they are time-barred. See Rule 32.2(c), Ala. R.

[6] "When the last state court rendering judgment affirms without explanation, we presume that it rests on the reasons given in the last reasoned decision." *Powell v. Allen*, 602 F.3d 1263, 1268 n.2 (11th Cir. 2010) (citing *Ylst v. Nunnemaker*, 501 U.S. 797, 803–05 (1991)). The Alabama Supreme Court summarily denied Tomlin's writ with no opinion. (Doc. 12-13). Therefore, the appellate court decision is the last state decision, and the proper decision to decide the procedural default issue.

> Crim. P.
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> Finally, with regard to claim 4, after this court [sic] affirmed the appellant's conviction and sentence of death, the Alabama Supreme Court "reverse[d] the judgment of the Court of Criminal Appeals as to Tomlin's sentence and remand[ed] the case for that court to instruct the trial court to resentence Tomlin, following the jury's recommendation of life imprisonment without the possibility of parole." *See Tomlin v [Alabama]*, 909 So. 2d 283, 287 (Ala. 2003). On remand, the trial court complied with the Alabama Supreme Court's instructions and sentenced the appellant to imprisonment for life without the possibility of parole. *See Tomlin v. [Alabama]*, 909 So. 2d 290 (Ala. Crim. App. 2004). Therefore, the appellant's argument is without merit.

(Doc. 12-10, pp. 2–3). Although the appellate court's wording for Claim 4 did not exactly mirror Petitioner's, the Court is satisfied that it understood the nature by its characterization: "the trial court allegedly improperly sentenced [Petitioner] to imprisonment for life without the possibility of parole." (Doc. 12-10 at 2). It is clear from this language that the appellate court declined to procedurally bar Claim 4 when it did so to Claims 1, 3, and 5. Instead, Claim 4 was specifically found to be *without merit***.** This language is no accident, and the Court gives it due weight. Such weight dictates that adequate and independent state law grounds do not procedurally bar Petitioner's claim. *Cf. Cumble v. Singletary*, 997, F.2d 715, 720 (11th Cir. 1993) (concluding that a state court decision finding appellant's claim had "no merit" was not based on state procedural grounds).[7] Therefore, under the "plain statement" rule, the

[7] Furthermore, Respondent's argument that Claim 4 was denied on jurisdictional grounds is not well taken. The appellate court did not classify Claim 4 as jurisdictional like it did Claim 2: "the district court allegedly did not have jurisdiction to conduct a felony trial." *Id.* at 2. Under Claim 4, the appellate court

Court is bound to evaluate Petitioner's federal claims in this habeas proceeding. *See Harris*, 489 U.S. at 263.

III. The Antiterrorism and Effective Death Penalty Act of 1996

Having determined that Petitioner's claims are properly before the Court, it is necessary to identify the level of deference afforded to the state court decision. Based on the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a district court cannot grant a petition for writ of habeas corpus on behalf of a person in custody pursuant to a state court judgment unless the claim "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); *see also White v. Woodall*, 134 S. Ct. 1697, 1702 (2014) (outlining the habeas standard in § 2254). "[A] state court acts contrary to clearly established federal law if it 'confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [its] precedent.'" *Smith v. Sec'y, Dep't of Corr.,* 572 F.3d 1327, 1333 (11th Cir. 2009) (second alteration in original) (quoting *Williams v. Taylor*, 529 U.S. 362, 406 (2000)). When a state court "identifies the correct governing legal rule . . . but unreasonably applies it to the facts of the particular state prisoner's case," a state court's decision involves an unreasonable application of clearly established federal

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does not use the word jurisdiction at all.

law. *Williams*, 529 U.S. at 407. An unreasonable application of clearly established federal law may also occur when a state court "unreasonably extends, or unreasonably declines to extend, a legal principle from Supreme Court case law to a new context." *Putman v. Head*, 268 F.3d 1223, 1241 (11th Cir. 2001).

A state court's decision is entitled AEDPA deference even if the state court provides no reasoning for its ruling. If a state court summarily denies a claim without explanation, the petitioner must show there was no reasonable basis for the state court to deny relief. *Harrington v Richter*, 562 U.S. 86, 98 (2011). This requires a federal habeas court to "determine what arguments or theories supported, or . . . could have supported, the state court's decision." Id. at 786. The court then must whether "whether it is possible fair-minded jurists could disagree that those arguments or theories are inconsistent" with a prior decision of the Supreme Court. *Id.*

The § 2254 habeas standard "is difficult to meet." *Metrish v. Lancaster*, 133 S. Ct. 1781, 1786 (2013). And such a high bar is no mistake. *Ritcher*, 562 U.S. at 102. Section 2254 habeas relief "functions as a guard against extreme malfunctions in the state criminal justice systems, and not as a means of error correction." *Greene v. Fisher*, 132 S. Ct. 38, 43 (2011) (internal citations and quotation marks omitted). Putting this standard into practice in the instant matter, the Court is cognizant that "[a] federal court may not grant habeas relief on a claim a state court has rejected on the merits simply because the state court held a view different from its own." *Hill v. Humphrey*, 662 F.3d 1335, 1355 (11th Cir. 2011).

As an initial matter, Petitioner argues that the state court decision did not address the merits of his claims and, therefore, is not due AEDPA deference. He contends that a merits evaluation required the state court to evaluate the "intrinsic rights and wrongs" of his claims. (Doc. 46, p. 46). In support of this position, Petitioner cites *Johnson v. Williams*, 133 S. Ct. 1088 (2013). Alternatively, Petitioner argues AEDPA deference is not due because Respondent failed to "invoke" such deference. (Doc. 48, pp. 18–19).

Petitioner misses the mark with *Johnson*. Although the *Johnson* Court discussed when a claim is evaluated "on the merits," *Johnson*'s focus was whether the *Harrington v. Richter*, 562 U.S. 86 (2011), presumption was rebuttable. *Richter* held that state court decisions summarily rejecting claims, even those including federal issues later pursued in federal court, are presumed adjudicated on the merits. 562 U.S. at 97–100. *Johnson* held that a petitioner may rebut this presumption with evidence that "leads very clearly to the conclusion that a federal claim was inadvertently overlooked in state court." 133 S. Ct. at 1097. In such a situation, AEDPA deference does not apply. Id.

Petitioner failed to overcome the *Richter* presumption. The state court specifically found the claim at issue "without merit." (Doc. 12-10, p. 3). This phrase is dispositive. *See Moritz v. Lafler*, 525 Fed. Appx. 277, 284 (6th Cir. 2013) (finding a state court's opinion that identifies a claim as "without merit" enough to invoke AEDPA deference). And when Petitioner quotes *Johnson* regarding a federal claim being rejected out of "sheer inadvertence" (Doc. 46, p. 46), it is out of context. In

that sense, the Court was speaking to a claim being unaddressed through oversight. *See Johnson*, 133 S. Ct. at 1097. That did not happen here. The state court squarely dealt with the claim at issue in deciding what it termed "Claim 4." (Doc. 12-10, p. 2). Therefore, Petitioner failed to show that the state appellate court decision should be denied AEDPA deference.[8]

In addition, Petitioner's argument that Respondent waived the "contention that AEDPA deference should apply" does not hold water. See (Doc. 48, pp. 18–19). "[T]he standard of review under AEDPA cannot be waived by the parties." *Gardner v. Galetka*, 568 F.3d 862, 879 (10th Cir. 2009), cert. denied, 559 U.S. 993 (2010); *see also Eze v. Senkowski*, 321 F.3d 110, 121 (2d Cir. 2003) (holding that AEDPA deference "is not a procedural defense, but a standard of general applicability for all petitions filed by state prisoners after the statute's effective date presenting claims that have been adjudicated on the merits by a state court"). AEDPA "is, unlike exhaustion, an unavoidable legal question we must ask, and answer, in every case." *Gardner*, 568 F.3d at 879. Therefore, AEDPA deference applies.

A. Clearly Established Federal Law

Finding AEDPA deference due, it is necessary to identify the "clearly established Federal law, as determined by the Supreme Court of the United States"

[8] Besides, to say that the state appellate court did not decide the federal issue on the merits works to Tomlin's detriment. If the federal issue was not addressed on the merits, what issue was found to be without merit? Was it the state jurisdictional issue? If so, this means that Claim 4 was decided on adequate and independent state procedural grounds. Thus, Tomlin's present claim would be procedurally barred and not properly before the Court. *See Harris v. Reed*, 489 U.S. 255, 260 (1989).

that applies to this case and whether the state court arrived at a conclusion that was contrary "to that reached by th[e] Court on a question of law or if the state court decide[d] [this] case differently than the Court has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 413 (2000). "Avoiding th[is] pitfall[ ] does not require citation [to] cases -- indeed, it does not even require awareness of [binding] cases, so long as neither the reasoning nor the result of the state-court decision contradicts them." *Early v. Packer*, 537 U.S. 3, 8 (2002). "Clearly established Federal law for the purposes of § 2254(d)(1) includes only the holdings, as opposed to the dicta, of [the] Court's decisions." *White v. Woodall*, 134 S. Ct. 1697, 1702 (2014). Additionally, only those holdings set fort as of the time the state court renders its decision are applicable. *Greene v. Fisher*, 132 S. Ct. 38, 44 (2011).

In support of his alleged constitutional violations, Tomlin cites *Bouie v. City of Columbia*, 378 U.S. 347 (1984), *Rogers v. Tennessee*, 532 U.S. 451 (2001), as the clearly established Federal law. (Doc. 46, p. 41).

i. Bouie v. City of Columbia

During the height of the civil rights movement, two African American college students refused to leave a restaurant after a "no trespassing" sign was posted and the manager asked them to leave. *Bouie*, 378 U.S. at 348. Police arrested the students and charged them with criminal trespass in violation of "s 16–386 of the South Carolina Code of 1952 (1960 Cum. Supp.)." Id. at 349. The terms of the statute defined criminal trespass as "'entry upon the lands of another *** after

notice from the owner or tenant prohibiting such entry ***.'" *Id.* (citation omitted). In affirming the students' conviction, the South Carolina Supreme Court relied on *City of Charleston v. Mitchell*, 123 S.E. 2d 512 (S.C. 1961), which was decided after the "sit-in" demonstration occurred. *Mitchell* "construed the statute to cover not only the act of entry on the premises of another after receiving notice not to enter, but also the act of remaining on the premises of another after receiving notice to leave." Id. at 350. The students argued the court's interpretation and retroactive application of the statute violated the "requirement of the Due Process Clause that a criminal statute give fair warning of the conduct which it prohibits." *Id.* In writing for the Court, Justice Brennan held that the judicial interpretation constituted a fair warning violation of the Due Process Clause.

In reaching this holding, the Court identified two instances in which a fair warning violation may arise: (1) statutory language that is vague or overbroad or (2) "from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language." *Id.* at 352. The thrust of the second potential violation is that "an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law, such as Art. I, s 10 of the Constitution forbids." *Id.* at 353. A law applies in an ex post facto manner when a legislative enactment has one of four effects: (1) makes an act innocent when done criminal after commission; (2) "aggravates a crime, or makes it greater than it was, when committed"; (3) changes a punishment by making it greater than the punishment associated with the law when the act is committed; and (4) alters evidentiary rules

so that less or different evidence is required to convict a defendant than was required when the act is committed. *Calder v. Bull*, 3 Dall. 386, 390 (1798) (*seriatim* opinion of Chase, J.) (emphasis deleted). It stands to reasons that the Due Process Clause prohibits the judiciary from exacting the same evil the Ex Post Facto Clause prohibits the legislature from enacting. Thus, when the "judicial construction of a criminal statute is unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue," the due process right of fair warning is violated if the judicial construction is retroactively applied. *Bouie*, 378 U.S. at 354.

ii. Rogers v. Tennessee

In *Rogers v. Tennessee*, 532 U.S. 451 (2001), the Court interpreted *Bouie* and illustrated when the retroactive application of a judicial construction complies with the fair warning requirement. A Tennessee jury convicted Wilbert Rogers of second-degree murder when a man died approximately fifteen months after Rogers stabbed him. Id. at 454. After his conviction, he appealed his case and raised the common law "year and a day rule" as a defense.[9] *Id.* When the Tennessee Supreme Court decided his case, it abolished the "year and a day rule" and retroactively applied the abolition to Rogers. *Id.* at 455. The state court rejected Rogers' contention that such an action violated the Ex Post Facto Clause of the State and

[9] The "year and a day rule" is a "common-law principle that an act causing death is not homicide if the death occurs more than a year and a day after the act was committed." BLACK'S LAW DICTIONARY (10th ed. 2014).

Federal Constitution and further held that its actions comported with *Bouie*. *Id.* The United States Supreme Court affirmed the state court decision on appeal. Id. at 456.

In reaching its decision, the Court rejected as dicta language in *Bouie* suggesting that fair warning protections are an absolute prohibition on the judiciary in the same manner that ex post facto prohibitions are on the legislature. *Id.* at 459. Moreover, strict application of the Ex Post Facto Clause on courts through due process cuts against "clear constitutional text." *Id.* at 460. "It also would evince too little regard for the important institutional and contextual differences between legislating, on the one hand, and common law decisionmaking, on the other." *Id.*

Given this, the Court reaffirmed that the proper measure of a fair warning claim is whether the "judicial alteration'[s]" retroactive application was "'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue.'" *Id.* (quoting *Bouie*, 378 U.S. at 354). In finding Tennessee's abolition of the "year and a day rule" expected and defensible, the Court reasoned in three parts: (1) the reason for the rule no longer existed, (2) "practically every court recently" to have considered the rule found "it without question obsolete," and (3) the rule "had only the most tenuous foothold as part of the criminal law" at the time of Rogers' crime. Id. at 463–64. As such, the Court held that the state court's abolition was not an "unfair and arbitrary judicial action against which the Due Process Clause aims to protect." *Id.* at 467. Instead, "the court's decision was a routine exercise of common law decisionmaking in which the

court brought the law into conformity with reason and common sense." *Id.*

Synthesizing *Bouie* and *Rogers*, it is clear that the absolute bar against ex post facto laws is inapplicable in a judicial interpretation context. More deference is afforded to judicial interpretations retroactively applied to outmoded common law, whereas judicial broadening retroactively applied to narrow legislatively enacted law is not. And this principle of Federal law was clearly established at the time of the state court's decision. Further, in analyzing whether a judicial broadening is "unexpected and indefensible" or in "conformity with reason and common sense," it is necessary to analyze the "statutory language at issue, its legislative history, and judicial constructions of the statute." *Webster v. Woodford*, 369 F.3d 1062, 1069 (9th Cir. 2004).

In evaluating whether the state court's decision is contrary to the above, the Court notes that the state court's post-conviction decision provides no reasoning beyond finding Petitioner's sentence is as the Alabama Supreme Court ordered. See (Doc. 12-10, p. 2). The Alabama Supreme Court opinion ordering his sentence of life imprisonment without parole offers no guidance because Petitioner's argument regarding his sentence of death on direct appeal differs from his post-conviction argument, which is the argument presently before the Court. *See Ex parte Tomlin*, 909 So. 2d 283, 286 (Ala. 2003) (deciding Petitioner's sentence of death was invalid because the trial judge overrode a unanimous jury recommendation of life imprisonment without parole). Thus, it is necessary to "determine what arguments or theories supported, or . . . could have supported, the state court's decision."

Richter, 562 U.S. at 102. This determination starts with an analysis of the 1975 Alabama Death Penalty Act's inception and evolution.

B. 1975 Alabama Death Penalty Act

On the heels of *Furman v. Georgia*, 408 U.S. 238 (1972),[10] the Alabama legislature enacted the 1975 Alabama Death Penalty Act (the "1975 Act"). ALA. CODE § 13-11-1, *et seq*. (1975). The evolution of the 1975 Act can be broken down into three phases: (1) the strict language of the 1975 Act; (2) the judicial interpretation of the 1975 Act by *Beck v. Alabama*, 396 So. 2d 645 (1981), and *Ex parte Kyzer*, 399 So. 2d 330 (1981); and (3) repudiation of the 1975 Act with the 1981 Alabama Death Penalty Act (the "1981 Act").

i. Phase 1

The 1975 Act pertained to the commission of all capital offenses occurring from March 7, 1976 until June 30, 1981.[11] It promulgated that, "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 13-11-2." ALA. CODE § 13-11-1 (1975).

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[10] In *Furman*, the Supreme Court unequivocally denounced the unbridled discretion of a jury or sentencing authority to impose the death penalty, "concluding that unguided sentencing led to the discriminatory, arbitrary, and capricious imposition of the death penalty in violation of the Eighth Amendment." *Johnson v. Singletary*, 938 F.2d 1166, 1179 (11th Cir. 1991). Prior to *Furman* and since 1841, an Alabama jury had the unguided discretion to impose such a sentence. *See Beck v. Alabama*, 396 So. 2d 645 (1981) (surveying the history of Alabama's death penalty).

[11] In 1978, the Alabama legislature transferred its capital murder statutes to Alabama Code Sections 13A-5-30 through 13A-5-38. (Supp. 1978). This Order makes use of the original statute numbers.

Section 13-11-2 identifies Alabama's capital felonies and applies to the guilt phase of a capital proceeding. This section decrees that a jury "shall fix the punishment at death" if the criminal defendant is found guilty of a capital felony. ALA. CODE § 13-11-2(a) (1975). However, this mandatory punishment only applies when "the defendant is charged by indictment with any of the following offenses and with aggravation, which must also be averred in the indictment . . . ." *Id.* Relevant to this matter, § 13-11-2(a)(10) identifies "[m]urder in the first degree wherein two or more human beings are intentionally killed by the defendant by one or a series of acts" as a capital felony.[12]

The statutory scheme provided that upon conviction of a capital felony, the capital proceeding shifted to the sentencing phase. See § 13-11-3. At this point, the trial court was to hold a second hearing, without jury participation, to determine whether it would "sentence the defendant to death or to life imprisonment without parole." *Id.* In order to aid in this decision, evidence as to "any matter" the court deemed relevant to sentencing was to be presented, including evidence of the eight §

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[12] At the time of the act in question, Alabama defined first-degree murder as follows:

> [e]very homicide, perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or the attempt to perpetrate, any arson, rape, robbery, or burglary, or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed; or perpetrated by any act greatly dangerous to the lives of others, and evidencing a depraved mind regardless of human life, although without any preconceived purpose to deprive any particular person of life . . . .

ALA. CODE § 13-1-70 (1975).

13-11-6 aggravating circumstances and seven § 13-11-7 mitigating circumstances. *Id.* "Notwithstanding the fixing of the punishment at death by the jury," the trial court could refuse to impose a sentence of death and instead sentence a defendant to life imprisonment without parole. § 13-11-4. Such a determination was to be made after weighing the § 13-11-6 aggravating and § 13-11-7 mitigating circumstances. *Id.* Upon upholding a jury recommended sentence of death, the 1975 Act required the trial judge to "set forth in writing, as the basis of a sentence of death," one or more of the enumerated aggravating circumstances in § 13-11-6 it found present and support a sentence of death. *Id.* Any mitigating circumstances the trial court found did not outweigh the sentence of death must also be spelled out. *Id.*

ii. Phase 2

Phase 2 consists of the judicial interpretation of the 1975 Act through two Alabama cases. In the first case, the Alabama Supreme Court issued an opinion severing a portion of the 1975 Act and revamping the capital sentencing procedure. *Beck v. Alabama*, 396 So. 2d 645 (1980). In *Beck*, an Alabama jury convicted Gilbert Beck of capital murder and fixed his punishment at death, per the mandatory language of the 1975 Act. On review, the court identified two issues, the second of which is relevant to this matter. The court framed the second issue as whether the jury's mandatory death sentence after finding Beck guilty of a capital felony was constitutional. *Id.* at 647. On this issue, the court held that the mandatory requirement could not be severed from the 1975 Act and the entire Act remain feasible. *Id.* at 659. So the court construed "the requirement that the jury fix the

penalty at death to be permissive instead of mandatory." *Id.* at 660.

In a further attempt to comport with constitutional requirements, the court implemented procedural changes in capital cases that, although classified as bifurcated, trifurcated the process into a guilt phase and a sentencing phase made up of two parts. *Id.* at 662. The central issue of the guilt phase of a capital proceeding was whether the state proved beyond a reasonable doubt that the defendant is guilty of each element of a capital felony. *Id.* at 662. If a jury convicted the defendant of the capital felony, a sentencing hearing was held. The central issue of the sentencing phase became whether the aggravating circumstances outweighed the mitigating circumstances, which would justify a sentence of death. *Id.* at 662. A fundamental change i implemented in the sentencing phase is that the jury would now participate in a sentencing hearing and make a sentence recommendation. *Id.* at 659. In making a sentence recommendation to the judge, the jury would consider the § 13-11-6 aggravating and § 13-11-7 mitigating circumstances. *Id.* at 662. If the jury recommended a sentence of death, the trial court would "hold a hearing as mandated by" § 13-11-3 and § 13-11-4. *Id.* at 663.

In the second case to judicially interpret the 1975 Act, *Ex parte Kyzer*, the Alabama Supreme Court reviewed a conviction based on an indictment charging a capital felony akin to the present: first-degree murder of "two or more human beings" "by one or a series of acts." *Kyzer*, 399 So. 2d 330, 332 (Ala. 1981). At the sentencing hearing, the trial court upheld the jury's recommendation of death based

on "the 'capital felony [being] especially heinous, atrocious or cruel,' an aggravating circumstance found in Code 1975, s 13-11-6(8)." *Id.* at 333.

Citing *Godfrey v. Georgia*, 446 U.S. 420 (1980), the Alabama Supreme Court found that the murders were not "especially heinous, atrocious, or cruel" because they were not "conscienceless or pitiless homicides which are unnecessarily torturous to the victim." *Id.* at 334. Based on the absence of any other § 13-11-6 aggravating circumstance, the court found itself faced with what it classified as an "anomaly in Alabama's Death Penalty Statute." *Id.* at 334. The court asked itself whether the death penalty would be available if *Kyzer* was retried since there was not a corresponding aggravating circumstance in § 13-11-6 for the capital felony contained in the indictment. *Id.* The court concluded that a "literal and technical reading of the statute would answer this inquiry in the affirmative, but to so hold would be completely illogical and would mean that the legislature did a completely useless act by creating a capital [felony] for which the defendant could not ultimately receive the death penalty." *Id.* at 337. To right this situation, the court read into the 1975 Act that a trial judge and jury may, in a sentencing hearing, rely on the capital felony in the indictment to support a sentence of death, even if no corresponding aggravating circumstance was included in § 13-11-6. *Id.* at 338.

iii. Phase 3

Phase 3 of the 1975 Act began when the Alabama legislature enacted a new death penalty act (the "1981 Act"), which expressly repealed the 1975 Act. Act of May 28, 1980, Pub. Act No 80-753, 1980, Acts of Alabama p. 1556–59. The 1981 Act

articulated that it "applies only to conduct occurring after 12:01 A.M. on July 1, 1981. Conduct occurring before 12:01 A.M. on July 1, 1981 shall be governed by pre-existing law, [the 1975 Act]." ALA. CODE § 13A-5-57.

The 1981 Act statutorily implemented many of the changes made by the Alabama Supreme Court in *Beck* but rejected *Kyzer*'s rule on aggravating circumstances. See ALA. CODE § 13A-5-45(f) ("Unless at least one aggravating circumstance as defined in section 13A-5-49 exists, the sentence shall be life imprisonment without parole.") Consequently, under the 1981 Act, a trial court could sentence a defendant to life imprisonment without parole after conviction of a capital felony only if it found no corresponding aggravating circumstance, and no other aggravating circumstance was present.

After nearly three decades, the Alabama Supreme Court rejected *Kyzer*'s expansion of the 1975 Act's § 13-11-6 aggravating circumstances. *See Ex parte Stephens*, 982 So. 2d 1148 (2006). The *Stephens* court found this portion of *Kyzer* to be dicta and unpersuasive. Id. at 1153. Further, the court reasoned that "the dicta in *Kyzer* conflicts with the plain language of the Alabama Criminal Code (as the *Kyzer* Court itself acknowledged)." Section 13-A-5-49, Ala. Code 1975, states that '[a]ggravating circumstances shall be the following.' The language 'shall be'—as opposed to 'shall include'—indicates that the list is intended to be exclusive." *Id.* at 1153.

C. AEDPA Analysis of the State Court's Decision

Petitioner argues that his "sentence of life imprisonment without parole

violates the ex post facto principle of fair warning at the heart of the Due Process Clause of the United States Constitution." (Doc. 46, p 45). Respondent counters that no constitutional violation occurred because Petitioner does not face a death sentence. (Doc. 47, p. 16). Further, Respondent contends the 1975 Act gave fair notice that Petitioner faced not only a death sentence but also a minimum of life imprisonment without parole if convicted. *Id.*

i. Ex Post Facto Application of Law

To begin with, Petitioner's ex post facto argument is misplaced as an independent argument. In essence, the thrust of his argument is that he suffers from a change in punishment or the infliction of greater punishment due to the retroactive application of law. *See Calder*, 3 Dall. at 390. The United States Constitution commands that "[n]o State shall . . . pass any [ ] ex post facto Law . . . ." U.S. Const. art. I, § 10, cl. 1. The Ex Post Facto Clause is a "limitation upon the powers of the Legislature." *Rogers*, 532 U.S. at 456. Assuming arguendo that Petitioner suffers from an ex post facto application of law, it is clear that the Alabama legislature had no hand in it. The disputed act was the doing of an Alabama court. Therefore, the appellate court did not act contrary to clearly established federal law in denying the ex post facto claim. Moreover, in as much as the prohibition against ex post facto laws may apply, it is in the sense that such protections are "inherent in the notions of due process." *Id.* at 456. So when the Court evaluates whether Petitioner's indictment and sentence are contrary to the right to fair warning contained in the Due Process Clause, the evaluation

necessarily includes the ex post facto question.

ii. The State Court Decision Is Not Contrary To *Bouie*

Petitioner contends that his due process right to fair warning was violated in that the only way he could be indicted for a capital offense, tried, and sentenced to life imprisonment without parole is through the retroactive application of *Ex parte Kyzer*, 399 So. 2d 330 (1981), and *Beck v. Alabama*, 396 So. 2d 645 (Ala. 1981), which were unexpected and indefensible under *Bouie.* (Doc. 46, pp. 41–45). In support of this claim, Petitioner cites *Magwood v. Warden, Alabama Department of Corrections*, 664 F.3d 1340 (11th Cir. 2011), for the proposition that *Kyzer* has already been found to violate the due process right to fair warning.[13] *Id.* at 45. Petitioner's characterization of *Magwood* is correct, but his situation is distinguishable from that in *Magwood*.

Writing for the Eleventh Circuit, Judge Black issued an opinion interpreting *Bouie* as it relates to the 1975 Act and aggravating circumstances that support a death sentence. *Magwood*, 664 F.3d 1340 (11th Cir. 2011). Billy Joe Magwood murdered the Coffee County Sheriff on March 1, 1979, and a jury convicted and sentenced him to death in June 1981. *Id.* at 1342. After receiving partial federal habeas relief, Magwood sought further habeas relief after the state court resentenced him to death. *Id.* He argued that the trial court erred when it found in the second sentencing hearing that the capital felony he was found guilty of, murder

[13] A circuit court decision is not clearly established Federal law, but it is persuasive in determining what law is clearly established. *Renico v. Lett*, 130 S. Ct. 1855, 1866 (2009).

of a law enforcement officer, was an aggravating circumstance supporting a death sentence although it was not specifically enumerated in § 13-11-6. *Id.* Magwood argued the only way the capital felony itself constituted an aggravating circumstance supporting a death sentence was by retroactively applying *Kyzer*, and such application constituted a fair warning violation. *Id.* at 1346.

The Court agreed with Magwood and concluded 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." *Id.* at 1348. The Court reasoned that it was unexpected and indefensible that *Kyzer* would judicially expand the aggravating circumstances supporting a death sentence to include the aggravated offense that made the initial crime a capital felony, even though it was not enumerated in § 13-11-6. Id. at 1349. Thus, the Eleventh Circuit affirmed the district court's grant of habeas relief. On remand, the trial court resentenced Magwood to life imprisonment without the possibility of parole. (Doc. 47-1, p. 3).

As Respondent points out, Petitioner's reliance on *Magwood* is misplaced. (Doc. 47, p. 12). The instant case is factually distinct from *Magwood*. Billy Joe Magwood faced a death sentence supported by an aggravating circumstance present only because of *Kyzer*; Petitioner does not. The Alabama Supreme Court vacated Petitioner's sentence of death. *Ex parte Tomlin*, 909 So. 2d 283 (Ala. 2003) (vacating Petitioner's death sentence and instructing the trial court to resentence him in accordance with the jury's unanimous recommendation). Now, Petitioner faces life imprisonment without parole, which does not require a judge to consider §

13-11-6 aggravating circumstances. *See* § 13-11-4 (requiring the existence of § 13-11-6 aggravating circumstances "[i]f the court imposes a" death sentence). Moreover, Magwood challenged a judicial decision that increased his punishment from life to death in the sentencing phase of a capital trial. Petitioner attempts to apply the same rational to the guilt phase of a capital trial and argues that he could not even be indicted for a capital offense. This argument is counterintuitive to the holding in *Magwood* which supported a capital conviction and sentence of life imprisonment without parole in the absence of an identifiable or corresponding § 13-11-6 aggravating circumstance. *See Magwood*, 664 F.3d at 1330 (affirming the district court's order vacating Magwood's death sentence but not his conviction).

And although the present case does not deal with the judicial interpretation of a common law principle that had a tenuous foothold in criminal law like that in *Rogers*, it differs from *Bouie* in three material ways. First, the *Bouie* students who conducted "sin-ins" did not have notice "of what the law intended to do" if they remained after notice was posted: make them subject to prosecution for criminal trespass. *See McBoyle v. United States*, 283 U.S. 25, 27 (1931). Here, the 1975 Act spelled out that the first-degree murder of two or more persons in one or a series of acts is a capital felony punishable by death or life imprisonment without parole.[14] *See* § 13-11-1 ("the death penalty or life imprisonment without parole shall be fixed

[14] This point further distinguishes Petitioner's case from *Magwood*, *supra*. Before *Kyzer,* Billy Joe Magwood did not have notice that the sentencing judge intended to use the aggravation that elevated his crime to a capital felony as support for a death sentence.

as punishment only in the cases and in the manner herein enumerated and described in section 13-11-2").

Second, in *Bouie*, the South Carolina legislature had enacted a statute that mirrored the judicial expansion shortly after the "sit-in" occurred. *Bouie*, 378 U.S. at 361. Therefore, it stands to reason that the South Carolina legislature did not intend the original criminal trespass statute to cover those persons who remained after notice was posted. Here, the 1981 Act repealed the 1975 Act, and the Alabama legislature reworded the 1981 Act in 1999. In neither 1981 nor 1999 did the legislature implement language or clarify that the §13-11-6 aggravating circumstances to be relied on during a sentencing proceeding must be averred in the indictment for a defendant to be charged or convicted of a capital felony, much less sentenced to life imprisonment without parole. In fact, the Alabama legislature deleted the introductory paragraph of § 13-11-2, which declared that the offense and aggravation must be averred in the indictment. Section 13-11-2's corollary in the 1981 Act, § 13A-5-40(a), reads in its entirety as follows: "[t]he following are capital offenses." The substance of the capital felonies remained unchanged. Thus, it appears that all the indictment would have to include is the specific capital felony alleged violated under the 1981 Act.

Third, "[s]o far as the words of the statute were concerned, [the *Bouie*] petitioners were given not only no 'fair warning,' but no warning whatever, that their conduct" would violate the precise language of the statute at issue. *Bouie*, 378 U.S. at 355. It is under this principle that Petitioner primarily attempts to animate

a *Bouie* violation with an extensive statutory interpretation argument. See (Doc. 46, pp. 31–41). The premise of his argument is that the plain language of § 13-11-2 of the 1975 Act requires a § 13-11-6 aggravating circumstance to be included in the indictment because "every word and clause must be given effect." *Id.* at 34. Thus, when the legislature included in § 13-11-2 the phrase "charged by indictment with any of the following offenses and with aggravation, which must also be averred in the indictment," it could mean nothing else but that the § 13-11-6 aggravating circumstance(s) the state may rely on at sentencing and a judge may include in his sentencing order must be spelled out in the indictment. *Id.* Its inclusion is what makes a defendant "death eligible." *See id.* at 29. Based on the absence of such in his indictment, he argues that he is not "death eligible," which means that he cannot be charged with or tried for a capital felony without *Kyzer* being retroactively applied. *Id.* at 32, 41. Petitioner insists that to decide otherwise would create legal incoherence. *Id.* at 41. Respondent counters that death eligibility is not established upon indictment but only after a jury has convicted a capital defendant and the trial judge has found the presence of a § 13-11-6 aggravating circumstance in a sentencing proceeding. (Doc. 47, p. 13). Therefore, the 1975 Act did not require a § 13-11-6 aggravating circumstance to be averred in Petitioner's indictment to be tried for a capital felony under § 13-11-2. *See* (Doc. 47, p. 16).

Several cannons of interpretation guide the Court's evaluation in this matter. The rule of lenity directs that "[s]tatutes creating crimes are to be strictly construed

in favor of the accused," and "the[ ] [statutes] may not apply to cases not covered by the words used . . . ." *United States v. Resnick*, 299 U.S. 207, 209 (1937); *see also, Fuller v. Alabama*, 60 So. 2d 202, 205 (Ala. 1952). Moreover, "criminal statutes should not be 'extended by construction.'" *Ex parte Evers*, 434 So. 2d at 817 (quoting *Locklear v. Alabama*, 282 So. 2d 116 (1973). "Because the meaning of statutory language depends on context, a statute is to be read as a whole." *Ex parte Jackson*, 614 So. 2d 405, 406 (Ala. 1993) (citing *King v. St. Vincent's Hospital*, 502 U.S. 215 (1991)).

Keeping these principles in mind, the plain language of the 1975 Act contemplates that a capital proceeding is to have two parts: the guilt phase, §§ 13-11-1–2, and the sentencing phase, §§ 13-11-3–7. In the guilt phase, § 13-11-1 directs that "the death penalty or a life sentence without parole" shall be enforced only in the manner outlined in § 13-11-2: "when the defendant is charged by indictment with any of the following offenses and with aggravation, which must also be averred in the indictment . . . ." Fair-minded jurists could agree that the 1975 Act requires an indictment be made up of two parts: an offense and aggravation. Petitioner takes a very narrow approach to the term aggravation, but in doing so he fails to recognize its context in the guilt phase. When § 13-11-2 contemplates two parts to an indictment, it is because each capital felony is made up of two parts: the intentional killing or first-degree murder (offense) *and* the aggravation that elevates the crime to a capital felony. *See Horsley v. Alabama*, 374 So. 2d 363, 367 (Ala. 1978) (finding § 13-11-2 enacted "for the prevention and

punishment of homicides committed under legislatively determined aggravating circumstances"), *rev'd on other grounds*, 100 S. Ct. 3043 (1980). So consideration must be given to why the phrase "with aggravation" is a necessary part of § 13-11-2 and how it applies to the guilt phase of a capital proceeding, not the sentencing phase.

On this point, the Alabama Court of Criminal Appeals found in relevant part:

> In Alabama, by statute, the aggravating circumstance must be alleged in the indictment where the death penalty is sought. Title 15, s 424(4), Code of Alabama 1940, Recompiled 1958, 1975 Interim Supplement, now s 13-11-2, Code of Alabama 1975. The aggravating circumstances must be set forth in the indictment because the state is required to give the accused notice that a greater penalty is sought to be inflicted than for a first offense. . . . Under the Death Penalty Statute, the aggravating circumstance is a statutory element of the crime. Without it, one could not be charged and convicted for "capital murder". Though the opinion of the jury is advisory only upon the trial judge (see *Jacobs v. [Alabama]*, 361 So. 2d 607, 632 (Ala. Crim. App. 1977), the state must prove the aggravating circumstance and the jury must find the existence of such, even though the enhanced punishment is left to be imposed by the trial judge.

Wilson v. Alabama, 371 So. 2d 932, 940–41 (Ala. Crim. App. 1978), *vacated on other grounds*, 448 U.S. 903 (1980). And when § 13-11-2 uses the phrase "with aggravation," it requires the aggravation as enumerated in § 13-11-2 to be contained within the indictment, not an aggravating circumstance enumerated in § 13-11-6 and used during sentencing. *See Evans v. Alabama*, 361 So. 2d 666, 670 (Ala. 1978). In other words, due process requires the state to put the defendant on notice that a non-capital felony has accompanying aggravation, which subjects the defendant to trial for a capital felony. Therefore, the aggravation to notice or aver

is that which elevates the non-capital felony to a capital felony. Fair-minded jurists could agree that such an interpretation of the 1975 Act does not create the legal incoherence Petitioner insists upon (Doc. 46, p. 39) but is in "conformity with logic and common sense." *See Rogers*, 532 U.S. at 462.

To be sure, the state indicted Petitioner for the violation of § 13-11-2(a)(10): the first-degree murder of two or more persons by one or a series of acts. (Doc. 9-1, p. 15). Under the 1975 Act, first-degree murder alone was not a capital felony. Even more, the first-degree murder of two or more people in unrelated acts was not a capital felony. In such a case, the most a defendant could face would be two separate counts of first-degree murder. *See* ALA. CODE § 13-1-70 (1975). And neither would be punishable by death or life imprisonment without parole. However, when one or a series of acts connects the first-degree murder of two or more people, the Alabama legislature decided that such an act was a capital felony. Richard Brune and Cheryl Moore were killed in one or a series of acts. *Tomlin*, 909 So. 2d at 224. At that point, the state had the opportunity to seek capital punishment. But due process required the state notify Petitioner of its intentions when it sought to try the crime as a capital felony. Thus, the criminal offense and aggravation that made the felony capital must be averred in the indictment. And both the offense and aggravation had to be proven beyond a reasonable doubt in order to be found guilty. In other words, the state had to prove (1) that two or more persons were murdered in the first-degree and (2) such was done in one or a series of acts.

Such an interpretation keeps the reach of § 13-11-2's words within their meaning and is supported by each capital felony that contains a first offense of murder or first-degree murder. *See* §§ 13-11-2 (a)(5), (6), (7), (10), (11), (12), (13), and (14). For instance, murder in the first-degree becomes a capital felony and triable as such "where the victim is a public official" and the murder "stems from . . . his official position." § 13-11-2(a)(11). Or murder in the first-degree becomes a capital felony and triable as such when an aircraft is highjacked with the intent to obtain valuable consideration for its release and the murder is committed in the process. § 13-11-2(a)(12). Based on this, fair-minded jurists could agree that the aggravating circumstances of 13-11-6 are not an element of the crime alleged in § 13-11-2 to be averred in the indictment. Instead, § 13-11-6 circumstances become relevant in the sentencing phase of the proceeding. *See* § 13-11-4; *see also Jacobs*, 361 So. 2d, at 631 (reasoning that the jury fixing the sentence at death was advisory and at that point the judge weighed the aggravating and mitigating circumstances before imposing a death sentence). An indictment containing the offense and aggravation that equaled the capital felony is more than an abstract possibility, having never once been enforced in Alabama.[15] *See Rogers*, 532 U.S. at 466. It

[15] In *Bouie*, the Court reasoned that "[i]t would be a rare situation in which the meaning of a statute of another State sufficed to afford a person 'fair warning' that his own State's statute meant something quite different from what its words said." *Bouie*, 387 U.S. at 359–60. The Court does not presume this to be such a "rare situation." But if it were, the popular trend around the time in question would further undermine Petitioner's position. *See* Del. Code. Ann. Tit. 11, 4209 (c) (1979) (requiring disclosure of aggravating circumstances that support a death sentence after a verdict of guilt but before the "punishment hearing); S.C. Code § 16-3-20(B) (Supp. 1980) (same); *Tennessee v. Berry*, 592 S.W. 2d 553, 562 (Tenn. 1980) (finding

happened each time a defendant was indicted for a capital felony, regardless of whether there was a corresponding circumstance in § 13-11-6.[16] Thus, 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 langue of the 1975 Act does not require the application of Kyzer for Petitioner to be indicted or tried for a capital felony.

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that an indictment need not include the enumerated aggravating circumstances that pertain to sentencing); *Dungee v. Hopper*, 244 S.E. 2d 849, 850 (Ga. 1978) (finding "no merit" in a criminal defendant's contention that due process was violated because an "indictment failed to specify any statutory aggravating circumstances"); *see also Spenkelink v. Wainwright*, 442 U.S. 1301, 1305–06 (1979) (rejecting the opportunity to grant certiorari on whether a defendant is due "some sort of formal notice" in an indictment of "the statutorily prescribed aggravating circumstances" the prosecution intends to rely on for the imposition of a death sentence).

[16] The prior decisions of the relevant state played a role in *Bouie* and *Rogers*. As to prior decisions supporting this interpretation, the present case stands in somewhat of a temporal irregularity. Although approved on September 9, 1975, the 1975 Act became effective on March 7, 1976. Ala. Code § 13-11-9 (1975). The law in question was in effect for only nine months and twenty-seven days when Petitioner committed the murders he stands convicted of. This is hardly enough time to create a sufficient body of case law to evaluate the point in question. Moreover, the differences between the 1975 Act and its predecessors make evaluation of prior case law futile. Nonetheless, the Court is hard pressed to say that fair-minded jurists would find such an interpretation "so clearly at variance" with the statute. *Bouie*, 378 U.S. at 356. In fact, of the decisions announced around this time that this Court surveyed, all of them viewed the indictment and guilt phase of a capital proceeding in accordance with the interpretation above. *See Horsley v. Alabama*, 374 So. 2d 363, 367 (Ala. Crim. App.) (viewing the fourteen capital offenses enumerated in § 13-11-2 as being made up of homicide with aggravation, *rev'd on other grounds*, 448 U.S. 903 (1980); *Jacobs v. Alabama*, 361 So. 2d 640, 641 (Ala. 1978) ("This case concerns the constitutionality of [the 1975 Act], which provides penalties for certain aggravated homicides."); *Bester v. Alabama*, 362 So. 2d 1282, 1282 (Ala. Crim. App. 1978) (indictment included § 13-11-2 aggravation that murder was committed while defendant was serving a sentence of life imprisonment).

Fair-minded jurists could also agree that the rule of lenity precludes Petitioner's interpretation. Under Petitioner's interpretation, the indictment must include the aggravating circumstance to be used in sentencing regardless of whether it corresponds to the committed offense. For instance, an indictment would have to aver that a defendant "was previously convicted of . . . a felony involving the use or threat of violence" even though it is not an element any capital felony. Such information goes towards the background, criminal history, or even propensity of a defendant and has no bearing on guilt. But Petitioner would have this allegation go back with the jury in the indictment. *See Wilson v. Alabama*, 296 So. 2d 774, 776 (Ala. Crim. App. 1974) ("It is proper for the indictment to go to the jury room with the jury.") Now it is understood that an indictment is not evidence. *Id.* Further, it is presumed that a jury follows a judge's order to such effect. *See Perkins v. Alabama,* 808 So. 2d 1041 (Ala. Crim. App. 1999). But to read the 1975 Act to require prejudicial information in the indictment cannot be said to accord with the rule of lenity or the Constitution. *See Gregg v. Georgia*, 428 U.S. 153, 190 (1976) ("Much of the information that is relevant to the sentencing decision may have no relevance to the question of guilt, or may even be extremely prejudicial to a fair determination of that question.").

Lastly, Petitioner's position regarding "death eligibility" and that life imprisonment without parole is only a "discretionary optional downward departure" fails to overcome the AEDPA standard. *See* (Doc. 49, pp. 22, 37). *Magwood*'s reasoning guides the Court concerning when a defendant becomes "death eligible."

Although the 1975 Act requires the jury to fix the penalty at death upon finding a defendant guilty, this designation of punishment is not final until a judge weighs the aggravating and mitigating circumstances in a sentencing hearing. *Magwood*, 664 F.3d at 1348–49. In a sentencing proceeding, a defendant found guilty by a jury becomes "'eligible' for the death penalty" only when at least one § 13-11-6 aggravating circumstance is found to outweigh any § 13-11-7 mitigating circumstance, which must be articulated in the judge's written sentencing order. *See id.* at 1349. Albeit indirectly, the only punishment the 1975 Act allows a trial judge to impose for a capital conviction in the absence of an enumerated § 13-11-6 aggravating circumstance is life imprisonment without parole. *See* § 13-11-4. Such is the case here.[17] Therefore, fair-minded jurists could agree that the plain language of the 1975 Act gave Petitioner notice that the minimum sentence he would face upon conviction is life imprisonment without parole if he was not found to be "death eligible."

Additionally, this conclusion is the same if the trifurcated proceeding *Beck*

[17] Additionally, the 6th Amendment violation addressed in *Hurst v. Florida*, 136 S. Ct. 616 (2016), is inapplicable in this case. In *Hurst* and its predecessor, *Ring v. Arizona,* 536 U.S. 584 (2002), the defendant faced a sentence of death imposed by a judge based on aggravating circumstances found independent of a jury's fact finding. Here, the Alabama Supreme Court reversed the judge's sentence of death and directed the imposition of the jury's recommended sentence of life imprisonment without parole. *Ex parte Tomlin*, 909 So. 2d 283, 287 (Ala. 2003). Further, Petitioner's sentence does not rely on facts not found by a jury. Moreover, it echoes the maximum punishment the Court reasoned a defendant could receive based on the conviction alone: life imprisonment without parole. *See Hurst,* 136 S. Ct. 616, at 622 ("As with Timothy Ring, the maximum punishment Timothy Hurst could have received without any judge-made findings was life in prison without parole.").

implemented is applied, which was the case in the trial below. *Beck* empowered the jury with the ability to recommend the lesser sentence of life imprisonment without parole at a sentencing hearing. *Beck*, 396 So. 2d at 660. Here, the jury unanimously recommended the sentence of life imprisonment without parole. (Doc. 10-1, pp. 64–65). The application of *Beck* was not contrary to or an unreasonable refusal to extend *Bouie* because its procedural changes only "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).

Therefore, 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 Petitioner's claim. *See Loggins v. Thomas*, 654 F.3d 1204, 1220 (11th Cir. 2011).

For all the foregoing reasons, Tomlin's Petition under 25 U.S.C. § 2254 for Writ of Habeas Corpus by Person in State Custody is **DENIED**.

DONE and **ORDERED** this 19th day of April, 2018.

/s/ Callie V. S. Granade
SENIOR UNITED STATES DISTRICT JUDGE

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

PHILLIP WAYNE TOMLIN,	)	
Petitioner,	)	
vs.	)	**CIVIL ACTION NO. 10-120-CG-B**
TONY PATTERSON, Warden, Holman Correctional Facility,	)	
Respondent.	)	

ORDER

This case is before the Court on Petitioner Phillip Wayne Tomlin's ("Petitioner") motion to reconsider pursuant to FED. R. CIV. P. 59 and 60. (Doc. 55). For the reasons explained below, the Court finds it does not have jurisdiction to consider Petitioner's motion to reconsider. Accordingly, Petitioner's motion will be dismissed.

I. Procedural Background

Petitioner's original habeas corpus petition raised thirty claims challenging his conviction and sentence for the murder of two people on January 2, 1977. (Doc. 1). This Court previously denied Petitioner habeas relief (Doc. 32) but failed to take into account Petitioner's motion to supplement claim number 30 in light of *Magwood v. Warden, Ala. Dept. of Corrections*, 664 F.3d 1340 (2011). (Doc. 22). Petitioner appealed, and the Eleventh Circuit Court of Appeals vacated this Court's

order without prejudice to resolve the issues Petitioner raised in Claim 30. (Doc. 40). The Court of Appeals specifically directed this Court "to (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." (Doc. 40, pp. 5–6). On remand, this Court granted Petitioner's Motion for Supplemental Pleading but denied Petitioner's habeas corpus petition as to his ex post facto and due process, fair-warning claim. Petitioner's current motion seeks reconsideration of his claim pursuant to Rules 59(e) and 60(b).

II. Analysis

Before the Court can address the merits of Petitioner's motion, the Court must determine whether it has jurisdiction to consider the motion at all. *See Cadet v. Bulger*, 377 F.3d 1173, 1179 (11th Cir. 2004) (Federal courts are "obligated to inquire into subject-matter jurisdiction sua sponte whenever it may be lacking."). The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") was enacted to ensure greater finality of state and federal court judgments in criminal cases. To that end, AEDPA greatly restricts the filing of second or successive petitions for relief under § 2254 or § 2255. *See Farris v. United States*, 333 F.3d 1211, 1216 (11th Cir. 2003) (without appellate authorization, district court lacks jurisdiction to consider a second or successive petition); 28 U.S.C. § 2244(b)(3)(A). In the § 2254 and § 2255 context, the Court must be wary of an unauthorized attempt at a second

or successive petition disguised as a Rule 59(e) or 60(b) motion. The Eleventh Circuit has held that a Rule 60(b) motion is foreclosed if it (1) "seeks to add a new ground of relief;" or (2) "attacks the federal court's previous resolution of a claim on the merits." *Williams v. Chatman*, 510 F.3d 1290, 1293–94 (11th Cir. 2007) (citing *Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005)). The use of the term "on the merits" is explained as follows:

> We refer here to a determination that there exist or do not exist grounds entitling a petitioner to habeas corpus relief under 28 U.S.C. § 2254(a) and (b). When a movant asserts one of those grounds (or asserts that a previous ruling regarding one of those grounds was in error) he is making a habeas corpus claim. He is not doing so when he merely asserts that a previous ruling which precluded a merits determination was in error—for example, a denial for such reasons as failure to exhaust, procedural default, or statute-of-limitations bar.

Williams, 510 F.3d at 1294 (quoting *Gonzalez*, 545 U.S. 524 at 532 n. 4). The Eleventh Circuit specifically addressed Rule 60(b) motions in *Williams v. Chatman*, but "the Southern District of Alabama has held that the 'jurisdictional prohibition on Rule 60(b) motions in the habeas context applies with equal force to Rule 59(e) motions.'" *Williams v. United States*, 2017 WL 3613042, at *2 (S.D. Ala. Aug. 22, 2017) (quoting *Aird v. United States*, 339 F.Supp.2d 1305, 1311 (S.D. Ala. 2004)).

Petitioner's grounds for reconsideration are that this Court was clearly erroneous in its interpretation of the 1975 Alabama Death Penalty Act and the Court failed to address whether the state court's decision is contrary to *Rogers v. Tennessee*, 532 U.S. 451 (2001). Petitioner contends that the Court should interpret the statute to prohibit punishment of life imprisonment without parole in his case and that if the Court properly followed the *Rogers* standard it would conclude that

Petitioner was entitled to relief. These arguments clearly go to the merits of Petitioner's ex post facto and due process, fair warning claim. Accordingly, this Court lacks jurisdiction to consider Petitioner's Rule 59(e) and 60(b) motion.

CONCLUSION

For the foregoing reasons, Petitioner's motion to reconsider pursuant to FED. R. CIV. P. 59 and 60 (Doc. 55), is **DISMISSED**.

DONE and **ORDERED** this 4th day of February, 2019.

/s/ Callie V. S. Granade
SENIOR UNITED STATES DISTRICT JUDGE

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

PHILLIP WAYNE TOMLIN,	)	
Petitioner,	)	
vs.	)	**CIVIL ACTION NO. 10-120-CG-B**
TONY PATTERSON, Warden, Holman Correctional Facility,	)	
Respondent.	)	

ORDER

This case is before the Court on the motion of Petitioner Phillip Wayne Tomlin ("Petitioner") for leave to proceed on appeal *in forma pauperis*, pursuant to 28 U.S.C. § 2250 and Rule 3 of the rules Governing § 2254 Proceedings in the United States District Courts. (Doc. 65). To appeal a district court's final order in a proceeding brought under 28 U.S.C. § 2254, a petitioner must first obtain a certificate of appealability. *See* 28 U.S.C. § 2253(c)(1); FED. R. APP. P. 22(b). Such a certificate may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

> [I]n order to make a substantial showing of the denial of a federal right a petitioner who has been denied relief in a district court "'must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are 'adequate to deserve encouragement to proceed further.'"

Lozada v. Deeds, 498 U.S. 430, 432 (1991) (emphasis in original) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)).

Additionally, "[a]n appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith." 28 U.S.C. § 1915(a)(3). Whether an appeal is taken in good faith is a matter within the discretion of the trial court. *See Adkins v. E.I. DuPont de Nemours & Co.*, 335 U.S. 331 (1948). In deciding whether an *in forma pauperis* appeal is frivolous the district court determines whether there is "a factual and legal basis, of constitutional dimension, for the asserted wrong, however inartfully pleaded." *Sun v. Forrester*, 939 F.2d 924, 925 (11th Cir.1991), (quoting *Watson v. Ault*, 525 F.2d 886, 892 (5th Cir.1976)).

Petitioner asserts that he has been declared indigent and has proceeded *in forma pauperis* in all of the prior state and federal court proceedings in this case since 1978. (Doc. 65, p. 2). However, "[a] prisoner who seeks to proceed IFP on appeal must obtain leave to so proceed despite proceeding IFP in the district court." *Jeffery v. Walker*, 113 F.3d 527, 528 (5th Cir. 1997) (citing *Jackson*, 102 F.3d at 136).

The plaintiff has not stated the basis for his appeal and has not presented any arguments other than those asserted in his original case. Federal Rule of Appellate Procedure 24 mandates that a party who desires to appeal *in forma pauperis* must file a motion in the district court that "states the issues that the party intends to present on appeal." FED. R. APP. P. 24(a)(1)(C). "A plaintiff who has been told that the claim is foreclosed and then files a notice of appeal without offering any argument to undermine the district court's conclusion is acting in bad

faith." *Newlin v. Helman*, 123 F.3d 429, 433 (7th Cir.1997); *see also Neitzke v. Williams*, 490 U.S. 319, 327 (1989) (a claim is frivolous if the factual contentions supporting it are clearly baseless, or if it relies on an indisputably meritless legal theory). The Court presumes that Petitioner seeks to appeal for the reasons previously stated in his case and in his motion to reconsider the judgment. After reviewing the record in this case, the Court concludes that Petitioner has failed to make a nonfrivolous argument for relief substantially for the reasons set forth in this Court's order denying habeas corpus relief. (Doc. 53). The Court finds that the Petitioner has not demonstrated that the issues in this action are debatable among jurists of reason, that a Court could resolve these issues in a different manner, or that they deserve encouragement to proceed further. The Court certifies that the appeal is not taken in good faith and finds that Petitioner is neither entitled to a Certificate of Appealability nor to appeal *in forma pauperis*. Accordingly, plaintiff's motion to proceed *in forma pauperis* (Doc. 65), is **DENIED**.

DONE and **ORDERED** this 8th day of March, 2019.

/s/ Callie V. S. Granade
SENIOR UNITED STATES DISTRICT JUDGE

Appendix D

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-10494-HH

PHILLIP WAYNE TOMLIN,

Petitioner-Appellant,

versus

TONY PATTERSON,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Alabama

ORDER:

Appellant's motion for a certificate of appealability ("COA") is DENIED because he has failed to make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2). The appellee's motion to remand on a limited basis for determination of a COA by the district court is DENIED AS MOOT because the district court since has denied appellant a COA. The appellee's motion to restart or reset briefing is DENIED AS MOOT because the briefing schedule automatically was stayed when appellant filed his COA motion in this Court. *See* 11th Cir. R. 31-1(b)(1).

/s/ Charles R. Wilson
UNITED STATES CIRCUIT JUDGE

Appendix E

No. 19-10494-HH

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PHILLIP WAYNE TOMLIN,

Petitioner-Appellant,

v.

TONY PATTERSON,

Warden, Holman Correctional Facility,

Respondent-Appellee.

MOTION FOR RECONSIDERATION OF THE DENIAL OF A CERTIFICATE OF APPEALABILITY

Case below: Civil Action 1:10-cv-00120-CG-B

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June 17, 2019

Counsel for Phillip Tomlin

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fed. R. App. P. 26.1 and 11th Cir. R. 26.1-1, undersigned counsel certifies that the following persons may have an interest in the outcome of this appeal:

Alexander and Knizley – former Law Firm for Petitioner-Appellant;

Alexander, Richard – former Counsel for Petitioner-Appellant;

Allen, Richard – former Commissioner of the Alabama Department of Corrections;

Brasher, Andrew – Solicitor General of the State of Alabama;

Bivins, Sonja F. – United States Magistrate Judge;

Bjurberg, P. David – Assistant Attorney General;

Carnes, Ed – former Deputy Attorney General and U.S. Circuit Court Judge;

Daniel, Tracy – former Assistant Attorney General;

Deason, Kristi – former Assistant Attorney General;

Evans, James – former Alabama Attorney General;

Forrester, Nathan – former Deputy Attorney General;

Graddick, Charles – former Alabama Attorney General;

Granade, Callie V. S. – United States District Court Judge;

Harcourt, Bernard E. – Counsel for Petitioner-Appellant;

Houts, James – former Assistant Attorney General;

Hughes, W. Gregory – former Counsel for Petitioner-Appellant;

King, Troy – former Alabama Attorney General;

Lackey, James – former Counsel for Petitioner-Appellant;

Madden, Arthur – former Counsel for Petitioner-Appellant;

Marston, Joseph III – former Assistant Attorney General;

McDermott, Edward – Mobile County Circuit Court Judge;

McRae, Ferrill – Mobile County Circuit Court Judge;

Milling, Bert – United States Magistrate Judge;

Poe, Beth – former Assistant Attorney General;

Poole, Andy Scott – Assistant Attorney General;

Pryor, William – former Alabama Attorney General and U.S. Circuit Court Judge;

Sessions, Jeff – former Alabama Attorney General;

Shows, Stephen – former Assistant Attorney General;

Siegelman, Don – former Alabama Attorney General;

Stewart, Sandra – former Assistant Attorney General;

Strange, Luther – Alabama Attorney General;

Thomas, Herman – Mobile County Circuit Court Judge;

Thomas, Kim – Commissioner, Alabama Department of Corrections;

Tomlin, Phillip – Petitioner-Appellant;

Valeska, Don – Former Assistant Attorney General.

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MOTION FOR RECONSIDERATION
OF THE DENIAL OF A CERTIFICATE OF APPEALABILITY

Phillip Wayne Tomlin has been incarcerated now for forty-one years, since 1978, at Holman Prison in Alabama—first, on Death Row at Holman for twenty-six years, from 1978 to 2004, and then, since 2004, in general population at Holman. Mr. Tomlin is now serving a sentence of life imprisonment without parole ("LWOP"). Tomlin seeks appellate review of the denial of his habeas corpus petition, which challenged his sentence as an improper retroactive judicial reinterpretation of the 1975 Alabama Death Penalty Act in violation of his right to fair notice protected by the Due Process Clause of the United States Constitution.

In an order dated May 8, 2019, this Court denied Phillip Tomlin a Certificate of Appealability ("COA"). *Tomlin v. Patterson*, No. 19-10494, Order dated May 8, 2019 (Appendix M). Pursuant to 11th Circuit Rules 22-1(c) and 27-1(d), and this Court's decision in *Hodges v. Attorney Gen., State of Fla.*, 506 F.3d 1337, 1339 (11th Cir. 2007), Mr. Tomlin respectfully requests panel reconsideration and the grant of a COA limited to one question:

> Whether the final state court judgment in Tomlin's case, upholding his LWOP sentence under the 1975 Alabama Death

> Penalty Act, violated Tomlin's right to fair notice under the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

PRELIMINARY STATEMENT

Phillip Tomlin's retroactivity challenge is practically identical to the legal claim considered and upheld by this Court in *Magwood v. Warden, Alabama Department of Corrections*, 664 F.3d 1340 (11th Cir. 2011), in which this Court ruled that the petitioner's sentence rested on an improper retroactive judicial reinterpretation of the 1975 Alabama Death Penalty Act, Ala. Code. §§ 13-11-1 *et seq*. (hereinafter "the 1975 Act," *see* Appendix A). In *Magwood,* 664 F.3d at 1348, this Court declared that the Alabama Supreme Court's judicial decision in *Ex parte Kyzer*, 399 So.2d 330 (Ala. 1981), rewriting the 1975 Act, was "unexpected and indefensible," and that the retroactivity violation constituted an unreasonable application of clearly established federal law as determined by the Supreme Court, under the AEDPA. Tomlin raised the identical legal claim in practically the identical factual context, and nevertheless received a merits denial by the District Court. *See Tomlin v. Patterson,* 1:10-cv-00120-CG-B, Order dated April 19, 2018 (Appendix L). His legal claim is not procedurally barred. The extension of *Magwood* to Phillip Tomlin's case—which is one smidgeon

away, factually—is clearly a close legal question that jurists of reason could debate.

This Court's retroactivity analysis in *Magwood* is identical to what would apply in Tomlin's case—in terms of the unexpected and indefensible retroactive judicial rewriting of the same statute, the 1975 Act. The only factual difference is that the petitioner in *Magwood* was sentenced to death, whereas Tomlin was sentenced to LWOP. However, both were sentenced under *the very same judicial reinterpretation* of the *same death penalty statute*—namely, the 1975 Act. Under the 1975 Act, there were only two possible sentences: death or LWOP. The logic of this Court's decision in *Magwood* clearly extends to the only other possible sentence under the 1975 Act: LWOP. Because the two cases are so close—practically identical—reasonable jurors could debate whether Tomlin is entitled to the *same* relief on his retroactivity claim regarding the *same* statute and the *same* unconstitutional judicial reinterpretation of that statute.

In denying Phillip Tomlin a COA, this Court essentially evaluated Tomlin's claims on the merits, rather than determining whether reasonable jurists could debate whether he is entitled to relief. The Court did not apply

the proper legal standard, which the United States recently reiterated in *Buck v. Davis*:

> The COA inquiry, we have emphasized, is not coextensive with a merits analysis. At the COA stage, the only question is whether the applicant has shown that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." […] A "court of appeals should limit its examination [at the COA stage] to a threshold inquiry into the underlying merit of [the] claims," and ask "only if the District Court's decision was debatable."

137 S. Ct. 759, 773-74 (2017) (citations omitted).

This Court went beyond the "threshold question" of appealability, *id*., when it denied Tomlin a COA. Here, as in *Buck*, the Court's decision should be overturned and a COA should be granted on the one legal issue raised on appeal. *Id*. at 780.

STANDARD OF REVIEW

When a District Court denies a habeas corpus claim on the merits, the petitioner is entitled to a COA if he can show that "reasonable jurists could debate whether […] the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Lott v. Att'y Gen. of Fla*., 594 F.3d 1296, 1301 (11th Cir. 2010) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003)).

Under binding Supreme Court precedent, the petitioner's burden is light. A court should issue a COA where "reasonable jurists would find the district court's assessment of the constitutional claims debatable." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). The Supreme Court has held that a petitioner is not required "to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus." *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003). "The question is the debatability of the underlying constitutional claim, not the resolution of that debate." *Id*. at 342. The Supreme Court has observed that "a 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." *Id*. at 338.

SUMMARY OF THE ARGUMENT

Phillip Tomlin's case is the companion case to this Court's decision in *Magwood v. Warden,* 664 F.3d 1340 (11th Cir. 2011), in which this Court ruled that the Alabama Supreme Court improperly rewrote the 1975 Act in its decision of *Ex parte Kyzer*, 399 So.2d 330 (Ala. 1981), in violation of the fair notice requirement of Due Process. As the Alabama Supreme Court itself held in *Ex parte Stephens*, 982 So. 2d 1148 (2006), and as this Court

emphasized in *Magwood,* the Alabama Supreme Court's judicial reinterpretation was "unexpected and indefensible" and violated Magwood's right to fair notice under *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964) and the Due Process Clause of the United States Constitution. This Court further held in *Magwood* that the constitutional error violated clearly established federal law as determined by the U.S. Supreme Court, thus satisfying the stringent requirements of the AEDPA. This Court therefore granted Magwood habeas corpus relief.

Phillip Tomlin's case is the direct companion case to *Magwood* because he, too, was charged and sentenced under the same 1975 Act as rewritten by the Alabama Supreme Court in *Kyzer*. The only difference—which does not affect the legal analysis—is that Tomlin was sentenced to the *only other possible sentence* under the 1975 Act, namely LWOP. But that is a difference without legal consequence because the same fatal error plagues his sentence: the unconstitutional retroactive reinterpretation and application of the 1975 Act.

Phillip Tomlin is entitled to the same relief as the petitioner in *Magwood*—at the very least, reasonable jurists could debate whether this Court's decision in *Magwood* extends to Tomlin's situation. The reason is

simple: At the time of the charged offense, in January 1977, Tomlin was not death eligible and so could not be charged with a "capital offense" under the 1975 Act—which was the *only way* under Alabama law that he could be sentenced to death *or LWOP*. As a result, Tomlin could only have been indicted for two counts of murder under the ordinary homicide statute (first-degree murder under § 13-1-70, *see* Appendix G), with a maximum sentence of two life sentences *with the possibility of parole*. It was only four years later, in April 1981, that Tomlin *became* death eligible, as a result of the Alabama Supreme Court rewriting the statute in *Ex parte Kyzer*, 399 So. 2d 330 (Ala. 1981) and *Beck v. State*, 396 So. 2d 645 (Ala. 1981)—two decisions that *judicially expanded* the scope of the 1975 Act. Since then, the Alabama Supreme Court has itself expressly stated that its opinions in *Kyzer* and *Beck* were an "unexpected and indefensible" judicial expansion of the 1975 Act, *see Ex parte Stephens*, 982 So. 2d 1148 (Ala. 2006); and this Court in *Magwood* held that the retroactivity violation is enforceable under the AEDPA as clearly established federal law determined by the Supreme Court. This Court's decision in *Magwood* entitles Mr. Tomlin to relief as well, but at the very least, it entitles him to a COA given that reasonable jurists could surely debate the legal question at length and extensively.

ARGUMENT

The legal issue at the heart of this motion for reconsideration is whether the Alabama Supreme Court unexpectedly and indefensibly rewrote the 1975 Act in such a way as to make Tomlin eligible to be sentenced to death or LWOP. This legal question is intricate, in large part because of nearly forty years of judicial reinterpretation of the 1975 Act. In order to understand the legal question, it is essential to begin with this forty-year history of judicial reinterpretations of the 1975 Act.

I. THE HISTORY OF THE 1975 ALABAMA DEATH PENALTY ACT AND ITS JUDICIAL INTERPRETATIONS

On September 9, 1975, in response to the United States Supreme Court's decision striking down capital punishment in *Furman v. Georgia*, 408 U.S. 238 (1972), the Alabama state legislature enacted the 1975 Alabama Death Penalty Act, §§ 13-11-1 *et seq*. ("the 1975 Act," *see* Appendix A).[1]

[1] The 1975 Act was codified in two different places, due to Alabama implementing a revised criminal code in 1978 that removed nearly all of Title 13 from the Alabama Code of 1975 and created Title 13A. *See* Appendix B (1978 Transfer Statute). The general practice has been to cite to the Title 13 codification.

As written, the 1975 Act—which is still in effect today for crimes committed before July 1, 1981, and thus still applies to Tomlin—requires a *mandatory jury verdict of death* upon a conviction of capital murder, but allows the sentencing court to depart *downward* from the jury's mandatory verdict of death and impose an LWOP sentence. After a jury returns a *mandatory* death sentence, the sentencing court must conduct a sentencing hearing pursuant to § 13-11-3 and 4, weigh the aggravated circumstance(s) listed in § 13-11-6 against the mitigating circumstance(s) listed in § 13-11-7, and decide whether to impose the jury's verdict of death or depart downward and sentence the defendant to LWOP. The sentencing court can only sentence the defendant to death if it finds the existence of one or more aggravated circumstances under §13-11-6.

Because there was a *mandatory* jury verdict of death upon conviction, only capital defendants who *could be sentenced to death* were subject to prosecution under the 1975 Act as written. A provision in § 13-11-2 guaranteed this by requiring the prosecution to "aver[] in the indictment" not only the capital offense charged under §13-11-2, but "also" the aggravated circumstance in §13-11-6 that would allow the sentencing court to impose a death sentence. In other words, the statute required the prosecution to state,

up front, in the indictment, the grounds that a sentencing court might have to sentence a capital defendant to death, so that a grand jury could determine whether the case included an aggravated circumstance and thus whether the case should proceed—if the defendant were found guilty—to a *mandatory* jury verdict of death.

A. The Requirements of the 1975 Act

Under the 1975 Act, the sentencing court imposed the final sentence and had the possibility of a discretionary downward departure after the mandatory jury death verdict. In order to ensure that the sentencing court would have an aggravated circumstance to consider at sentencing, the 1975 Act required the prosecution to aver in the indictment, and thus present to the grand jury, at least one aggravating circumstance. The 1975 Act explicitly stated:

> Section 2. If the jury finds the Defendant guilty, they shall fix the punishment at death when the Defendant is charged by indictment with any of the following offenses *and with aggravation which must also be averred in the indictment*, and which offenses so charged with said aggravation shall not include any lesser offenses: [list of 14 capital offenses]

§ 13-11-2 (emphasis added).

The use of the words "and" and "also" make clear that the statute was referring here not merely to the aggravated offense listed in § 13-11-2 (that,

naturally, had to be averred in the indictment), but to an aggravated circumstance from § 13-11-6 that could be the basis for a death sentence by the court.

The 1975 Act contains a list of fourteen (14) capital offenses in § 13-11-2, which includes double intentional murder under provision § 13-11-2(10). However, the 1975 Act contains a list of only eight (8) aggravating circumstances in § 13-11-6 for the court to consider at sentencing. That list of eight (8) aggravated circumstances does *not* include double intentional murder.

The fact that the list of eight (8) aggravated circumstances does *not* include double intentional murder is key to this dispute. The statute was intentionally written to contain some *different* capital offenses from aggravated circumstances, and some *different* aggravated circumstances from capital offenses, as evidenced by the following table of correspondences. In this table, the italicized entries represent either aggravated offenses that were *not* included as aggravated circumstances, or aggravated circumstances that were *not* included as aggravated offenses; the gray entries represent overlap in aggravated offenses and aggravated circumstances:

§ 13-11-2 aggravated offenses	**§ 13-11-6 aggravated circumstances**
Kidnapping for ransom [2(a)]	Kidnapping for ransom [6(d)]
Robbery [2(b)]	Robbery [6(d)]
Rape [2(c)]	Rape [6(d)]
Carnal knowledge or abuse a girl younger than 12 [2(c)]	
Nighttime burglary of occupied dwelling [2(d)]	Burglary [6(d)]
Victim is law enforcement official or on-duty corrections officer [2(e)]	
Victim is off-duty corrections officer and murder is related to some official job-related act or performance [2(e)]	
Offender is serving a life sentence at time of offense [2(f)]	Offender is serving *any* sentence of imprisonment [6(a)]
Pecuniary gain/murder for hire [2(g)]	Pecuniary gain [6(f)]
Indecent molestation of child under 16 [2(h)]	
Willful use of explosives [2(i)]	
Multiple victims [2(j)]	
Victim is public official or public figure and killing related to status as public official or figure [2(k)]	
Airplane hijacking [2(l)]	
Prior conviction of first or second-degree murder in previous 20 years [2(m)]	Prior conviction for felony involving use or threat of violence to the person [6(b)]
Victim is witness in trial and killing is intended to prevent witness from testifying [2(n)]	Disruption or hindrance of lawful governmental function/law enforcement [6(g)]
	Serving any sentence of imprisonment [6(a)]

	Prior conviction of felony involving use or threat of violence to the person [6(b)]
	Knowingly created a great risk of death to many persons [6(c)]
	Attempting to avoid arrest or escape from custody [6(e)]
	Heinous, atrocious, and cruel (6[h])

The 1975 Act defined capital offenses and aggravated circumstances separately and, in many cases, *differently*. It was not a mistake that certain aggravated offenses were not in and of themselves aggravated circumstances; and vice versa. It was no mere inadvertence. In fact, when the Alabama legislature rewrote the Alabama death penalty law in 1981 after the United States Supreme Court's decision in *Beck v. Alabama*, 447 U.S. 625 (1980), the legislature *again intentionally* did not include double intentional murder as an aggravated circumstance for sentencing consideration. That aggravated circumstance was only added by the legislature eighteen (18) years later in 1999.

What is clear from the 1975 Act is that, in order for anyone to be subject to the statute, there had to exist at least one aggravated circumstance under § 13-11-6 so that, if the jury could return its mandatory verdict of

death, the sentencing court could possibly impose death after a hearing and having found, under § 13-11-6, at least one aggravated circumstance.

B. The First Capital Trial of Phillip Tomlin in 1978

On January 2, 1977, Richard Brune and Cheryl Moore were fatally shot in Mobile County, Alabama. Two years earlier, Richard Brune had fatally shot David Tomlin (Phillip Tomlin's younger brother), and so suspicion fell on Tomlin. On September 22, 1977, Phillip Tomlin was indicted by a grand jury of Mobile County for double intentional murder under the 1975 Act. *See* Appendix C.

The 1977 indictment carried three counts, including a murder for hire count for which Tomlin was acquitted. For purposes here, the third count was the relevant count and it provided:

> 3. The Grand Jury of said County further charge, that, before the finding of this indictment, PHILLIP WAYNE TOMLIN, did unlawfully, intentionally, and with malice aforethought kill Richard Brune and Cheryl Moore, by shooting them with a gun, wherein both Richard Brune and Cheryl Moore were intentionally killed by PHILLIP WAYNE TOMLIN by one or a series of acts, in violation of Act Number 213, Section 2, Sub-Section J (Act #213, § 2(j)) and Act Number 213, Section 6, Sub-Section H (Act #213, § 6(h)) Acts

> of Alabama, Regular Session, 1975, in that said killings were especially heinous, atrocious or cruel.[2]

As is clear from this count of the indictment, the State of Alabama understood and interpreted the 1975 Act as requiring that the aggravated circumstance—in addition to the capital offense—be "averred" in the indictment and considered by the grand jury. That is why the indictment averred the aggravated circumstance in the indictment, stating specifically: "*that said killings were especially heinous, atrocious or cruel*." *See* Appendix C.

The aggravated circumstance averred in the indictment was the "heinous, atrocious and cruel" ("HAC") aggravator, which, already by the time of the indictment in September 1977, had been deemed to be inapplicable to a case like Tomlin's. *See Jacobs v. State*, 361 So. 2d 607, 630 (Ala. Crim. App. July 26, 1977); and *Godfrey v. Georgia*, 446 U.S. 420 (1980). There is no dispute that the HAC aggravator does not apply in Tomlin's case and should not have been alleged in the indictment or ever

[2] § 13-11-2(10) was called 2(j) in the original legislation; and § 13-11-6(8) was called 6(h). These refer to the capital offense of double intentional murder and the aggravated circumstance of "heinous, atrocious or cruel" respectively.

used at trial. There is no dispute in this case that there is *no aggravated circumstance* that applies to Tomlin under the 1975 Act.

Mr. Tomlin was tried in Mobile County, and, in March 1978, was convicted of double intentional murder under § 13-11-2(10). The jury returned the mandatory sentence of death as required by the 1975 Act. The sentencing hearing was conducted in November 1978. The sentencing court, Judge Ferrill McRae, sentenced Tomlin to death on December 8, 1978.

C. United States Supreme Court Review of the 1975 Act

On June 20, 1980, the United States Supreme Court declared the 1975 Act unconstitutional on the ground that the preclusion clause included in the 1975 Act (which precluded the jury from considering lesser-included offenses) violated the Due Process Clause. *See Beck v. Alabama*, 447 U.S. 625 (1980). In another case involving North Carolina's mandatory death penalty scheme, *Woodson v. North Carolina*, 428 U.S. 280 (1976), the Supreme Court struck down capital statutes that involved mandatory death verdicts.

The negative implication of *Woodson* regarding the mandatory jury verdict of death in the 1975 Act was clear; however, the United States

Supreme Court did not address the mandatory jury death verdict because the issue was not raised by the parties.

D. Alabama Supreme Court Judicially Rewrites the 1975 Act

On March 6, 1981, on remand from the United States Supreme Court, the Alabama Supreme Court severed the preclusion clause—precluding lesser-included offenses—from the 1975 Act. *Beck v. State*, 396 So. 2d 645, 655 (Ala. 1981).

In that same decision, the Alabama Supreme Court also held the mandatory jury verdict unconstitutional, in light of *Woodson*. However, the Alabama Supreme Court was unwilling to and did not sever the jury participation clause from the statute. Instead, in *Beck v. State* and a companion case, *Ex parte Kyzer*, 399 So. 2d 330 (Ala. Mar. 6, 1981), the Alabama Supreme Court judicially rewrote and expanded the 1975 Act.

First, the Alabama Supreme Court converted the *mandatory* jury verdict of death into a *permissive* jury verdict of death.

Second, the Alabama Supreme Court, in its own words, "engrafted" onto the statute a whole new jury sentencing hearing. *See Ex parte Kyzer*, 399 So. 2d at 339 ("Courts are not powerless to write standards and

requirements which can be engrafted onto statutes to make the procedures comport with legislative intent and due process of law").

Third, the Alabama Supreme Court then declared that the jury and the sentencing court could consider *all* of the fourteen (14) possible capital offenses listed in § 13-11-2 as aggravated circumstances, instead of the more limited list of eight (8) aggravated circumstances listed in § 13-11-6. As the court explained in *Ex parte Kyzer*:

> If, on review, the trial judge could not "weigh the aggravating ... circumstance" which was averred in the indictment, and which was a part of the substantive offense, but which aggravating circumstance was not included in § 13-11-6, the sentencing hearing would be a complete and useless endeavor. We cannot assume that the legislature did a useless act. It is apparent that the legislature intended to permit the trial judge to find the same "aggravated circumstances enumerated in § 13-11-2." Code 1975, § 13-11-1. We so hold.

Kyzer, 399 So. 2d at 338.

Under this judicial expansion of the 1975 Act in *Kyzer* and *Beck*, Tomlin all of a sudden became death eligible because, even though there still was no aggravated circumstance listed expressly under § 13-11-6 that applied to him, his capital offense under § 13-11-2 was now considered an aggravated circumstance. As a result, Tomlin all of a sudden became death and LWOP eligible.

E. Alabama Passes a New Death Penalty Act in 1981

That same year, 1981, the Alabama legislature enacted a new death penalty statute, 1981 Ala. Laws 203 (codified at Ala. Code §13A-5-39 *et seq*. (2013)), for crimes committed after July 1, 1981. *See* Appendix D. The new 1981 death penalty statute again deliberately did *not* include double intentional murder as an aggravated circumstance under the equivalent of § 13-11-6 for the penalty phase jury and sentencing court hearings.

F. Alabama Supreme Court Grafts Upward Judicial Override

On August 26, 1986, the Alabama Supreme Court further rewrote the 1975 Act to allow an upward judicial override so that the sentencing judge could override a new jury verdict of LWOP and impose a sentence of death under the 1975 Act. *Ex parte Hays*, 518 So. 2d 768 (Ala. 1986).

G. The Second Capital Trial of Phillip Tomlin

On September 23, 1988, the Alabama Supreme Court reversed Tomlin's 1978 conviction of capital murder because of prosecutorial misconduct on the part of the state prosecutor, Don Valeska. *Ex parte Tomlin*, 540 So. 2d 688 (Ala. 1988).

In January and February 1990, Tomlin was retried in Mobile County and convicted of double intentional murder under § 13-11-2(10). The

sentencing jury returned a unanimous verdict of LWOP by a vote of 12 to 0. However, the sentencing judge, Judge Ferrill McRae, overrode the jury's unanimous life verdict and sentenced Tomlin to death under the combined effect of *Beck, Kyzer*, and *Hays*. *State v. Tomlin*, CC-89-000481 (Cir. Ct. Mobile Cnty. 1990), District Court ECF No. 10-1 at pp. 64-73.

H. The Third Capital Trial of Phillip Tomlin

On July 26, 1991, the Alabama Court of Criminal Appeals reversed Tomlin's conviction and sentence of death on the grounds, again, of prosecutorial misconduct by, again, Don Valeska. *Tomlin v. State*, 591 So. 2d 550 (Ala. Crim. App. 1991).

On May 28, 1993, Phillip Tomlin was reindicted by the Grand Jury of Mobile County in a one-count indictment charging him with double intentional murder under § 13-11-2(10). *See* Appendix E. The indictment did *not* aver any aggravated circumstances under § 13-11-6. It states as follows:

COUNT I

> The GRAND JURY of [Mobile] County charge, that, before the finding of this indictment, Phillip Wayne Tomlin, whose name is to the Grand Jury otherwise unknown than as stated, did by one act or a series of acts, unlawfully, intentionally, and with malice aforethought, kill Richard Brune by shooting him with a gun, and unlawfully, intentionally, and with malice aforethought, kill Cheryl Moore by shooting her with a gun, in

> violation of Code of Alabama 1975, § 13-11-2(10), against the peace and dignity of the State of Alabama.

This is the indictment under which Phillip Tomlin is presently sentenced to LWOP. Notice again that it does *not aver any aggravated circumstances under § 13-11-6* because there is none that applies to Tomlin under the 1975 Act.

Phillip Tomlin was tried on this indictment in Mobile County in November 1993. He was convicted of the capital charge and received the benefit of the prior unanimous jury verdict of LWOP. However, the sentencing judge, Judge Edward McDermott, overrode the unanimous life verdict and sentenced Tomlin to death on January 21, 1994 under the combined effect of *Beck, Kyzer*, and *Hays*. On June 21, 1996, that conviction was reversed by the Alabama Court of Criminal Appeals because of juror misconduct. *Tomlin v. State*, 695 So. 2d 157 (Ala. Cr. App 1996).

I. Further Alabama Legislative Action in 1999

In 1999, the Alabama legislature amended the 1981 Alabama death penalty statute, §§ 13A-5-39 *et seq*., to include double intentional murder as an aggravated circumstance for consideration at both the jury and sentencing court penalty phase hearings. *See* Appendix F. That amendment applies to any conduct committed after September 1, 1999.

J. The Fourth Capital Trial of Phillip Tomlin in 1999

In June 1999, Phillip Tomlin was again retried under § 13-11-2(10), pursuant to the May 28, 1993 indictment *supra*. Tomlin was convicted of capital murder on June 4, 1999. This is the conviction at issue in this case.

Tomlin received the benefit of the unanimous jury verdict of LWOP. However, on August 8, 2000, after a lengthy sentencing hearing, the sentencing judge, Judge Herman Thomas, overrode the unanimous jury verdict of LWOP and sentenced Tomlin to death under the combined effect of *Beck, Kyzer,* and *Hays*. See *State v. Tomlin*, CC 93-1494 (Mobile County Cir. Ct. 2000), District Court ECF 10-1 at pp. 52-62.

On October 3, 2003, the Alabama Supreme Court vacated Phillip Tomlin's sentence of death and ordered the Circuit Court of Mobile County to sentence Tomlin to LWOP. *Ex parte Tomlin*, 909 So. 2d 283 (Ala. 2003). The Alabama Supreme Court noted that the sentencing court did not find the existence of any aggravated circumstance under § 13-11-6, *id.* at 285, but decided the case on an entirely independent ground (that the override was improper because it was based on the death sentence of the co-defendant). *Id.* at 286-88. On May 10, 2004, the Circuit Court of Mobile County

sentenced Phillip Tomlin to LWOP. This is the sentence that is at issue in this case.

K. Subsequent Alabama Supreme Court Decision in 2006

On July 28, 2006, the Alabama Supreme Court expressly overruled its 1981 decisions in *Ex parte Kyzer* and *Beck v. State*, declaring the relevant parts of those decisions "unexpected and indefensible." *See Ex parte Stephens*, 982 So. 2d 1148 (Ala. 2006). The Alabama Supreme Court went out of its way to make clear that its judicial expansion of the 1975 Act was indefensible, unforeseeable, unexpected, and incomprehensible. The Alabama Supreme Court explicitly stated in *Stephens*:

> In *Kyzer*, the Court noted that "[a] literal and technical reading of the statute" would preclude the consideration of an aggravating circumstance other than those identified by statute. 399 So. 2d at 337. This would mean that some defendants, such as Kyzer, could be convicted of capital murder without being eligible for a death sentence. This Court rejected that conclusion as "completely illogical." *Id*. It is, however, the Court's responsibility to give effect to the plain meaning of a statute, not to substitute its own judgment as to what is logical or illogical. *Munnerlyn v. Alabama Dep't of Corr*., 946 So. 2d 436, 438 (Ala. 2006).

Stephens, 982 So. 2d at 1153 n.6.

As a consequence of the decision in *Stephens*, at any sentencing hearing under the 1975 Act, the jury and the sentencing court may *only* consider the eight (8) aggravated circumstances explicitly enumerated in

§ 13-11-6, which do not include double intentional murder. As the Alabama Supreme Court explained in *Stephens*:

> The statutory scheme clearly permits the trial court and advisory jury to consider only those aggravating circumstances listed in § 13A-5-49.

Stephens, 982 So. 2d at 1153.

The Alabama Supreme Court in *Stephens* was clear that the earlier decisions in *Kyzer* and *Beck* were indefensible[3]: the Supreme Court noted that "the discussion of aggravating circumstances in sentencing was completely irrelevant to our decision"; that "*Kyzer* did not 'hold' anything with respect to sentencing"; that "[o]ur discussion of aggravating circumstances in that case was premature"; and that "the dicta in *Kyzer* conflicts with the plain language of the Alabama Criminal Code (as the *Kyzer* Court itself acknowledged)." *Stephens*, 982 So. 2d at 1153. The court's opinion in *Stephens* is a total repudiation of *Kyzer* and *Beck*.

[3] It could be argued that *Ex parte Stephens* only overrules *Kyzer* and not *Beck* regarding its ruling that the sentencing jury may consider § 13-11-2 aggravated offenses as aggravated circumstances, because *Stephens* involved the 1981 Act and not the 1975 Act (and the 1981 Act was more explicit about jury sentencing). However, this Court ruled out that argument in *Magwood v. Warden*, 664 F.3d at 1346 n.6.

L. This Court's *Magwood* Decision

This Court also declared that the *Kyzer* and *Beck* cases were "an unexpected and indefensible construction of narrow and precise statutory language." *Magwood v. Warden,* 664 F.3d 1340, 1349 (11th Cir. 2011). The situation in *Magwood* was practically identical to this case, except that the petitioner there was sentenced to death rather than LWOP. This Court held that the application of those cases, *Kyzer* and *Beck,* violated the fair notice principle of the Due Process Clause and that this was well established federal constitutional law under the AEDPA.

II. MR. TOMLIN IS ENTITLED TO A CERTIFICATE OF APPEALABILITY BECAUSE REASONABLE JURISTS COULD DEBATE WHETHER HIS CLAIM OF RETROACTIVITY ENTITLES HIM TO RELIEF

Jurists of reason could debate whether this Court's decision in *Magwood* applies not only to a death sentence, but to a sentence of LWOP—the only other possible sentence under the 1975 Act, which was the only way someone could be sentenced to LWOP in Alabama for conduct prior to 1981.

Just as in *Magwood*, at the time of Tomlin's alleged offense on January 2, 1977, the 1975 Act did not extend to the conduct and circumstances alleged against Tomlin, because the capital statute did not

include, as an aggravating factor, double intentional homicide. At that time in 1977, Tomlin was not death eligible and could not be charged under the 1975 Act, which was the *exclusive* vehicle for a sentence of death *or of LWOP*. As a result, Tomlin could only be indicted for two murders under the ordinary homicide statute at the time (first-degree murder under § 13-1-70, *see* Appendix G), which only provided for a maximum sentence of life *with the possibility of parole*.

Mr. Tomlin did not have fair notice under the Due Process Clause of the United States Constitution that he could be sentenced to LWOP. It was only as a result of subsequent judicial decisions by the Alabama Supreme Court—decisions that judicially rewrote the capital statute—that Tomlin became death and LWOP eligible. Those judicial decisions, however, were entirely unforeseeable at the time of the offense in 1977. And since then, they have been overruled by the Alabama Supreme Court. They were "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue." *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964). Due process prohibits the retroactive application of any such judicial rewritings of the 1975 Act.

The United States Supreme Court made clear, in *Rogers v. Tennessee*, that the test under *Bouie* is limited to the simple question whether a judicial reinterpretation of a statute is "unexpected and indefensible." *Rogers,* 532 U.S. at 461. It is under that clarified *Rogers* standard that this Circuit held that the Alabama Supreme Court's decision in *Ex parte Kyzer*, 399 So.2d 330 (1981), rewriting the 1975 Act, was "unexpected and indefensible," and that this is clearly established federal law under AEDPA, *see Magwood v. Warden*, 664 F.3d at 1348.

The 1975 Act, as originally written, is crystal clear that Tomlin *could not be reindicted under the Act*, as he was in 1993. The plain and literal language of the 1975 Act states in unambiguous words:

> "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 (last sentence; emphasis added) of 1975 Act, *see* Appendix A at page A006-A007.

All parties agree that there is no aggravated circumstance in Tomlin's case that would make him death eligible. As the District Court held in its order, *see* Appendix L, *slip op.* at p. 3, the "indictment which controls Petitioner's present sentence" does not allege an aggravated circumstance.

That is because double-intentional homicide was *not* included in Alabama's death penalty scheme as an aggravated circumstance until 1999.

The 1975 Act explicitly states what would happen in Tomlin's case and literally provides that "the punishment shall *not* be death *or life imprisonment without parole*." Appendix A at page A006-A007. Therefore it is inconceivable that Tomlin had fair notice that his sentence could be LWOP. The words of the statute say otherwise. Even if this Court ultimately does not agree on a full review on the merits, there is no doubt that reasonable jurists could debate whether Tomlin is entitled to relief on this retroactivity claim. Accordingly, this Court should grant a COA.

A. A Plain Reading of the 1975 Act Demonstrates that Phillip Tomlin Does Not Fall within the Ambit of the Capital Statute

On a plain reading of the 1975 Act at the time of the charged offense (January 2, 1977), the statute did not extend to the conduct and circumstances alleged against Tomlin. At that time—in 1977—the Alabama Supreme Court had not yet judicially rewritten the statute. At that time, fair warning was provided entirely by the plain meaning of the 1975 Act. At that time, under a plain reading of the 1975 Act, with due regard for the rule of lenity that must be afforded all persons charged with criminal offenses in the State of Alabama, Tomlin could not have been indicted with a capital

offense under § 13-11-2(10) and could not have been sentenced to death or to LWOP.

The reason that Tomlin could *not* be charged with a capital offense is that he was not (and is not) death eligible. The 1975 Act, as written, did not provide for an independent sentence of LWOP ("LWOP"), but allowed LWOP *only* as a discretionary *downward departure* by the sentencing judge from a jury's *mandatory* verdict of death. In order to be *charged* under the 1975 Act, and in order to receive a sentence of LWOP, *a defendant had to be death eligible* so that he could receive a mandatory death sentence from the jury. For that, there had to exist an aggravated circumstance under § 13-11-6 that the sentencing court could find at the sentencing hearing, in order either to impose the jury's mandatory death verdict or to *depart downward* from the jury's death verdict and sentence the defendant to LWOP.

This is clear from the words and the structure of the 1975 Act as originally written: The jury could *not* recommend a sentence of LWOP, and the sentencing judge could *only* impose such as a sentence as a *downward departure* from the jury's death verdict. The 1975 Act required that the defendant be sentenced to death by the jury and, therefore, it required that

the defendant be death eligible. *If a defendant was not death eligible, he did not fit within the scope of the 1975 Act.* The statute also literally provided that if a defendant was re-indicted in a case without an aggravated circumstance, the punishment could not be death or LWOP. §13-11-2 (last sentence).

Phillip Tomlin would advance three related arguments to support this plain reading of the 1975 Act, as written. Jurists of reason could debate these three arguments:

1. The Plain Words of the 1975 Act

A plain reading of the statute demonstrates that a defendant could only be indicted for a capital offense if there existed an aggravated circumstance that a sentencing court could find in order to sentence the defendant to death. Section 2 expressly required that a defendant be "charged by indictment with any of the following offenses [the 14 capital offenses listed in § 13-11-2] *and* with aggravation [the 8 aggravated circumstances listed in § 13-11-6] which must *also* be averred in the indictment." § 13-11-2 (emphasis added). The use of the extra clause "and with aggravation which must also be averred in the indictment" can only be understood one way: in addition to the capital offense that must be charged

in the indictment, the indicting instrument must "also" include an aggravated circumstance listed in § 13-11-6.

This is the only acceptable plain meaning of the 1975 Act given the canons of statutory construction—three foundational canons in particular:

(1) *First*, "every word and clause must be given effect":[4] this fundamental canon of construction requires that we read the clause—"and with aggravation which must also be averred in the indictment"—and especially the words "and" and "also," to have meaning. It requires that the clause not be read as completely redundant—that it not be read to mean that the indictment "must state the capital offense *and must also state the capital offense*." That would give effect neither to those explicit words, nor to the clause itself.

(2) *Second*, the "purpose rule": this foundational canon of construction requires that we "interpret ambiguous statutes so as best to

[4] *See* Henry Campbell Black, *Handbook on the Construction and Interpretation of Laws*, § 60 (2d ed. 1911); Jabez Grisby Sutherland & John Lewis, *Statues and Statutory Construction* § 380 (2d ed. 1904); 2A Norman J. Singer & Shambie Singer, *Sutherland Statutes and Statutory Construction*, § 46:6 (7th ed. 2014); *Carroll v. Ala. Pub. Serv. Comm'n*, 206 So. 2d 364 (Ala. 1968); William N. Eskridge, Phillip P. Frickey & Elizabeth Garrett, *The Supreme Court's Canons of Statutory Construction* 389–97, *in Legislation and Statutory Interpretation* (2d ed. 2006).

carry out their statutory purposes."[5] In this case, the only coherent reading of the extra clause, to carry out the purpose of the capital statute, is to limit prosecution only to where there is an aggravated circumstance that would allow a sentencing court to sentence a defendant to death.

(3) *Third*, and most importantly under Alabama law as it existed in 1977, the "rule of lenity": this is the fundamental canonical rule that "all doubts concerning [the interpretation of criminal statutes] are to predominate in favor of the accused." *Fuller v. State*, 60 So. 2d 202, 205 (Ala. 1952); *see Anderson v. City of Birmingham*, 88 So. 900, 901 (Ala. 1921); *Locklear v. State*, 282 So. 2d 116 (Ala. Crim. App. 1973). The strong rule of lenity in Alabama, on which Tomlin was entitled to rely, would command that the statute be read as requiring that an aggravated circumstance be averred in the indictment in order to protect defendants. Under the rule of lenity, the statute must be construed in Tomlin's favor.

This plain reading of § 13-11-2 should control. Under this reading, Phillip Tomlin could not have been charged with a capital offense because the prosecution could not aver in the indictment an aggravated circumstance

[5] Eskridge, Frickey, & Garrett, *supra*, at 395; *see Age-Herald Publ'g Co. v. Huddleston*, 92 So. 193, 197–98 (Ala. 1921).

that would allow a court to sentence Tomlin to death under § 13-11-4. The one-count indictment issued on May 28, 1993 does *not* aver an aggravated circumstance, because there is indisputably none in Tomlin's case. Accordingly, Tomlin could not be sentenced to death by the jury, which means the sentencing court could not *depart downward* from the death sentence and impose LWOP. Tomlin did not fall within the ambit of the 1975 Act.

2. The Structure of the 1975 Act

The structure of the 1975 Act makes clear that the statute, as written, was only intended to apply to a defendant who was death eligible. The 1975 Act was structured as a mandatory death penalty statute with a discretionary optional downward departure: the sentence of LWOP was *not* an independent option on par with a death sentence, but was instead a safe harbor for the sentencing court should it find, at its discretion, that a sentence of death was inappropriate.

This is clear from three structural elements of the 1975 Act that reasonable jurists could debate:

(i) *First*, in the very first section of the Act, § 13-11-1, the legislation makes clear that a defendant in Alabama can only be sentenced to death or

LWOP if the procedures spelled out in § 13-11-2 are followed. The statute is clear that a sentence of death or LWOP may only be imposed "in the cases and *in the manner* herein enumerated and *described* in Section 2 of this Act." § 13-11-1 (emphasis added). In other words, LWOP cannot be imposed on a defendant except as per the rules set out in Section 2.

(ii) *Second*, Section 2 is entirely silent about the sentence of LWOP. Instead, it addresses only death sentencing, and requires a mandatory jury verdict of death in the case of conviction. In setting out the procedure, Section 2 requires two things: *first*, that the indictment must aver an aggravated circumstance (to ensure that the grand jury determine whether the defendant could be sentenced to death); and *second*, that the jury return a mandatory sentence of death. In other words, it is only if a defendant can be sentenced to death by the jury and sentencing court that he falls under the ambit of the statute. It is only in cases where a defendant can be sentenced to death that the procedures engage, namely that the jury must return a mandatory death sentence, and then that the sentencing court would hold a sentencing hearing under §§ 13-11-3 and 4.

(iii) *Third*, it is at the court sentencing hearing, pursuant to § 13-11-4, that the trial court could decide either to follow the jury's verdict of death

and sentence a defendant to death, or to *depart downward* and impose a sentence of LWOP. In order to sentence a defendant to death, the court has to find one or more aggravated circumstances under § 13-11-6. For this reason, in § 13-11-2, the statute requires that the prosecutor allege the aggravated circumstance(s) in the indictment—precisely to prevent the situation where a defendant is sentenced to death by the jury, but could not be sentenced to death by the court.

3. The Need to Avoid Legal Incoherence

Tomlin's reading is also the only reasonable reading of the 1975 Act that would avoid incoherence. It would be unreasonable—and surely violate the rule of lenity—to read the 1975 Act to require a mandatory jury verdict of death in a case where the defendant could never, under any circumstance, be sentenced to death. It would be entirely unreasonable to impose on a jury the responsibility of sentencing someone to death when the individual could never, under any circumstance, receive a death sentence.

The Alabama Supreme Court in fact recognized as much in *Ex parte Kyzer* (1981), and actually tried to resolve this incoherence—in a manner that it would regret and repudiate 25 years later in *Ex parte Stephens* (2006). In *Kyzer*, the court expressly acknowledged the incoherence, noting that it

would be "*completely illogical* and would mean the legislature did a *completely useless act* by creating a capital offense for which the defendant could not ultimately receive the death penalty." *Kyzer*, 399 So. 2d at 337 (emphasis added). The court in *Kyzer* emphasized:

> Why would the legislature require that "aggravation" be averred in the indictment and authorize the jury to fix the punishment at death, and then not provide a corresponding "aggravating circumstance" for the judge to find, and thereby force the judge at the post conviction hearing to refuse to accept the death penalty fixed by the jury? We can think of no reason why the legislature would intend such a result.

Id.

Now, in *Kyzer,* the Alabama Supreme Court resolved this incoherence by declaring that the sentencing court could simply use the 14 elements of aggravation in the definition of the capital offense from § 13-11-2 (in Tomlin's case, double intentional homicide) as the aggravated circumstances under § 13-11-6 (even though they were not all listed there, particularly not double intentional murder). Twenty-five years later, in 2006, in *Ex parte Stephens*, 982 So. 2d 1148, 1153 (Ala. 2006), the Alabama Supreme Court would repudiate this language in *Kyzer*, overrule its earlier decision, and correctly state that this part of the *Kyzer* opinion was "pure dicta," was "completely irrelevant to our decision," and "conflicts with the plain

language of the Alabama Criminal Code (as the *Kyzer* Court itself acknowledged)."

Today, *Ex parte Kyzer* is no longer valid law. But the potential incoherence the court recognized in *Kyzer* remains—unless, of course, the statute is read as Tomlin suggests it must. As a matter of fact, the incoherence actually played out in Tomlin's case: a fully-empanelled 12-person Alabama jury agonized over whether to sentence him to death—and very possibly could have sentenced him to death—despite the fact that the court could not have sentenced him to death.

To interpret the 1975 Act in any other way would violate Phillip Tomlin's due process right to fair notice, because it amounts to an unexpected and indefensible interpretation of the 1975 Act, in violation of *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964). Of this, at the very least, reasonable jurists could debate.

III. REASONABLE JURISTS COULD DEBATE WHETHER THE DISTRICT COURT INCORRECTLY APPLIED *HARRINGTON V. RICHTER* TO AN EXPLAINED, BUT ERRONEOUS, STATE COURT DECISION.

The District Court improperly accorded AEDPA deference to the decision of the Alabama Court of Criminal Appeals denying Mr. Tomlin's due process claim on state collateral review. The District Court's error was

to treat the reasoned decision from the Court of Criminal Appeals as an "unexplained" decision; then, applying the mode of analysis applicable only to unexplained decisions, the District Court searched for reasons that "could have supported [] the state court's decision," *Harrington v. Richter*, 562 U.S. 88, 102 (2011), and accorded AEDPA deference to those reasons.

Because the decision of the Alabama Court of Criminal Appeals was a *reasoned* decision, the District Court should instead have evaluated whether the Alabama Court of Criminal Appeals' actual reasons for its decision were contrary to the principles clearly established in *Bouie v. City of Columbia*, 378 U.S. 347 (1964) and *Rogers v. Tennessee*, 532 U.S. 451 (2001). They were. Accordingly, the strict standard of review required under AEDPA does not apply in this case. At the very least, this could be debated among jurists of reason, and the Court should issue a COA to review the merits.

A. In Its AEDPA Analysis, The District Court Incorrectly Substituted Its Own Reasons with those Actually Given by the Alabama Court of Criminal Appeals.

The District Court recognized, and Phillip Tomlin agrees, that the relevant final state court decision, for purposes of this federal habeas action, is the 2009 decision of the Alabama Court of Criminal Appeals denying Tomlin's Rule 32 petition (Appendix I). *See Wilson v. Sellers*, 138 S. Ct.

1188, __ (2018) (federal habeas courts generally "look through" to the last reasoned state court decision on the merits); *Tomlin v. Patterson,* 1:10-cv-00120-CG-B, *Slip Op.* at 8-9 (Appendix L).

That 2009 Alabama Court of Criminal Appeals decision, in relevant part, reads as follows:

> Finally, with regard to [the claim that Tomlin's sentence of life imprisonment without parole was improper], after this court affirmed the appellant's conviction and sentence of death, the Alabama Supreme Court "reverse[d] the judgment of the Court of Criminal Appeals as to Tomlin's sentence and remand[ed] the case for that court to instruct the trial court to resentence Tomlin, following the jury's recommendation of life imprisonment without the possibility of parole." See Tomlin v. State, 909 So. 2d 283, 287 (Ala. 2003). On remand, the trial court complied with the Alabama Supreme Court's instructions and sentenced the appellant to imprisonment for life without the possibility of parole. See Tomlin v. State, 909 So. 2d 290 (Ala. Crim. App. 2004). Therefore, the appellant's argument is without merit.

Tomlin v. State, CR-08-0493 (Ala. Crim. App. Jun. 12, 2009) at 2-3 (second and third alterations in original), *see* Appendix I at A070-A071.

"Therefore": The word "therefore" means "for that reason," "because of that," or "on that ground." By using the word "therefore," the Alabama Court of Appeals indicated that it denied Tomlin's due process claim for one particular reason: namely, that the Alabama Supreme Court had previously ordered that Tomlin be sentenced to life imprisonment without the

possibility of parole. The Alabama Court of Criminal Appeals clearly rejected Tomlin's claim for the reason that the Alabama Supreme Court's prior order in Tomlin's case precluded relief.

The District Court generally recognized as much: it noted "that the state court's post-conviction decision provides no reasoning beyond finding Petitioner's sentence is as the Alabama Supreme Court ordered." *Slip Op.* at 25, *see* Appendix L at page A106. And the District Court correctly found that "[t]he Alabama Supreme Court opinion ordering his sentence of LWOP offers no guidance because Petitioner's argument regarding his sentence of death on direct appeal differs from his post-conviction argument, which is the argument presently before the Court." *Id.*

But the District Court's next sentence goes on to state that "[t]hus, it is necessary to 'determine what arguments or theories supported, or . . . could have supported, the state court's decision.'" *Slip Op.* at 25-26 (citing *Richter*, 562 U.S. at 102). That was in error. While a District Court reviewing a federal habeas corpus petition must supply reasons for a state court that chooses not to provide any, it must not substitute reasons different from those the state court stated it relied upon.

This much is now clear from the Supreme Court's recent decision in *Wilson v. Sellers*, 138 S. Ct. 1188 (2018). In *Wilson*, the Supreme Court recognized that:

> [W]hen the last state court to decide a prisoner's federal claim explains its decision on the merits in a reasoned opinion . . . . *a federal habeas court simply reviews the specific reasons given by the state court and defers to those reasons if they are reasonable*. We have affirmed this approach time and again. *See, e.g., Porter v. McCollum*, 558 U.S. 30, 39–44 (2009) (per curiam); *Rompilla v. Beard*, 545 U.S. 374, 388–392 (2005); *Wiggins v. Smith*, 539 U.S. 510, 523–538 (2003).

138 S.Ct. at 1192 (emphasis supplied). By contrast, "where 'a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief.'" *Id.* (quoting *Richter*, 562 U.S. at 98).

Wilson then made clear the limitations of *Richter*, noting that:

> Had we intended *Richter*'s "could have supported" framework to apply even where there is a reasoned decision by a lower state court, our opinion in *Premo [v. Moore]* would have looked very different. We did not even cite the reviewing state court's summary affirmance. Instead, we focused exclusively on the *actual reasons* given by the lower state court, and we deferred to *those reasons* under AEDPA.

Id.

The *Wilson* Court therefore limited *Richter*'s rule to a narrow subset of cases: those cases, and only those cases, where "'a state court's decision

is unaccompanied by an explanation.'" *Id.* (quoting *Richter*, 562 U.S. at 98). By contrast, when a state court provides specific reasons for its decision, federal courts defer to "those reasons if they are reasonable." *Id. Wilson* renders the District Court's reliance on *Harrington* untenable in this case.

To be sure, the Alabama Court of Criminal Appeals' specific reason for rejecting Tomlin's claim is unsatisfactory. In response to Tomlin's validly presented due process claim, the state court held that the prior decision of the Alabama Supreme Court dated October 3, 2003—which *preceded* Tomlin's LWOP sentence and his fair notice claim—nonetheless rendered that claim without merit. But that is the reason the Alabama Court of Criminal Appeals gave. The unsatisfactory nature of that reason is not a basis on which to hold that its decision was simply unexplained. The next step in the District Court's analysis should have been to determine whether the Alabama Court of Criminal Appeals' reason—and that reason alone—was contrary to clearly established federal law at the time of the decision.

B. The Alabama Court of Criminal Appeals' Reason for Its Decision was "Contrary To" Clearly Established Federal Law.

To determine whether a state court decision is "contrary to" clearly established federal law, a federal court determines whether "the state court applied a rule different from the governing law set forth in Supreme Court

precedent or decided a case differently than the Supreme Court has done on a set of materially indistinguishable facts." *Barnes v. Sec'y, Dep't of Corrs.*, 888 F.3d 1148, 1155 (11th Cir. 2018) (quoting *Bell v. Cone*, 535 U.S. 685, 694 (2002)) (alterations omitted)). "Under this prong, the state court need not cite federal law 'so long as neither the reasoning nor the result of the state-court decision contradicts' the Supreme Court's precedents." *Childers v. Floyd*, 642 F.3d 953, 971 (11th Cir. 2011) (en banc) (quoting *Early v. Packer*, 537 U.S. 3, 8 (2002) (per curiam)).

This case falls into the first category: the Alabama Court of Criminal Appeals applied a rule entirely different from, and irreconcilable with, the rule outlined in *Bouie* and *Rogers*. The heart of the *Bouie/Rogers* framework is that a state judiciary cannot unforeseeably enlarge the coverage of a criminal statute through interpretation. *See Bouie*, 378 U.S. at 353-55; *Rogers*, 532 U.S. at 461. The *Bouie/Rogers* test, at a minimum, requires an analysis of whether the state court's interpretation of a criminal statute in the petitioner's case unforeseeably enlarged the conduct proscribed or the available punishment. By contrast, the Alabama Court of Criminal Appeals' rule in this case was that if a higher state court had issued an order requiring imposition of a particular sentence, no *Bouie/Rogers* claim could lie. If a

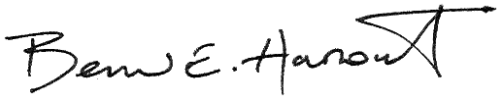
decision from the highest state court ordering a petitioner sentenced to a particular sentence as a matter of state law precluded *Bouie/Rogers* claims, neither *Bouie* nor *Rogers* could have been decided in the manner they were.

Both *Bouie* and *Rogers* rest on the proposition that the federal Due Process Clause provides a check on state court interpretations of state law. A state court interpretation of state law in the circumstances of a particular case does not, and cannot, decide the distinct federal law question of whether that interpretation violates the federal Due Process Clause, as the *Bouie* court held, and the *Rogers* court reaffirmed. Because, as the District Court recognized, the Alabama Supreme Court did not have a *Bouie/Rogers* claim before it when it reversed Tomlin's death sentence and ordered a sentence of life imprisonment without the possibility of parole, the Alabama Supreme Court's decision to order that sentence can only be understood as an interpretation of state law. The Alabama Court of Criminal Appeals' rule was therefore contrary to the rules set out in *Bouie* and *Rogers*, and its decision is not entitled to AEDPA deference. Accordingly, Tomlin's Due Process claim is entitled to *de novo* review in this federal habeas corpus proceeding. At the very least, this is debatable among reasonable jurists.

CONCLUSION

For the foregoing reasons, Appellant Tomlin respectfully requests that this Court reconsider and grant his motion for a COA.

Respectfully submitted,



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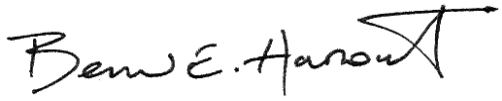
June 17, 2019

CERTIFICATE OF COMPLIANCE

This motion complies with the word count limitation of this Court's Order dated June 11, 2019, because it contains 9,497 words, which is less than 9,500 words, excluding the parts of the motion exempted by Fed. R. App. P. 27 and Eleventh Circuit Rule 27. This motion complies with the typeface and type style requirements of Fed. R. App. P. 27(d)(1)(D), Fed. R. App. P. 27(d)(1)(E), and 11th Cir. R. 27-1(a)(10) because it has been prepared in a proportionally spaced typeface using Word, in 14-point Times New Roman font.



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CERTIFICATE OF SERVICE

I hereby certify that on June 17, 2019, I electronically filed the foregoing motion with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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Appendix F

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-10494-HH

PHILLIP WAYNE TOMLIN,

Petitioner-Appellant,

versus

TONY PATTERSON,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Alabama

Before: WILSON and JILL PRYOR, Circuit Judges

BY THE COURT:

Phillip Wayne Tomlin has filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's May 7, 2019, order denying a certificate of appealability in his appeal of the district court's denial of his *pro se* 28 U.S.C. § 2254 habeas corpus petition. Upon review, Tomlin's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.

Appendix G

COLUMBIA LAW SCHOOL
COLUMBIA UNIVERSITY

Bernard E. Harcourt
Isidor and Seville Sulzbacher Professor of Law
Attorney-at-Law

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August 16, 2019

David J. Smith
Clerk of Court
United States Court of Appeals for the Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Re: Appeal Number: 19-10494-HH
Case Style: Phillip Tomlin v. Tony Patterson
District Court Docket No: 1:10-cv-00120-CG-B

Dear Mr. Smith,

I write to inform the Court that the United States Supreme Court has granted certiorari in *McKinney v. Arizona*, No. 18-1109, which has implications for Mr. Tomlin's case and warrants reconsideration of this Court's denial of his certificate of appealability. I file this letter in the spirit of Fed.R.App.P. 28(j) and 11th Cir. R. 40-5, given that, under 11th Cir. R. 22-1(c), Mr. Tomlin may not file a petition for rehearing en banc.

The *McKinney* case raises the question whether a capital defendant who receives a resentencing hearing must be resentenced under the capital statute as interpreted at the time of the offense or at the time of the resentencing. The Supreme Court granted certiorari specifically to decide whether the Arizona Supreme Court was required to apply current law in resentencing a capital defendant.

McKinney has direct implications for Mr. Tomlin's retroactivity claim. Mr. Tomlin was resentenced to life imprisonment without parole on May 10, 2004, under the prevailing sentencing law at that time in 2004, which included the 1981 decisions in *Ex parte Kyzer*, 399 So.2d 330 (Ala. 1981), and *Beck v. State*, 396 So. 2d 645 (Ala. 1981). Two years later, on July 28, 2006, the Alabama Supreme Court expressly overruled its decisions in *Ex parte Kyzer* and *Beck v. State*, declaring the relevant parts of those decisions "unexpected and indefensible." See

Ex parte Stephens, 982 So. 2d 1148 (Ala. 2006). The *Stephens* decision effectively returned the Alabama capital sentencing law back to how it read in 1978 at the time of the offense.

Mr. Tomlin's retroactivity claim raises the question at issue in *McKinney*: whether Mr. Tomlin should have been resentenced (as he was) under the law in 2004, which included *Kyzer* and *Beck*, or instead (as he argues he should be) under the law as it was originally written and applied to him at the time of the offense in 1978.

Mr. Tomlin respectfully request that the Court reconsider its order of July 30, 2019, denying reconsideration and grant a certificate of appealability in this case. A copy of the certiorari petition in *McKinney* is attached as an appendix.

Sincerely yours,

Bernard E. Harcourt
Counsel of Record

Appendix H

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
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August 22, 2019

Bernard E. Harcourt
Columbia Law School
Jerome Green Hall 515
435 W 116TH ST
NEW YORK, NY 10027

Appeal Number: 19-10494-HH
Case Style: Phillip Tomlin v. Tony Patterson
District Court Docket No: 1:10-cv-00120-CG-B

RETURNED UNFILED: Supplemental Authority in Support of Rehearing filed by Bernard E. Harcourt for Phillip Wayne Tomlin is returned unfiled because a party may file only one motion for reconsideration with respect to the same order (See 11th Cir.R.27-3).

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Christopher Bergquist, HH
Phone #: 404-335-6169

MOT-11 Motion or Document Returned

Appendix I

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 13-13878-C

PHILLIP WAYNE TOMLIN,

Petitioner-Appellant,

versus

TONY PATTERSON,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Alabama

ORDER:

Phillip Wayne Tomlin, an Alabama prisoner serving a sentence of life imprisonment without the possibility of parole for capital murder, seeks a certificate of appealability ("COA") and leave to proceed *in forma pauperis* ("IFP") in order to appeal the denial of his 28 U.S.C. § 2254 petition for writ of habeas corpus. Tomlin's *pro se* § 2254 petition raised 30 claims.

Procedural History

In 1978, Tomlin was tried and convicted for the double murder of Ricky Brune and Cheryl Moore, and sentenced to death. While Tomlin's case was pending on *certiorari* review in the Alabama Supreme Court, the U.S. Supreme Court issued *Beck v. Alabama*, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980), holding that the death penalty statute under which Tomlin was convicted was defective because it did not allow a jury to consider any lesser-included offenses. The Alabama Supreme Court ordered that Tomlin be retried based on *Beck*,

but withdrew its order directing a new trial when the Supreme Court released *Hopper v. Evans*, 456 U.S. 605, 102 S.Ct. 2049, 72 L.Ed.2d 367 (1982), which held that, because the defendant had admitted that he intentionally shot the victim, there was no prejudice in the trial court's failure to instruct the jury on any lesser-included offenses. The Alabama Supreme Court found that, in light of *Hopper*, Tomlin was not prejudiced by the trial court's failure to instruct the jury on any lesser-included offenses because Tomlin presented an alibi defense. Accordingly, the Alabama Supreme Court affirmed Tomlin's conviction and sentence.

On second application for rehearing, the Alabama Supreme Court reversed Tomlin's conviction on the basis of improper closing argument by the prosecutor, and ordered a new trial. Tomlin was tried for a second time in 1990, convicted of capital murder, and again sentenced to death. The Alabama Court of Criminal Appeals reversed his conviction on several grounds, including prosecutorial misconduct and the improper admission of certain evidence.

In 1993, Tomlin was again tried and convicted of capital murder, and sentenced to death. The Alabama Court of Criminal Appeals again reversed the conviction because two jurors failed to disclose information during vior dire. In 1999, Tomlin was tried and convicted of capital murder for the fourth time. The trial court ordered that Tomlin be sentenced to death, and the Alabama Court of Criminal Appeals affirmed the conviction and sentence.

On December 20, 2002, Tomlin filed a petition for writ of *certiorari* with the Alabama Supreme Court, which the court granted for the limited purpose of reviewing Tomlin's sentence. On October 23, 2003, the Alabama Supreme Court reversed Tomlin's death sentence and remanded the case with instructions that he be resentenced to life imprisonment without the possibility of parole. Tomlin was resentenced to life imprisonment without the possibility of

parole on May 10, 2004, and the Alabama Court of Criminal Appeals affirmed. The Alabama Supreme Court denied Tomlin's petition for *certiorari*.

In 2007, Tomlin filed a counseled petition for post-conviction relief under Ala.R.Crim.P. 32, which the state court denied. Tomlin filed another Rule 32 petition in 2007, which the state court denied as time-barred, procedurally barred, and without merit. The Alabama Court of Criminal Appeals affirmed, and the Alabama Supreme Court denied Tomlin's petition for *certiorari*. Tomlin then filed the instant § 2254 petition.

Trial Evidence

The evidence presented at trial showed that, on January 2, 1977, Charles Castro and his wife reported to police that a body was lying next to a vehicle on an exit ramp from I-10 in Mobile County, Alabama. Police arrived and discovered 15-year-old Moore lying beside the car and 19-year-old Brune slumped behind the steering wheel. Both victims had been shot and had died as a result of multiple gunshot wounds, inflicted with a .38 caliber weapon. Brune had been shot four times, and Moore had been shot once. The toxologist testified that wadding recovered from Moore's body during the autopsy matched the 16-gauge shotgun shells recovered from the apartment where Tomlin's codefendant, John Daniels,[1] resided.

The evidence further showed that, in 1975, approximately two years before the murders, Tomlin's brother, David Tomlin ("David"), had been killed in a shooting involving Brune. David and Brune were employed at a furniture store as guards when the shooting occurred. Brune told police that a shotgun was knocked over and accidentally discharged, fatally wounding David. Tomlin's father told police that he did not believe that David's death was an accident, and that

[1] Daniels was convicted of the murder for hire of Brune and Moore. He was sentenced to death, and his conviction was affirmed on appeal. In 1995, Daniels died of natural causes while on Alabama's death row.

his family wanted Brune to be charged with murder. Tomlin's father wrote a letter to police stating that, if the police did not act within a certain period of time, he would take "further action."

At the time of the murders, Tomlin was living in Houston, Texas, with his wife and two children. Tomlin's wife was employed at a local club. Approximately ten months before the murders, a Texas Ranger was in the club and met with Tomlin. The ranger testified that Tomlin stated that he had to go to Mobile to take care of some family business. Specifically, Tomlin stated that he was going to kill the person who had murdered his younger brother. Another Texas Ranger overheard Tomlin's statements.

Tomlin's in-laws, Randy and Danny Shanks, testified that Tomlin arrived in Mobile unexpectedly on the day before the murders. Randy Shanks testified that Tomlin told them that he had flown from Houston to New Orleans and he had driven from New Orleans to Mobile. Shanks said that Tomlin told them that he had come to Mobile to kill Brune. Both Randy and Danny Shanks testified that Tomlin was accompanied by Daniels, and Tomlin asked them to get a hotel room for him and Daniels. The Shankses took Tomlin and Daniels to a local motel where Randy Shanks filled out a registration card. Randy Shanks testified that, when they got to the room, Tomlin and Daniels showed them a pistol and a sawed-off shotgun. They also testified that Tomlin referred to Daniels as a "hit man." Other witnesses also testified that Tomlin was in Mobile on the day before and the day of the murders.

Mobile County Sheriff Deputy Warren Baker testified that he found a large bag with an airline sticker while conducting a search of Daniels's apartment in Houston, and the number on the airline sticker matched the flight number of a flight that had left New Orleans for Houston on January 2. Baker also recovered a sawed-off shotgun from Daniels's car.

Tomlin testified in his first trial. His testimony was read into evidence at the subsequent trials. He testified that he was in Houston at the time of the murders, and the Shankses had lied about his whereabouts because they did not like him.

Instant § 2254 petition

To obtain a COA, Tomlin must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Where the district court has denied a habeas petition on the merits, the petitioner must demonstrate that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S.Ct. 1595, 1604, 146 L.Ed.2d 542 (2000).

In Claim 1, Tomlin argued that the prosecutor in his final trial used peremptory challenges in a racially discriminatory fashion, in violation of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). Specifically, Tomlin took issue with the prosecution's striking of juror number 71 ("Juror 71"), an African-American man. Tomlin alleged that the prosecutor at first stated that he struck Juror 71 because "we had to strike somebody," but, when pressed, the prosecutor stated that Juror 71 was struck because he was young. Tomlin alleged that this reason was "clearly pretextual," because a younger white woman on the venire ("Juror 11") ultimately sat on the jury. Tomlin also alleged that striking an African-American prospective juror because she was a postal worker was clearly pretextual. He further argued that African-American prospective juror number 7 ("Juror 7") was improperly struck based on an unverified conviction for driving under the influence ("DUI").

The Supreme Court has held that the Equal Protection Clause of the Fourteenth Amendment prohibits prosecutors from exercising peremptory challenges to exclude black jurors solely on account of their race or on the assumption that black jurors, as a group, will be unable

to consider the case impartially. *Batson*, 476 U.S. at 89, 106 S.Ct. at 1719. The Supreme Court established a three-step analysis in evaluating a Batson claim:

> First, the defendant must make out a prima facie case by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose. Second, once the defendant has made out a prima facie case, the burden shifts to the [prosecutor] to explain adequately the racial exclusion by offering permissible race-neutral justifications for the strikes. Third, if a race-neutral explanation is tendered, the trial court must then decide whether the opponent of the strike has proved purposeful racial discrimination.

Johnson v. California, 545 U.S. 162, 168, 125 S.Ct. 2410, 2416, 162 L.Ed.2d 129 (2005) (quotations, citations, and alterations omitted); *see also Batson*, 476 U.S. at 96-98, 106 S.Ct. at 1722-24.

Regarding a prosecutor's proffered race-neutral explanation, the Supreme Court has explained that, "[a]lthough the prosecutor must present a comprehensible reason, the second step of this process does not demand an explanation that is persuasive, or even plausible; so long as the reason is not inherently discriminatory, it suffices." *Rice v. Collins*, 546 U.S. 333, 338, 126 S.Ct. 969, 973-74, 163 L.Ed.2d 824 (2006) (quotation and alteration omitted). Additionally, while the final step of the Batson analysis requires the court to evaluate the persuasiveness of the justification proffered by the prosecutor, the ultimate burden of persuasion regarding racial motivation never shifts from the opponent of the strike. *Id.* at 338, 974.

In this case, the state court denied Tomlin's *Batson* claim on direct appeal. First, the state court found that, "because the only basis for the *Batson* objection was the number of strikes that the State used to remove blacks[,] the trial court could have lawfully found that the defense had failed to establish a prima facie case of discrimination." The state court then concluded that the reasons proffered by the prosecutor for the suspect strikes— opposition to the death penalty,

association with previous defense counsel, youth, occupation, and prior criminal convictions—were race-neutral and did not violate *Batson*.

With respect to Tomlin's allegations regarding Jurors 11 and 71, the record demonstrates that, during the *Batson* hearing, defense counsel made a general objection about the number of African-Americans being struck by the prosecutor. Although the trial court did not explicitly find that a *prima facie* case had been established, the state appellate court presumed that there had been a showing, since the trial court proceeded to the reasons for the strikes. Defense counsel then argued that the proffered reasons were pretextual, and noted that some jurors were struck because they had children, while some were struck because they did not have children. The prosecutor explained that the state was attempting to strike potential jurors who were unmarried and had no children. The prosecutor acknowledged that some may have been missed, and explained that Juror 11 was married. Thus, although she was young, she was not stricken.

Tomlin asserted that the prosecution's strike of Juror 71, an African-American man, was pretextual because, like Juror 11, Juror 71 was married, and was actually older than Juror 11; yet, he was struck for the purported reason that he was young. The state court did not specifically address Tomlin's contention regarding Juror 71. Review of the record shows that the strike of Juror 71 was not one of the specific strikes that defense counsel argued was pretextual; thus, the trial court never had the opportunity to consider Tomlin's argument regarding this particular strike. While the state court did not specifically address Tomlin's contention regarding Juror 71, it did find that the prosecution offered race-neutral reasons for its strikes and that Tomlin did not establish a *Batson* violation.

Tomlin has not shown that the state court's application of *Batson* was unreasonable. The Supreme Court has emphasized that the second step of the *Batson* process does not demand an

explanation that is persuasive, or even plausible, and that the ultimate burden of proving racial motivation is always on the opponent of the strike. *See Rice v*, 546 U.S. at 338, 126 S.Ct. at 973-74. The prosecutor's comments indicated that he was comfortable having Juror 71 serve on the panel, but because he was at the end of the process, the prosecutor needed to make one more strike; thus, he selected Juror 71 because he was young. The trial court had an opportunity to consider the prosecutor's demeanor and credibility with respect to his asserted reason, which went unchallenged by defense counsel, and was satisfied that it was race-neutral and credible. *See Miller-El v. Cockrell*, 537 U.S. 322, 339, 123 S.Ct. 1029, 1041, 154 L.Ed.2d 931 (2003) (noting that deference to a trial court is "necessary because a reviewing court, which analyzes only the transcripts from *voir dire*, is not as well positioned as the trial court is to make credibility determinations"). Further, the record shows that the prosecutor's strike immediately prior to Juror 71 was a white, married individual that, like Juror 71, was also older than Juror 11, the white woman who was allowed to serve on the jury. Therefore, in light of this background, although the prosecutor's reason for striking Juror 71 may now be deemed illogical or weak, it did not raise a strong inference of purposeful discrimination.

As to Tomlin's claim that the prosecution's reason for the strike of Juror 7 was pretexual because there was no certification of his DUI conviction, the state court properly found that involvement in criminal activity was a race-neutral reason for the strike. Tomlin has not argued that Juror 7 did not have a DUI conviction, but instead, contended that certification was required. However, the Alabama Court of Criminal Appeals found that the prosecutor was relying upon information obtained from the district attorney's office that reflected that Juror 7 had a criminal conviction, and that the prosecutor had presented the trial court with the documentation relied

upon. Thus, the state court's conclusion that no pretext was established was reasonable and supported by the record.

Finally, Tomlin's contention that the prosecution's striking of some jurors, such as postal workers or teachers, was egregious and established pretext, was without merit. As the state court found, there is no evidence in the record indicating that there was a white juror who was a postal worker or a teacher and was not struck by the state. The prosecutor's articulated reason need not be persuasive, and the decision to strike jurors based on occupation is race-neutral.

In Claim 2, Tomlin argued that the trial court's practice of dismissing the entire jury venire upon a successful *Batson* challenge, rather than merely re-seating any improperly removed jurors, made the assertion of a challenge impracticable. However, review of the record demonstrates that defense counsel was unaware of the trial court's proposed remedy until *after* the defense's *Batson* challenge had been rejected by the trial court. The record shows that the parties were first made aware of the district court's practice for remedying *Batson* violations when the prosecutor sought to make a reverse *Batson* challenge based on the fact that the defense used all of its 25 strikes on white jurors. This occurred *after* Tomlin made his objection and the discussion concerning Tomlin's *Batson* challenge was concluded. Therefore, the trial court's proposed remedy could not have made Tomlin's assertion of a *Batson* challenge impractical, as he was not aware of the remedy until after his challenge had been asserted and rejected.

Tomlin also appeared to argue that the trial court's practice of "imposing a single remedy in all cases" violated *Batson*, because, according to Tomlin, the Supreme Court mandated that the constitutional violation "must be remedied in light of the circumstances of the case at hand." In *Batson*, the "Supreme Court made it clear that the fashioning of a remedy for an unconstitutional strike is a matter upon which the lower courts are to be accorded significant

latitude." *United States v. Walker*, 490 F.3d 1282, 1294 (11th Cir. 2007) (quotations and alterations omitted); *see also Batson*, 476 U.S. at 99, 106 S.Ct. at 1724-25. Here, even if Tomlin is correct that *Batson* prohibits a trial court from establishing a single remedy to be applied in all cases in the event of a successful *Batson* challenge, there was no constitutional error with respect to Tomlin's conviction. As discussed above, Tomlin's *Batson* challenge was not successful, and he did not learn of the trial court's proposed remedy until after his *Batson* challenge had been rejected. Therefore, the court's proposed *Batson* remedy, even if unconstitutional, did not have any application to Tomlin's case.

In Claims 3 and 4, Tomlin argued that the admission of certain testimony from Captain Sanford Henton violated Tomlin's rights to due process and a fair trial. In Claim 5, Tomlin argued that his rights were violated when the trial court refused to allow him to introduce "habit evidence" of Brune's drug use. Evidentiary errors are a matter of state law and are not the subject of federal habeas corpus relief unless violative of federal constitutional standards. *Jones v. Kemp*, 794 F.2d 1536, 1541 (11th Cir. 1986). Therefore, this Court's inquiry is limited to determining whether the evidentiary ruling was so prejudicial as to deny fundamental fairness to the criminal trial. *United States v. Hurn*, 368 F.3d 1359, 1363 n.3 (11th Cir. 2004). Here, Tomlin has not shown that the alleged errors rendered his trial fundamentally unfair, and therefore, he has not stated cognizable federal habeas claims.

In Claim 6, Tomlin argued that the trial court admitted into evidence his testimony from his first trial to the effect that he did not tell the police his alibi because his "lawyers advised [him] not to," which constituted an impermissible comment on his invocation of his right to remain silent, in violation of *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976).

However, even assuming that the questioning violated *Doyle*, the error was harmless, because defense counsel discussed Tomlin's post-arrest silence in his opening statement.

In Claims 7, 8, and 10, Tomlin argued that his constitutional rights were violated by the trial court's failure to remove for cause five prospective jurors. Similarly, in Claim 9, Tomlin argued that his constitutional rights were violated when the trial court refused his request to ask further questions of prospective juror P.J. Tomlin used peremptory strikes to remove all of the jurors complained of, and he did not allege that the jury that ultimately sat was not impartial. *See Ross v. Oklahoma*, 487 U.S. 81, 88, 108 S.Ct. 2273, 2278, 101 L.Ed.2d 80 (1988) (where a juror who should have been excused for cause was removed by defendant's peremptory challenge, any claim that the jury was not impartial must focus, not on the excused juror, but on the jurors who ultimately sat). Therefore, Tomlin has not shown that the state court's denial of Claims 7-10 was unreasonable.

In Claim 11, Tomlin argued that the trial court violated his Sixth and Fourteenth Amendment rights by allowing the state's expert, James Small, to testify outside of his area of expertise. Tomlin's claim regarding fingerprinting was not raised in the state court, and is, therefore, unexhausted. *See Bailey v. Nagle*, 172 F.3d 1299, 1302-03 (11th Cir. 1999). Tomlin did not show that Small's testimony as to the causes of the victims' deaths rendered his trial fundamentally unfair, because the fact that both deaths were caused by multiple gunshot wounds was never contested.

In Claim 12, Tomlin argued that his constitutional rights were violated by the trial court's admission of testimony concerning "a prior drug sting operation that had been conducted against Tomlin in Texas and for which he was never convicted." This claim is belied by the record, as

there was no testimony that Tomlin was the subject of a prior investigation, or that he was arrested and tried but never convicted.

In Claim 13, Tomlin argued that his Fifth, Sixth, and Fourteenth Amendment rights were violated by the trial court's denial of his motion for judgment of acquittal. The evidence recounted by the state court, summarized in the "background" section of this order, is supported by the record, and was more than sufficient to support Tomlin's conviction for the capital murders of Brune and Moore.

In Claim 14, Tomlin argued that his constitutional rights were violated by the trial court's denial of his motion for change of venue. However, as the state court found, the record shows that only 10 prospective jurors out of the venire of 75 stated that they had heard or read something about the case. Upon questioning by the trial judge, those prospective jurors indicated that they only had vague recollections of the case. Therefore, Tomlin did not demonstrate that the pretrial publicity saturated the community where the trial was held. *See Coleman v. Kemp*, 778 F.2d 1487, 1490 (11th Cir. 1985).

In Claim 15, Tomlin argued that the prosecutor violated his constitutional rights by presenting evidence to the grand jury of Tomlin's involvement in a plot to "murder for pecuniary gain," (murder for hire), a charge of which he had been acquitted in a previous trial. Tomlin did not allege that the prosecutor incorrectly informed the grand jury that he had been convicted of murder for hire. Rather, he alleged that some of the evidence that the prosecutor presented to the grand jury in securing an indictment for capital double murder in Tomlin's fourth trial was the same evidence that was introduced Tomlin's second trial in an attempt to prove the charge of murder for hire.

The Alabama Court of Criminal Appeals rejected this claim. The state court noted that it did not have a record of the evidence presented in the grand jury proceedings, but assumed that the evidence allegedly presented to the fourth grand jury regarding murder for hire was the same that the prosecution introduced at Tomlin's second trial: that Tomlin accompanied a man named Ron Daniels from Houston, Texas, to Mobile, Alabama, to avenge the death of Tomlin's brother, and that Tomlin referred to Daniels as a "hit man." The state court found that Tomlin's argument was not that the prosecutor failed to present sufficient evidence to the grand jury on the charge of double murder, but rather, that the grand jury considered illegal, prejudicial evidence. The state court found that "all evidence that would have supported a charge that Tomlin contracted the murders was also relevant to the issue whether Tomlin intentionally caused the death of the victims and was in the form of admissible hearsay." Because the evidence was admissible regarding the double-murder charge, Tomlin's claim was merely that the evidence presented to the grand jury was prejudicial. The state court concluded that the allegation that the evidence was prejudicial did not render it inadmissible, citing *Oregon v. Kennedy*, 456 U.S. 667, 674, 102 S.Ct. 2083, 2089, 72 L.Ed.2d 416 (1982) ("Every act on the part of a rational prosecutor during a trial is designed to 'prejudice' the defendant by placing before the judge or jury evidence leading to a finding of his guilt.").

Here, Tomlin failed to state precisely what evidence was improperly presented to the grand jury on this issue. Therefore, the district court could have denied the claim as too vague and conclusory to warrant habeas relief. *See Tejada v. Dugger*, 941 F.2d 1551, 1559 (11th Cir. 1991). Nevertheless, the district court assumed, as the state court did, that the evidence was the same as that presented at trial: that Tomlin accompanied Daniels from Houston to Mobile to avenge the death of Tomlin's brother, and that Tomlin referred to Daniels as a "hit man." All of

this evidence supported the grand jury's charge of intentional double-murder, because it was, at the very least, relevant on the question of Tomlin's intent. Because this evidence was relevant to the charge of intentional double-murder, the evidence was properly admitted, despite Tomlin's previous acquittal on the murder-for-hire charge.

Moreover, even assuming that this evidence was not properly admitted in the grand jury proceedings in Tomlin's fourth trial, there is no indication that its admission was material to the grand jury's decision to indict Tomlin for intentional double murder. *C.f. Bank of Nova Scotia v. United States*, 487 U.S. 250, 256, 108 S.Ct. 2359, 2374, 101 L.Ed.2d 228 (1988) (holding that, for errors brought to the trial court's attention prior to the conclusion of trial, dismissal of the indictment "is appropriate only if it is established that the violation substantially influenced the grand jury's decision to indict or if there is grave doubt that the decision to indict was free from the substantial influence of such violations") (internal quotations omitted). Finally, this Court has recognized that, in some circumstances, a petit jury's conviction renders harmless any admission of illegal evidence before the grand jury. *See Anderson v. Sec'y Dep't of Corrs.*, 462 F.3d 1319, 1327 (11th Cir. 2006) ("Although *Mechanik* does not squarely address the situation presented in this case, it arguably favors a holding that the petit jury's conviction of Petitioner renders harmless [a witness's] perjured grand jury testimony.")(citing *United States v. Mechanik*, 475 U.S. 66, 71-73, 106 S.Ct. 938, 942-943, 89 L.Ed.2d 50 (1986) (holding that, where the government makes factual errors before a grand jury, but a petit jury later finds the accused guilty beyond a reasonable doubt, the grand jury errors are deemed harmless)).

In Claim 16, Tomlin argued that his constitutional rights were violated by the trial court's admission of hearsay evidence in the form of an airport parking claim ticket. Because there was other evidence showing that Tomlin was in Mobile on the day before and the day of the murders,

the admission of the parking ticket, even if erroneous, did not render Tomlin's trial fundamentally unfair.

In Claim 17, Tomlin argued that his constitutional rights were violated when the trial court allowed a transcript of his testimony from his first trial to be read into evidence. Review of the records shows that there was no evidence that Tomlin's testimony from his first trial was involuntary or was the result of constitutionally ineffective representation. *See Harrison v. United States*, 392 U.S. 219, 223, 88 S.Ct. 2008, 2010, 20 L.Ed.2d 1047 (1968) (generally, statements made under oath in a prior trial by a criminal defendant who then waived his constitutional right are admissible in a subsequent trial). Therefore, Tomlin's prior testimony was correctly received into evidence at his fourth trial.

Tomlin argued in Claim 18 that his constitutional rights were violated by the trial court's admission of gruesome, duplicative, and prejudicial photographs of the crime scene. However, Tomlin did not make any allegation as to how the admission of the photographs rendered his trial fundamentally unfair, nor did he explain why the photographs were unfairly prejudicial.

In Claim 19, Tomlin argued that his constitutional rights were violated by the trial court's admission of hearsay evidence in the form of a letter written by Tomlin's father regarding the death of David. Tomlin has not provided any allegations or argument as to how the admission of the letter rendered his trial fundamentally unfair, and review of the record reveals no indication that the letter had a substantial influence on the jury's verdict.

In Claim 20, Tomlin argued that his constitutional rights were violated by the prosecutor's improper statements during the opening statement and closing argument. Review of the record shows that the prosecutor's comments were supported by the evidence at trial, and therefore, were not improper. *See United States v. Baker*, 432 F.3d 1189, 1252 (11th Cir. 2005)

(the prosecutor may discuss the evidence presented at trial, make arguments regarding witness credibility, and argue that the evidence has shown the defendant's guilt).

In Claim 21, Tomlin argued that the trial court improperly instructed the jury on the issue of "particularized intent" after the jury asked questions related to intent. However, Tomlin failed to argue, before the state court or the district court, how the instruction was erroneous or otherwise improper, and thus, has not demonstrated that the inclusion of the instruction rendered his trial fundamentally unfair.

In Claims 22 and 23, Tomlin argued that the trial court gave improper instructions on premeditation, deliberation, and malice, and that the trial court improperly instructed the jury on accomplice liability. As the state court found, the statute pursuant to which Tomlin was charged required that the murder be "wilful, deliberate, malicious and premeditated." *See Young v. State*, 428 So.2d 155 (Ala. Crim. App. 1982). Thus, the trial court's jury instructions were consistent with the law and accurate accounts of the law at the time that the murders were committed. As to accomplice liability, there is no indication that undue influence was placed on that instruction. Additionally, in light of the jury instructions as a whole, the state clearly retained the burden of proving that Tomlin had the particularized, specific intent to kill Brune and Moore, and that he caused their deaths by one act or pursuant to one scheme or course of conduct.

In Claim 24, Tomlin argued that the trial court improperly refused to instruct the jury on the lesser included offenses of murder with extreme indifference to human life and manslaughter. He contended that the court's refusal to instruct on these offenses violated *Beck*. This Court has held that *Beck*'s prohibition against an all-or-nothing choice between death or acquittal is not violated where the law permits the charging of lesser included non-capital offenses if the evidence supports it. *Maples v. Allen*, 586 F.3d 879, 849 (11th Cir. 2009) *rev'd on other*

grounds, *Maples v. Thomas*, 565 U.S. __, 132 S.Ct. 912, 181 L.Ed.2d 807 (2012). Here, Alabama law permitted the charging of lesser included non-capital offenses, and the trial court instructed the jury on the lesser included non-capital offenses of intentional murder and felony murder. However, the evidence did not support a finding of manslaughter or murder with extreme indifference to human life, because the evidence established that the two victims were killed by gunshot wounds fired at close range. Therefore, *Beck* was not violated here.

In Claim 25, Tomlin argued that the trial court improperly instructed the jury on reasonable doubt. Specifically, he contended that the trial court's use of the term "moral certainty" violated *Cage v. Louisiana*, 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990), *overruled in part*, *Estelle v. McGuire*, 502 U.S. 62, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991), because it lowered the government's burden of proof below the standard of proof beyond a reasonable doubt. However, unlike the instruction at issue in *Cage*, the charge here did not use the term "moral certainty" in conjunction with terms such as "grave uncertainty" and "substantial doubt." Rather, the instruction here used "moral certainty" in conjunction with "abiding conviction," like the instruction that the Supreme Court approved of in *Victor v. Nebraska*, 511 U.S. 1, 114 S.Ct. 1239, 127 L.Ed. 583 (1994).

In Claim 26, Tomlin argued that the trial court erred in instructing the jury on the elements of the capital murder offense with which he was charged. This claim is procedurally defaulted, and Tomlin did not allege cause and prejudice to overcome the procedural bar.

In Claim 27, Tomlin argued that his fourth trial violated his rights under the Double Jeopardy Clause. Specifically, he argued that prosecutorial misconduct in his first three trials barred his fourth prosecution. Review of the record reveals no indication that the actions of the prosecutor in any of the former proceedings were motivated by an intent to provoke a mistrial.

See Oregon v. Kennedy, 456 U.S. 667, 675-76, 102 S.Ct. 2083, 2089, 72 L.Ed.2d 416 (1982). Tomlin also did not allege that the prosecutor intended to provoke a mistrial. Therefore, this claim is meritless.

In Claim 28, Tomlin argued that the cumulative effect of the trial errors alleged in Claims 1 through 26 violated his constitutional rights. As discussed above, there was no merit to the assertions of error set forth in Claims 1-26, and therefore, there could be no cumulative error. *See United States v. Waldon*, 363 F.3d 1103, 1110 (11th Cir. 2004) ("because no individual errors . . . have been demonstrated, no cumulative errors can exist").

In Claim 29, Tomlin argued that the state district court judge was not authorized under Alabama law to preside over a capital murder trial in state court. This is purely an issue of state law that should be reviewed only for fundamental unfairness. However, Tomlin has not alleged that any error rendered his trial fundamentally unfair.

In Claim 30, Tomlin argued that his sentence of life imprisonment without the possibility of parole was "illegal," because the aggravating circumstance on which it was based—intentionally causing the death of two or more persons by one act or pursuant to one scheme—was not enumerated in Ala. Code § 13-11-6 (1975), which, at the time of the murders in 1977, contained a list of aggravating circumstances upon which the death penalty or life imprisonment without the possibility of parole could be imposed. Liberally construed, Tomlin argued that his sentence of life without the possibility of parole violated the Ex Post Facto Clause.

The Ex Post Facto Clause operates not to protect an individual's right to less punishment, but rather as a means of assuring that an individual will receive fair warning of criminal statutes and the punishments they carry. *United States v. Bordon*, 421 F.3d 1202, 1207 (11th Cir. 2005). A criminal statute or sentencing scheme violates the Ex Post Facto Clause if: (1) it is enacted

after the crime was committed and before sentencing, and (2) its application results in a more onerous penalty. *United States v. York*, 428 F.3d 1325, 1337 (11th Cir. 2005).

Because Tomlin has made a substantial showing of the denial of a constitutional right with regard to this claim, Tomlin is hereby granted a COA on the following issue: 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 an unreasonable application of, clearly established federal law, as determined by the U.S. Supreme Court.

Conclusion

Tomlin's motion for a COA is GRANTED as to the following issue only:

> 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.

Tomlin's motion for leave to proceed IFP is also GRANTED.

/s/ Adalberto Jordan
UNITED STATES CIRCUIT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

John Ley
Clerk of Court

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June 02, 2014

Phillip Wayne Tomlin
Holman CF - Inmate Legal Mail
HOLMAN 3700
ATMORE, AL 36503-3700

Appeal Number: 13-13878-C
Case Style: Phillip Tomlin v. Tony Patterson
District Court Docket No: 1:10-cv-00120-CG-B

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause.

The enclosed order has been ENTERED.

Sincerely,

JOHN LEY, Clerk of Court

Reply to: Walter Pollard, C
Phone #: (404) 335-6186

MOT-2 Notice of Court Action

Appendix J

BE IT RESOLVED, That we urge anyone having any knowledge or information which might lead to the conviction of the perpetrator or perpetrators of this heinous crime to come forward and give this information to the district attorney, and in an attempt to deter such deplorable conduct, concurrently with this Resolution there is being introduced in this body legislation authorizing a reward of up to $10,000.00 to the person giving information leading to arrest and conviction in cases of a heinous nature, including attempted assassination of members of the judiciary.

BE IT RESOLVED FURTHER, That a copy of this Resolution be sent to The Honorable Arthur Gamble, Jr.

Approved September 8, 1975

Time: 3:00 P.M.

Act No. 213 H. 212—Morris, Biddle, Mitchem, Callahan, Sandusky, White, Campbell, Sasser

AN ACT

To provide for a sentence of death or life imprisonment without parole in certain aggravated offenses; to prescribe the manner of charging and sentencing in such cases and to eliminate lesser included offenses in such cases; to limit the maximum punishment in all other cases to life imprisonment; to provide for an effective date of this act.

Be It Enacted by the Legislature of Alabama:

Section 1. Except in cases enumerated and described in Section 2 herein, neither a court nor a jury shall fix the punishment for the commission of treason, felony, or other offenses at death, 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 of this Act. In all cases where no aggravated circumstances enumerated in Section 2 are expressly averred in the indictment, the trial shall proceed as now provided by law, except that the death penalty or life imprisonment without parole shall not be given, and the indictment shall include all lesser offenses.

Section 2. If the jury finds the Defendant guilty, they shall fix the punishment at death when the Defendant is charged by indictment with any of the following offenses and with aggravation which must also be averred in the indictment, and which offenses so charged with said aggravation shall not include any lesser offenses:

(a) Kidnapping for ransom or attempts thereof, when the victim is intentionally killed by the defendant.

(b) Robbery or attempts thereof when the victim is intentionally killed by the defendant.

(c) Rape when the victim is intentionally killed by the defendant; carnal knowledge of a girl under 12 years of age, or abuse of such girl in an attempt to have carnal knowledge, when the victim is intentionally killed by the defendant.

(d) Nighttime burglary of an occupied dwelling when any of the occupants is intentionally killed by the defendant.

(e) The murder of any police officer, sheriff, deputy, state trooper, or peace officer of any kind, or prison or jail guard, while such prison or jail guard is on duty, or because of some official or job-related act or performance of such officer or guard.

(f) Any murder committed while the Defendant is under sentence of life imprisonment.

(g) Murder in the first degree when the killing was done for a pecuniary or other valuable consideration, or pursuant to a contract or for hire.

(h) Indecent molestation, or an attempt to indecently molest a child under the age of 16 years, when the child victim is intentionally killed by the defendant.

(i) Willful setting off or exploding dynamite or other explosive under circumstances now punishable by Title 14, Section 123 or 124, Code of Alabama 1940, when a person is intentionally killed by the defendant because of said explosion.

(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.

(k) Murder in the first degree where the victim is a public official or public figure, and the murder stems from or is caused by or related to his official position, acts, or capacity.

(l) Murder in the first degree committed while Defendant is engaged or participating in the act of unlawfully assuming control of any aircraft by use of threats or force with intent to obtain any valuable consideration for the release of said aircraft or any passenger or crewman thereon, or to direct the route or movement of said aircraft, or otherwise exert control over said aircraft.

(m) Any murder committed by a Defendant who has been convicted of murder in the first or second degree in the twenty years preceding the crime.

(n) Murder when perpetrated against any witness subpoened to testify at any preliminary hearing, trial or grand jury proceeding against the defendant who kills or procures the killing of witness, or when perpetrated against any human being while intending to kill such witness.

Evidence of intent under this section shall not be supplied by the felony-murder doctrine.

In such cases, if the jury finds the Defendant not guilty, the Defendant must be discharged. The court may enter a judgment of mistrial upon failure of the jury to agree on a verdict of guilty or not guilty or on the fixing of the penalty of death. After entry of a judgment of mistrial, the Defendant may be tried again for the aggravated offense, or he may be re-indicted for an offense wherein the indictment does not allege an aggravated circumstance. 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.

Section 3. If the jury finds the Defendant guilty of one of the aggravated offenses listed in Section 2 hereof and fixes the punishment at death, the court shall thereupon hold a hearing to aid the court to determine whether or not the court will sentence Defendant to death or to life imprisonment without parole. In the hearing evidence may be presented as to any matter that the court deems relevant to sentence, and shall include any matters relating to any of the aggravating or mitigating circumstances enumerated in Section 6 and 7 of this Act. Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided that the Defendant is accorded a fair opportunity to rebut any hearsy statements; and further provided that this section shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the State of Alabama. The State and the Defendant, or his counsel, shall be permitted to present argument for or against the sentence of death.

Section 4. Notwithstanding the fixing of the punishment at death by the jury, the court after weighing the aggravating and mitigating circumstances may refuse to accept the death penalty as fixed by the jury and sentence the Defendant to life imprisonment without parole, which shall be served without parole; or the court after weighing the aggravating and mitigating circumstances, and the fixing of the punishment at death by the jury, may accordingly sentence the Defendant to death. If the court imposes a sentence of death, it shall set forth in

writing as the basis for the sentence of death, findings of fact from the trial and the sentence hearing which shall at least include the following:

(a) One or more of the aggravating circumstances enumerated in Section 6, which it finds exists in the case and which it finds sufficient to support the sentence of death, and

(b) Any of the mitigating circumstances enumerated in Section 7 which it finds insufficient to outweigh the aggravating circumstances.

Section 5. The judgment of conviction and sentence of death shall be subject to automatic review as now required by law.

Section 6. Aggravating circumstances. Aggravating circumstances shall be the following:

(a) The capital felony was committed by a person under sentence of imprisonment;

(b) The Defendant was previously convicted of another capital felony or a felony involving the use or threat of violence to the person;

(c) The Defendant knowingly created a great risk of death to many persons;

(d) The capital felony was committed while the Defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit, rape, robbery, burglary, or kidnapping for ransom;

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;

(f) The capital felony was committed for pecuniary gain;

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws;

(h) The capital felony was especially heinous, atrocious or cruel.

Section 7. Mitigating circumstances. Mitigating circumstances shall be the following:

(a) The Defendant has no significant history of prior criminal activity;

(b) The capital felony was committed while the Defendant was under the influence of extreme mental or emotional disburbance;

(c) The victim was a participant in the Defendant's conduct or consented to the act;

(d) The Defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor;

(e) The Defendant acted under extreme duress or under the substantial domination of another person;

(f) The capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired;

(g) The age of the Defendant at the time of the crime.

Section 8. Each person indicted for an offense punishable under the provision of this act who is not able to afford legal counsel must be provided with court appointed counsel having no less than five years prior experience in the active practice of criminal law.

Section 9. The provisions of this act are severable. If any part of this act is declared invalid or unconstitutional, such declaration shall not affect the part which remains.

Section 10. This act shall become effective one hundred and eighty (180) days from the date which the Governor affixes his signature thereto.

Approved September 9, 1975

Time: 2:55 P.M.

Act No. 214 S. 326—Pearson, Fine, Clemon, Gilmore, Bank and Foshee

AN ACT

To create and establish the Alabama Board of Funeral Service; to establish rules and regulations; to provide for the licensing of funeral directors, embalmers and funeral establishments; to provide for the examination for licenses; and to set fees therefor; to establish procedure for election and terms of members of the Board and to define powers and duties of the Board; to provide penalties; to merge the State Embalming Board into the Alabama Board of Funeral Service and provide that the latter Board shall perform all the functions and duties of the State Embalming Board; and to repeal Title 46, Sections 121 through 128, Code of Alabama 1940, and all other conflicting laws.

Be It Enacted by the Legislature of Alabama:

Section 1. — Purpose of the Act.

It is declared and established that the procedures for mak-

Appendix K

Certificates of Appealability in Habeas Cases in the United States Court of Appeals for the Eleventh Circuit: A Study

Julia Udell[1]

Abstract

This study examines the Certificate of Appealability ("COA") granting process in the United States Court of Appeals for the Eleventh Circuit. Using the docket database of Westlaw, the online legal resource, it identifies cases in which the Eleventh Circuit granted or denied COAs between January 1, 2018 and September 30, 2019. It compares the grant rate of the Eleventh Circuit to that of another circuit, the First Circuit, and finds that the Eleventh Circuit's noncapital COA grant rate (8.44 percent) is far below that of the First Circuit (14.29 percent). The study also explores COA data within the Eleventh Circuit, comparing the rate at which noncapital COAs are granted (8.44 percent) to the rate at which capital ones are (58.3 percent). It also examines the rate at which individual judges in the Eleventh Circuit grant COAs, finding that some judges grant as many as 25.81 percent of the COAs they hear, whereas others grant as few as 2.33 percent.

Introduction

In 1996, the Antiterrorism and Effective Death Penalty Act ("AEDPA") went into effect with the objective of "eliminat[ing] delays in the federal habeas review process"[2] and "encouraging finality of state court judgments."[3] AEDPA's provision on habeas corpus reform revised a number of procedures for both capital and noncapital petitioners. One such revision was the

[1] Columbia College, Columbia University, Class of 2021. This research was conducted in the Fall of 2019 under the supervision of Professors Bernard E. Harcourt and Alexis Hoag of Columbia Law School. Columbia Law School students Naomi Bates, Angel Valle, and Ashwini Velchamy, as well as Ghislaine Pagès, provided research support and guidance. I am grateful as well for the research assistance of Sonam Jhalani, Mary LeSeur, and Ilina Logani who helped collect data for this study.

[2] *Holland v. Florida*, 560 U.S. 631, 648 (2010).

[3] *Rhines v. Weber,* 544 U.S. 269, 270 (2005).

requirement that petitioners—under both 28 U.S.C. § 2254 and § 2255—obtain a Certificate of Appealability ("COA") in order to appeal the denial of habeas corpus relief.[4] The COA replaced the Certificate of Probable Cause ("CPC") requirement which existed prior to AEDPA.[5] The COA requirement has been the subject of numerous Supreme Court decisions.[6]

In *Slack v. McDaniel*, interpreting AEDPA four years after its adoption, the Supreme Court explained that satisfying the COA standard requires a petitioner "make a substantial showing of the denial of a constitutional right" and demonstrate either that "reasonable jurists could debate whether...the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'"[7] When a denial is procedural, a "substantial showing" requires consideration both of whether "jurists of reason would find it debatable whether the petition states a valid claim of the denial of the constitutional right" and "whether the district court was correct in its procedural ruling."[8]

This research focuses on the United States Court of Appeals for the Eleventh Circuit and examines its rate of COA grants in comparison to that of the First Circuit. It also identifies the difference in grant rates between noncapital and capital COAs in the Eleventh Circuit and compares the grant rates of individual judges in the Eleventh Circuit.

Previous Research

To date, there have been few efforts to analyze the impact of AEDPA's COA requirement. We discuss existing research below, before turning to our own inquiry and its implications.

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[4] See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of the U.S. Code); Fed. R. App. P. 22(b)(3).
[5] See Margaret A. Upshaw, *The Unappealing State of Certificates of Appealability*, 82 U. Chi. L. Rev. 1609, 1616 (2015).
[6] See, e.g., *Slack v. McDaniel*, 529 U.S. 473 (2000); *Miller-El v. Cockrell*, 537 U.S. 322 (2003); *Buck v. Davis*, 137 S. Ct. 759 (2017); *Tharpe v. Sellers*, 138 S. Ct. 545 (2018).
[7] *Slack v. McDaniel*, 529 U.S. 473, 483–484 (2000).
[8] *Id.* at 484.

1. "Non-Capital Habeas Cases after Appellate Review: An Empirical Analysis," 2011

Nancy J. King, Professor at Vanderbilt Law School, published a study in 2011 looking at aspects of appellate review in noncapital habeas cases. This study built on an earlier study of King's from 2007 in which she examined "district court activity" in 2,384 noncapital habeas cases that had been randomly selected from approximately 37,000 noncapital habeas cases state prisoners filed in federal district courts in 2003 and 2004.[9] King followed the 2,384 noncapital cases into the courts of appeals using Public Access to Court Electronic Records (PACER).

In her 2011 study, King looked at the appellate activity in the selected noncapital habeas cases. She specifically examined the number of COAs granted and denied, at both the district court and appellate court levels. She found 92 percent of all COA rulings to be denials.[10]

King observed a circuit split in the rate at which different circuits were granting COAs. Comparing the two circuits that received the greatest number of habeas petitions, King determined that in the Ninth Circuit, district judges granted over 14 percent of COAs and circuit judges granted over 13 percent, while in the Fifth Circuit, district judges granted no COAs and the court of appeals granted only 7 percent.[11]

The discrepancy between the Ninth and Fifth Circuits is not the only circuit split King identified. The study also indicates splits between the Eleventh and Ninth Circuits, and between the Eleventh and Sixth Circuits. While the Eleventh Circuit only had a noncapital grant rate of 6 percent at the appellate level, the Ninth and Sixth Circuits had noncapital grant rates of 13.1 and 12.7 percent respectively.[12]

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[9] Nancy J. King, *Non-Capital Habeas Cases after Appellate Review: An Empirical Analysis*, 24 Fed. Sent'g Rep. 308, 308 (2012) (citing Nancy J. King, Fred L. Cheesman II & Brian J. Ostrom, *Final Technical Report: Habeas Litigation in U.S. District Courts: An Empirical Study of Habeas Corpus Cases Filed by State Prisoners Under the Antiterrorism and Effective Death Penalty Act of 1996*, (August 21, 2007), https://www.ncjrs.gov/pdffiles1/nij/grants/219558.pdf.

[10] *Id.*

[11] *Id.*

[12] *Id*.

Table 3.
Rulings on Certificates of Appealability by Circuit

		COA Rulings by District Court					COA Rulings by Circuit Court				
Circuit	Total Cases	*No COA Ruling*	*% Cases with No Ruling**	*COA Denied*	*COA Granted*	*% COA rulings Granted*	*No COA Ruling*	*% Cases with No Ruling**	*COA Denied*	*COA Granted*	*% COA rulings Granted*
1	27	19	70%	6	2	25.0%	21	78%	6	0	0.0%
2	175	62	35%	108	5	4.4%	120	69%	54	1	1.8%
3	149	41	28%	108	0	0.0%	93	62%	52	4	7.7%
4	183	133	73%	49	1	2.0%	116	63%	67	0	0.0%
5	463	284	61%	178	0	0.0%	363	78%	93	7	7.0%
6	193	74	38%	113	6	5.0%	138	72%	48	7	12.7%
7	169	124	73%	44	1	2.2%	142	84%	26	1	3.7%
8	115	66	57%	45	4	8.2%	92	80%	22	1	4.3%
9	511	303	59%	178	30	14.4%	343	67%	146	22	13.1%
10	89	59	66%	30	0	0.0%	64	72%	23	2	8.0%
11	310	214	69%	90	6	6.3%	227	73%	78	5	6.0%
Totals	2384	1379	58%	949	55	5.47%	1719	72%	615	50	7.52%

* Of all cases filed in district courts in each circuit, including cases still pending in the district court and those transferred to another district. For percentages calculated using only cases terminated in the district courts in favor of the state, see text at notes 10–12, and note 19.

Figure 1: Ruling on Certificates of Appealability by Circuit table from Nancy J. King study.

2. "Certificate of Appealability Review" in *Buck v. Davis* Petition for Writ of Certiorari, 2016

In 2016, the counsel for the petitioner in *Buck v. Davis* included a "Certificate of Appealability Review" in the appendix of their Petition for Writ of Certiorari. Petitioner, Duane Buck, had filed claims for state and federal habeas relief based on ineffective assistance of counsel. He had been convicted of capital murder and sentenced by the state trial court to death. Under Texas law, the jury could impose a sentence of death only if it found Buck likely to commit future violence. During the trial, defense counsel called a psychologist to testify on Buck's inclination toward future violence. The psychologist testified that Buck was "statistically more likely to act violently because he is black."[13]

Buck filed for state and federal habeas relief asserting that his constitutional right to a fair trial had been denied, but the Fifth Circuit denied a COA.[14] Buck then petitioned the Supreme Court of the United States for review, presenting the question of whether the Fifth Circuit "impose[d]

[13] *Buck v. Davis*, 137 S. Ct. 759, 763 (2017).
[14] *Id.* at 765.

an improper and unduly burdensome Certificate of Appealability (COA) standard that contravene[d] this Court's precedent and deepen[ed] two circuit splits."[15] The appendix to the petition included a review of capital COAs in the Fourth, Fifth, and Eleventh Circuits.

The researchers who created this "Certificate of Appealability Review" used Westlaw, an online legal database, to find relevant cases. They created search terms to retrieve all electronically available capital cases with COAs between January 1, 2011 and the filing of their petition in February of 2016. They used "Granted, Circuit" to describe COAs granted by the circuit courts after having been denied by a district court, as well as COAs expanded (with respect to the number of issues authorized for review) by the circuit courts after having been granted by a district court. They used "Granted, District" to describe cases in which the district court granted the COA (and in which no COA therefore needed to occur at the appellate level).[16]

Their results were as follows: in the Fifth Circuit, a COA was denied in 76 of the 129 capital cases, or 58.9 percent; in the Eleventh Circuit, a COA was denied in 7 of the 111 capital cases, or 6.3 percent; and in the Fourth Circuit, a COA was denied in 0 of the capital cases. In other words, the grants varied greatly by Circuit. In the Fourth Circuit, 100 percent of capital COA requests were granted; in the Eleventh Circuit, 93.7 percent of capital COA requests were granted; and in the Fifth Circuit, 41.4 percent of capital COA requests were granted.[17]

The Study

Methodology

We used Westlaw, the online legal database, to retrieve the data for our study. We developed the following search term to input into Westlaw's docket database, which directly connects to court

[15] Petition for Writ of Certiorari at i, *Buck v. Davis*, 137 S. Ct. 759 (2017) (No. 15-8049), 2016 WL 3162257; *see also* Brief for Petitioner at i, *Buck v. Davis*, 137 S. Ct. 759 (2017) (No. 15-8049).
[16] Brief for Petitioner, *supra* note 15, at app. 1.
[17] *Id.*

dockets: (c.o.a. (cert! /2 appeal!) /7 deny! denied denial grant!) /20 2018 2019.[18] This term searches for all dockets in a specified court that describe a grant or denial of a COA during 2018 or 2019. For our study, we collected all dockets involving granted or denied COAs at the circuit court level between January 1, 2018 and September 30, 2019.

We reviewed each docket that our search term retrieved to see if it listed a COA at the circuit court level and, if so, whether that COA was granted or denied. We collected the following data for each case: the outcome and date of the COA ruling (granted or denied), the case names and numbers, whether the case was capital, and the initials of the judge(s) who issued the orders granting and denying the COAs. We labeled COAs that the court granted as "Granted" and COAs that the court denied as "Denied." We excluded all extraneous search results. The reasons for exclusion included: COA rulings at the district level, motions related to COAs (but not specific rulings), and rulings outside of our date range.

We collected data on COA grant rates in the United States Court of Appeals for the Eleventh Circuit, and, in order to have a comparison rate, we collected data on the First Circuit as well. In the Eleventh Circuit, we distinguished noncapital cases from capital ones and also collected data on the rates at which individual judges in the circuit grant COAs. For the individual judge grant rates, we anonymized the results by using a numerical code for each judge.

For the Eleventh Circuit, to distinguish between noncapital and capital habeas cases, we used Westlaw's "search within results" function to search for dockets including the words "death penalty" or "capital." We also checked our results against publicly available lists of people on death row and people who had been recently executed.[19]

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[18] Like the Petitioner in *Buck,* we used Westlaw to create our study. Our search process, however, provides results that are more complete. Whereas the *Buck* study used search terms to retrieve cases, we used our search term to retrieve dockets. The docket database on Westlaw provides a more complete set of results as it pulls dockets directly from the courts. The cases on Westlaw are less complete because not every docket results in a case that ends up on Westlaw.

[19] See Eleventh Circuit Prisoner Petitions Cases, Justia: Dockets & Filings, https://dockets.justia.com/browse/circuit-11/noscat-6/nos-535 (last visited Dec. 23, 2019).

The complete dataset of all the names and numbers of all of the cases reviewed in this study can be found in the Appendix to this study available below or on SSRN at the following web address: https://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=3895965. Also included are the outcomes of the COAs, and the initials of the judge(s) who issued the orders. For the Eleventh Circuit, the list includes whether or not each case is capital.

Data

Our findings are reported in the following tables:

Table 1: Certificates of Appealability in the U.S. Court of Appeals for the Eleventh Circuit between January 1, 2018 and September 30, 2019

Type of Habeas	Grants	Denials	Total	Grant Rate
Noncapital	91	987	1,078	8.44%
Capital	7	5	12	58.3%[20]
Total	98	993	1,091	8.98%

Table 2: A Comparison of the Grant Rate of Noncapital Certificates of Appealability in the U.S. Courts of Appeals for the First and Eleventh Circuits between January 1, 2018 and September 30, 2019

Circuit	Grants	Denials	Total	Grant Rate
1st[21]	3	18	21	14.29%
11th[22]	91	987	1,078	8.44%

[20] Note the difference between this Eleventh Circuit capital COA grant rate of 58.3 percent and the Eleventh Circuit capital COA grant rate of 93.7 percent in the *Buck* petition study. It appears as though the capital COA grant rate in the Eleventh Circuit has worsened since *Buck* and is now nearly as low as the grant rate was for Fifth Circuit during that time.

[21] None of the COAs for the U.S. Court of Appeals for the First Circuit were in cases in which the petitioner was sentenced to the death penalty. The First Circuit has appellate jurisdiction over the District Courts in Maine, Massachusetts, New Hampshire, Puerto Rico, and Rhode Island. Capital punishment has been abolished in all of these districts—New Hampshire most recently in May 2019. "State by State," The Death Penalty Information Center," https://deathpenaltyinfo.org/state-and-federal-info/state-by-state.

[22] The Eleventh Circuit has appellate jurisdiction over the District Courts in Alabama, Florida, and Georgia. All three states have the death penalty. *Id*.

Table 3: Judges and Certificates of Appealability in the U.S. Court of Appeals for the Eleventh Circuit between January 1, 2018 and September 30, 2019 (Includes Capital COAs)

Judge (by Order of Caseload)	Total Cases (Excluding Panels)	Total Cases as a Percentage of All Cases (Excluding Panels)	Number of Grants (Excluding Panels)	Grant Rate (Excluding Panels)	Total Grants as Part of Panel	Total Grants on Reconsideration (Original Judge)	Total Grants on Reconsideration (Added Judge)
01	118	10.82%	6	5.08%	1	1	
02	112	10.27%	3	2.68%	1		
03	112	10.27%	8	7.14%	2	1	
04	107	9.81%	3	2.80%			
05	106	9.72%	14	13.21%	1		
06	94	8.62%	25	26.60%			2
07	92	8.43%	6	6.52%			1
08	83	7.61%	4	4.82%		1	
09	79	7.24%	17	21.52%	1		1
10	72	6.60%	6	8.33%			
11	43	3.94%	1	2.33%			
12	32	2.93%	2	6.25%		1	
13	1	0.09%	0	0.00%			
14	1	0.09%	0	0.00%	1		
Panel	39	3.57%	3	7.69%			

Table 4: Judges and Noncapital Certificates of Appealability in the U.S. Court of Appeals for the Eleventh Circuit between January 1, 2018 and September 30, 2019 (Excludes Capital COAs)

Judge (by Order of Caseload)	Total Cases (Excluding Panels)	Total Cases as a Percentage of All Cases (Excluding Panels)	Number of Grants (Excluding Panels)	Grant Rate (Excluding Panels)	Total Grants as Part of Panel	Total Grants on Reconsideration (Original Judge)	Total Grants on Reconsideration (Added Judge)
01	118	10.95%	6	5.08%	1	1	
02	112	10.39%	3	2.68%	1		
03	112	10.39%	8	7.14%	2	1	
04	106	9.83%	3	2.83%			
05	105	9.74%	13	12.38%	1		
06	93	8.63%	24	25.81%			2
07	91	8.44%	5	5.49%			1
08	81	7.51%	4	4.94%		1	
09	78	7.24%	16	20.51%	1		1
10	71	6.59%	5	7.04%			
11	43	3.99%	1	2.33%			
12	31	2.88%	1	3.23%		1	
13	0	0.00%	0	0.00%			
14	1	0.09%	0	0.00%	1		
Panel	36	3.34%	2	5.56%			

Analysis

The data provide a number of important findings about noncapital COA grants in the United States Court of Appeals for the Eleventh Circuit. Table 2 suggests a circuit split between the First and Eleventh Circuits. In other words, whereas only 8.44 percent of noncapital COAs were granted in the Eleventh Circuit, 14.29 percent were granted in the First Circuit.

The distinction between the noncapital and capital grant rate in the Eleventh Circuit suggests that there are not just variations between how the COA standard is applied between circuits, but also how it is applied within circuits. Table 1 shows that 58.3 percent of the capital COAs were granted, while only 8.44 percent of the noncapital COAs were granted. The grant rates for capital and noncapital COAs are strikingly different, yet the standard of review for both is the same: whether reasonable jurists could debate the legal claim.

The Eleventh Circuit judge data also indicates a high degree of arbitrariness in COA decisions. Tables 3 and 4 demonstrate that the grant rates among judges of the Eleventh Circuit vary widely. Table 4, which includes only noncapital COAs, shows significant disparities in grant rates between judges with similar caseloads.[23] For example, Judge 06 granted 25.81 percent of their 93 COA applications, while Judge 07 granted only 5.49 percent of their 91 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 percent. Judge 06 and Judge 09, with noncapital COA grant rates of 25.81 percent and 20.51 percent respectively, granted COAs at a much higher rate than their fellow judges.

Given that we have individual judge grant rates for the Eleventh Circuit, but only panel rulings for the First Circuit, we can also compare the median noncapital COA grant rate for the judges in

[23] The data in Table 3 is similar, but includes capital COAs.

the Eleventh Circuit, 5.29 percent, to the overall First Circuit three-judge panel rate of 14.29 percent, revealing again a deep circuit split.[24]

This research also reveals very different procedures for consideration of COAs in the circuit courts. In the First Circuit, all 21 COAs were decided by three-judge panels. This procedure differs tremendously from that of the Eleventh Circuit in which only 36 of the 1,078 noncapital COAs were decided by a panel of more than one judge. 1,042 noncapital COAs in the Eleventh Circuit were decided by one judge, two were decided by a two-judge panel, and 34 were decided by a three-judge panel. In other words, 96.66 percent of the COAs decided in the Eleventh Circuit are decided by only one judge, whereas all COAs decided in the First Circuit are decided by a panel of three judges.

Further Research

The initial presentation of data, above, compares the Eleventh Circuit only to the First Circuit. Additional appellate data is being collected and will be reported in a later draft. We have also made data requests to the Clerk's Offices of circuit courts that may track the rate at which COAs are granted.

[24] The median noncapital COA grant rate is calculated by finding the median of the grant rates of the judges who granted at least one noncapital COA. The median grant rate for the Eleventh Circuit is 5.29 percent.

Appendix L

TABLE OF LOCAL RULES REGARDING COAs BY CIRCUIT

Naomi Bates and Ashwini Velchamy[1]

This table includes all of the local rules and internal operating procedures ("IOP") of the circuits that elaborate on Fed. R. App. P. 22(b). "General Procedure" refers to the initiation of a Certificates of Appealability ("COA") in circuit court. "Panels" refers to the composition of a circuit panel that may rule on a COA. "Reconsideration" describes the initiation process for rehearing after a COA denial. If an element of a circuit's COA review conforms with Fed. R. App. P. 22(b), it is designated by "N/A" (there is no applicable local rule).

Circuit	General Procedure	Panels	Reconsideration
1st	**Local Rule 22.0(a):** "In this circuit, ordinarily neither the court nor a judge thereof will act on a request for a certificate of appealability if the district judge who refused the writ is available and has not ruled first."	<u>Noncapital Cases</u> N/A <u>Capital Cases</u> **IOP VII(E)(2):** "Notwithstanding the practices identified in Internal Operating Procedure V, the assigned capital case panel handles all matters relating to the case, including but not limited to, the merits of a direct appeal, all case management, all petitions for collateral review, motions for stay of execution, motions to vacate a stay of execution, applications for a certificate of appealability,	N/A

[1] Naomi Bates, Columbia Law School, Class of 2021; Ashwini Velchamy, Columbia Law School, Class of 2020.

		motions for an order authorizing the district court to consider a second or successive application for habeas corpus, appeals from subsequent petitions, and remands from the United States Supreme Court." **IOP VII(E)(1):** "Capital Case Panel. Capital cases, as defined in Local Rule 48.0, shall be randomly assigned to a panel of three judges, of whom at least one is an active judge of this Court, from the capital case pool. The capital case pool of judges shall consist of all active judges of this Court and those senior judges who have filed with the Clerk a statement of willingness to serve on capital case panels."	
2nd	**Local Rule 22.1(a):** "In a case governed by 28 U.S.C. § 2253 and FRAP 22(b), this court will not act on a request for a certificate of appealability (COA) unless the district court has denied a COA.…A request to this court for a COA is decided without oral argument. The court ordinarily limits its consideration of the request to the issues identified in the request."	<u>Noncapital Cases</u> N/A <u>Capital Cases</u> **IOP 47.1(b)(2):** "On receipt of a notice of appeal or a request for a certificate of appealability, or other application	**Local Rule 40.2:** "When the court determines an appeal by issuing an order for which a FRAP 36 judgment is not entered, a party adversely affected may file a motion for panel reconsideration and a motion for reconsideration en banc that complies with FRAP

		to this court for relief in a death penalty case, the clerk dockets the case and assigns it to a death penalty case panel." **IOP 47.1(c):** "The clerk initially refers a request for a certificate of appealability to a single judge of the panel assigned to a death penalty case, who has authority to issue the certificate. If the single judge denies the certificate, the clerk refers the application to the full panel for disposition by majority vote."	35 and 40 and LRs 35.1 and 40.1. No response may be filed unless the court orders."
3rd	**Local Rule 22.1(b):** "If the district court grants a certificate of appealability as to only some issues, the court of appeals will not consider uncertified issues unless appellant first seeks, and the court of appeals grants, certification of additional issues." **Local Rule 22.1(c):** "In a multi-issue case if the district court grants a certificate of appealability, but does not specify on which issues the certificate is granted as required by 28 U.S.C. § 2253(c)(3), the clerk will remand the case for specification of the issues."	**Local Rule 22.3:** "An application for a certificate of appealability will be referred to a panel of three judges. If all the judges on the panel conclude that the certificate should not issue, the certificate will be denied, but if any judge of the panel is of the opinion that that the applicant has made the showing required by 28 U.S.C. § 2253, the certificate will issue."	**Local Rule 27(g):** "A party may file a motion for reconsideration of any other action of a panel, of a single judge or of the clerk. See 6 Cir. R. 45(b). A panel may reconsider its own action or may review the action of a single judge or of the clerk, but the panel reviewing a single judge's action shall not include that judge."
4th	**Local Rule 22(a)(1):**	**Local Rule 22(a)(1):**	N/A

	"The appellant may submit a request for a certificate with the Court of Appeals specifying the issues on which the appellant seeks authorization to appeal and giving a statement of the reasons why a certificate should be issued. The request shall be submitted either in the form prescribed by Fed. R. App. P. 27 for motions or on a form provided by the clerk. The clerk shall refer the request and other relevant materials to a three-judge panel. If the panel denies a certificate, the appeal will be dismissed. If the panel grants a certificate, the clerk shall enter a briefing order specifying the issues the Court will review."	"The clerk shall refer the request and other relevant materials to a three-judge panel." **Local Rule 22(a)(3):** "A request to grant or expand a certificate, including a brief filed pursuant to Subsection (1)(B) of this Rule or a brief and statement filed pursuant to Subsection (2)(B), shall be referred to a panel of three judges. If any judge of the panel is of the opinion that the applicant has made the showing required by 28 U.S.C. § 2253(c), the certificate will issue." "NOTE: Section (3) retains our current practice of referring requests for certification to three-judge panels. While Fed. R. App. P. 22(a) may afford the Court some flexibility in this matter, the use of three-judge panels is consistent with Fed. R. App. P. 27(c), which provides that a single judge "may not dismiss or otherwise determine an appeal or other proceeding."	
5th		**Local Rule 27.2:** "Single Judge May Rule on	

		Certain Motions…[t]o act on applications for certificates of appealability under FED.R.APP.P. 22(b) and 28 U.S.C. § 2253 except for death penalty cases where a three judge panel must act."	
6th	N/A	N/A	**IOP 35:** "Petitions seeking rehearing en banc from an order that disposes of the case on the merits or on jurisdictional grounds are circulated to the whole court. The court will also circulate to all active judges, for a determination of whether or not the matter should be reheard by the en banc court, petitions for en banc review of: (3) An order denying in full or in part an application for a certificate of appealability under 28 U.S.C. 2253(c)"
7th	N/A	<u>All Cases</u> **IOP 1(A)(1):** "At least two judges shall act on...denials of certificates of appealability....Ordinarily three judges shall act to dismiss or otherwise finally determine an appeal or other proceeding, unless the dismissal is by	N/A

		stipulation or is for procedural reasons." <u>Noncapital Cases</u> N/A <u>Capital Cases</u> **Local Rule 22:** "Cases within the scope of this rule will be assigned to a panel as soon as the appeal is docketed. The panel to which a case is assigned will handle all substantial matters pertaining to the case, including certificates of appealability, stays of execution, consideration of the merits, second or successive petitions, remands from the Supreme Court of the United States, and associated procedural matters."	
8th	N/A	**IOP I(D)(3):** "The administrative panels consider and decide: (3) applications for certificates of appealability under 28 U.S.C. § 2253...The administrative panels consist of three judges."	N/A
9th	N/A	N/A	**Local Rule 22-1(d):**

			"If, after the district court has denied a COA in full, the court of appeals also denies a COA in full, appellant, pursuant to Circuit Rule 27-10, may file a motion for reconsideration."
10th	**Local Rule 22.1(A):** "Although a notice of appeal constitutes a request for a certificate of appealability, the appellant must also file a brief."	N/A	N/A
11th	N/A	**Local Rule 22-1(3):** "An application to the court of appeals for a certificate of appealability may be considered by a single circuit judge."	**Local Rule 22-1(3):** "The denial of a certificate of appealability, whether by a single circuit judge or by a panel, may be the subject of a motion for reconsideration but may not be the subject of a petition for panel rehearing or a petition for rehearing en banc."
D.C.	N/A	N/A	N/A