No. 19-7127

IN THE SUPREME COURT OF THE UNITED STATES

PHILLIP WAYNE TOMLIN,
Petitioner,

v.

TONY PATTERSON, WARDEN,
HOLMAN CORRECTIONAL FACILITY,
Respondent.

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

PETITION FOR REHEARING

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Pursuant to Supreme Court Rule 44, Mr. Phillip Wayne Tomlin respectfully petitions this Court for rehearing of its June 1, 2020 order denying a writ of certiorari. *Tomlin v. Patterson, Warden*, No. 19-7127, 590 U.S. __ (June 1, 2020). Mr. Tomlin calls the Court's attention to a recent development, since the denial of certiorari, that affects the questions presented in his petition and that may affect the Court's consideration of this case. Pursuant to Supreme Court Rule 44.2, this petition for rehearing is filed within 25 days of this Court's decision.

On June 8, 2020, a week after the denial of certiorari in Mr. Tomlin's case, Justice Sonia Sotomayor issued a statement accompanying the denial of certiorari in *St. Hubert v. United States,* 590 U.S. ___ (2020), raising concerns about the process in second or successive habeas petitions at the United States Court of Appeals for the Eleventh Circuit. Justice Sotomayor's concerns in *St. Hubert* amplify the due process violations that Mr. Tomlin raised in his certiorari petition regarding the desultory process for review of applications for Certificates of Appealability (COA) at the Eleventh Circuit. Justice Sotomayor's portrayal of a troubling tableau at the Eleventh Circuit makes clear that there is not simply an isolated due process problem at the Eleventh Circuit, but rather a pattern: The Eleventh Circuit's habeas corpus practices more broadly are out of step with those of the other federal circuits, violate due process, and need to be examined by this Court. Mr. Tomlin's petition is the right vehicle for this Court to address these troubling and mounting concerns.

In her statement in *St. Hubert*, Justice Sotomayor cautioned that a prisoner seeking authorization to file a second or successive habeas petition in the Eleventh Circuit "faces even greater hurdles" than the already significant restrictions imposed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). *See St. Hubert v. United States,* 590 U.S., at ___; 28 U.S.C. §§ 2244, 2255. Under AEDPA, a prisoner must first get authorization from the circuit court of appeals before filing a successive habeas corpus petition. To get authorization, a prisoner must demonstrate that the petition will either be based on new evidence so convincing that no reasonable factfinder would have found them guilty or a new constitutional rule which applies retroactively. But on top of these restrictions imposed by AEDPA, Justice Sotomayor underscored, the Eleventh Circuit has painted a "troubling tableau" of additional barriers for those seeking leave to file second or successive habeas petitions. *St. Hubert,* 590 U.S. at ___.

One significant barrier is that the Eleventh Circuit has interpreted the relevant statute to mandate that the court issue its decision within 30 days. *See In re Williams*, 898 F. 3d 1098, 1102 (11th Cir. 2018) (Wilson, J., concurring). This short timeframe leaves the court with insufficient time to consider complex applications. A second barrier is that the application form is so constrained that "[f]ew prisoners manage to squeeze more than 100 words into the permitted space." *United States v. St. Hubert*, 918 F. 3d 1174, 1198 (11th Cir. 2019) (Wilson, J., dissenting from denial of rehearing *en banc*). Another hurdle is that, while "many other Circuits 'often consider briefing from the government before issuing a published order; [and] some

also entertain oral argument from both parties,'" the Eleventh Circuit typically does not receive briefs of the petitioner or Government and never grants oral argument. *St. Hubert,* 590 U.S. at ___ (citing *Williams*, 898 F. 3d, at 1103 (Wilson, J., concurring)). In addition, the Eleventh Circuit also "often decides the merits of the habeas claims sought to be presented in the second or successive habeas petition, when the statutory question at the preliminary authorization stage is simply whether the applicant has 'ma[de] a prima facie showing that the application satisfies' the authorization requirements," *St. Hubert,* 590 U.S. at ___ (citing §2244(b)(3)(C); *see United States v. St. Hubert*, 918 F. 3d, at 1203 (Martin, J., dissenting from denial of rehearing *en banc*)). These troubling practices are compounded because the Eleventh Circuit has bound all litigants to the holdings of the many orders it has published denying authorization to file successive petitions. *See United States v. St. Hubert*, 909 F. 3d 335, 346 (11th Cir. 2018).

These practices reveal the Eleventh Circuit to be out of step with the rest of the circuits and potentially in violation of due process regarding successive habeas petitions. As Justice Sotomayor concluded in *St. Hubert,* "the Eleventh Circuit represents the 'worst of three worlds.' It 'publish[es] the most orders,' 'adhere[s] to a tight timeline that the other circuits have disclaimed,' and 'do[es] not ever hear from the government before making [its] decision.' In this context, important statutory and constitutional questions are decided (for all future litigants) on the basis of fewer than 100 words of argument." *St. Hubert,* 590 U.S. at ___ (internal citations omitted).

These troubling problems with the Eleventh Circuit's successive habeas

practices are amplified and aggravated by the Eleventh Circuit's equally, if not more, troubling practices in the context of applications for COAs. As evidenced in Mr. Tomlin's case, the COA procedures of the Eleventh Circuit differ markedly from those of the other federal circuits and fail entirely to ensure due process. Together, these two vectors of problems at the Eleventh Circuit call for this Court to intervene and exercise its supervisory powers over the lower federal courts.

In fact, the *New York Times* as well has identified the potential due process problems at the Eleventh Circuit. In an article published shortly after the *St. Hubert* denial, on June 15, 2020—fourteen days after the Court denied certiorari in Mr. Tomlin's case—Adam Liptak of the *New York Times* described the combination of troubling practices, regarding both successive habeas petitions and COA procedures, at the Eleventh Circuit. Mr. Liptak noted: "It is not easy for prisoners to challenge their convictions in federal courts anywhere in the nation. But it is especially tough in the United States Court of Appeals for the 11th Circuit." Adam Liptak, "'Troubling Tableau' in 11th Circuit's Prisoner Cases, Sotomayor Says," *The New York Times*, June 15, 2020.

In the context of applications for COAs, the Eleventh Circuit has put in place the worst and lowest due process protections anywhere in the country. Under the Eleventh Circuit local rules, an application for COA may be considered "by a single circuit judge." 11th Cir. R. 22-1(c). Moreover, a motion for reconsideration from the denial of a COA can be decided by simply adding another circuit judge, resulting in a two-judge panel. Prisoners are limited in their ability to seek rehearing, as "[t]he

denial of a certificate of appealability…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." *Ibid.*

This process is illustrated well in Mr. Tomlin's case. The Eleventh Circuit failed entirely to empanel a three-judge panel at any point during Mr. Tomlin's COA process. Mr. Tomlin's initial COA application was considered only by Judge Charles R. Wilson, who denied the application in a single sentence. Mr. Tomlin's motion for reconsideration was then heard by Judge Wilson and one additional judge, Judge Jill Pryor, and it was denied, again, in a single sentence. (Incidentally, Judge Wilson has one of the lowest COA grant rates in the Eleventh Circuit. Of the 112 COA applications reviewed by Judge Wilson between January 1, 2018 and September 30, 2019, he granted only three, or 2.68 percent. *See* "Certificates of Appealability in Habeas Cases in the United States Court of Appeals for the Eleventh Circuit: A Study," SSRN No. 3506320 (December 24, 2019), by Julia Udell, Columbia College, Columbia University, available at https://ssrn.com/abstract=3506320, at 9 (attached as Appendix K to Mr. Tomlin's original cert. petition). The only judge on the Eleventh Circuit with a worse grant rate is Judge Britt C. Grant.[1])

By contrast, other federal circuits recognize the due process interest in having three-judge panels and therefore employ them in their COA proceedings.

The Third Circuit refers COA applications to a three-judge panel, and "if any

[1] Judge Britt C. Grant granted only one of the 43 COA applications she reviewed between January 1, 2018 and September 30, 2019, or 2.33 percent. *See* Udell, "Certificates of Appealability in Habeas Cases in the United States Court of Appeals for the Eleventh Circuit: A Study" at 9.

judge of the panel is of the opinion that the applicant has made the showing required by 28 U.S.C. § 2253, the certificate will issue." 3d Cir. L.A.R. 22.3; *see also* "Table of Local Rules for Certificates of Appealability by Circuit," by Naomi Bates and Ashwini Velchamy, Columbia Law School (attached as Appendix L to Mr. Tomlin's original cert. petition).

The Fourth Circuit similarly requires a three-judge panel for all reviews of COA applications. In the Fourth Circuit, a COA application "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." 4th Cir. R. 22(a)(3). The Fourth Circuit even notes that "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.'" 4th Cir. R. 22(a)(3).

Like the Third and Fourth Circuits, the Eighth Circuit also uses three-judge panels to "consider and decide ... applications for certificates of appealability under 28 U.S.C. § 2253." 8th Cir. I.O.P. I(D)(3).

The Second Circuit also uses three-judge panels to review COA applications. While it does not have a specific local rule delineating the number of judges required to review COA applications, the Second Circuit consistently empanels three judges in practice.[2] *See, e.g.*, *Morency v. Annucci,* 2018 WL 1975034, No. 17-3435, (2nd Cir. 2018); *Gonzalez v. Lee,* 2018 WL 1444858, No. 17-2949, (2nd Cir. 2018); *Silva v.*

[2] Confirmed during a phone conversation on June 24, 2020, between the Clerk of the Court, Ms. Catherine O'Hagan Wolfe, and Julia Udell of Columbia College, Columbia University.

Keyser, 2018 WL 1831778, No. 17-3324, (2nd Cir. 2018). When a COA is denied by the Second Circuit, the petitioner can file a motion for panel reconsideration and a motion for reconsideration *en banc*. 2nd Cir. L.A.R. 40(2). The Second Circuit also has specific rules regarding certificates of appealability in death penalty cases. If someone requests a COA in a death penalty case, "the clerk dockets the case and assigns it to a death penalty case panel." 2nd Cir. I.O.P. 47.1(b)(2). After the case has been assigned, "[t]he 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." 2nd Cir. I.O.P. 47.1(c).

Similar to the Second Circuit, the Tenth Circuit also uses three-judge panels to review COA applications, but does not have a specific local rule outlining this practice.[3] *See, e.g.*, *McKinley v. McCollum*, 710 Fed. App'x 349, No. 17-6097 (10th Cir. 2018); *McCloskey v. Wyoming Attorney General*, 710 Fed. App'x 788, No. 17-8056 (10th Cir. 2018); *Hodson v. Reams*, 729 Fed. App'x 661, No. 17-1440 (10th Cir. 2018).

Like the Second and Tenth Circuits, the D.C. Circuit does not have a local rule that explicitly outlines the number of judges assigned to review COA applications, but it too uses three-judge panels in practice.[4] *See, e.g., Foreman v. Lappin*, 2018 WL 1391547, No. 17-5222 (D.C. Cir. 2018); *United States v. Taylor*, 2018 WL 4099683,

[3] Confirmed during a phone conversation on June 23, 2020, between the Chief Deputy Clerk of the Court, Ms. Jane K. Castro, and Julia Udell of Columbia College, Columbia University.
[4] Confirmed during a phone conversation on June 24, 2020, between the Chief Deputy Clerk of the Court, Mr. Clifton Cislak, and Julia Udell of Columbia College, Columbia University.

No. 17-3055 (D.C. Cir. 2018); *United States v. Eiland*, 2019 WL 4565494, No. 18-3050 (D.C. Cir. 2019).

According to its published rules, the First Circuit mandates the use of three-judge panels in capital cases, *see* 1st Cir. I.O.P. VII(E)(2); and, in practice, the First Circuit used a three-judge panel for all COAs from January 1, 2018 through September 30, 2019, regardless of whether the case was capital. *See* Udell, "Certificates of Appealability in Habeas Cases in the United States Court of Appeals for the Eleventh Circuit: A Study," at 11.

The Seventh and Ninth Circuits do not mandate three-judge panels, but they still ensure that COA applications are reviewed by more than one judge. The Seventh Circuit assigns review of COA applications to two-judge panels. In an opinion clarifying the operating procedure of the court, the Seventh Circuit declared that if both judges on the two-judge panel assigned to review a COA application vote to deny the COA, then the applicant can apply for reconsideration by a three-judge panel which will issue a COA "if one of the judges to whom the application was referred under Operating Procedure 1(a)(1) concludes, on reconsideration, that the statutory criteria for a certificate have been met." *Thomas v. United States,* 328 F.3d 307-309 (7th Cir. 2003). Under the Ninth Circuit rules, "The Court shall appoint 2 judges to serve as the certificate of appealability ('COA') panel" and "Any judge participating may vote to grant relief and so order." 9th Cir. General Order 6.3(g)(1). The Ninth Circuit allows motions of reconsideration in cases in which the court denies a COA in full. 9th Cir. R. 22(1)(d).

The Sixth Circuit does not delineate in its local rules the number of judges who review COAs; however, it does outline its policy for rehearing denied applications for COAs. The rule is as follows: "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." 6 Cir. I.O.P. 35(g).

Only one circuit, the Fifth Circuit, has rules almost as troubling as those of the Eleventh Circuit; but even the Fifth Circuit provides more due process. Like the Eleventh Circuit, the Fifth Circuit allows single-judge COA rulings, but it differs from the Eleventh Circuit in that it requires a three-judge panel for review of COA applications in capital cases. 5th Cir. R. 27.2.

The vast majority of the circuits recognize and value the need to ensure three-judge panels for COA applications. That is truly the only way to enable the COA standard to be realized in practice. *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). The very presence of more than one judge on a panel is the condition of possibility for debatability "amongst jurists of reason." A single judge cannot and should not make the determination that a claim is not debatable. A District Judge of the Northern District of Georgia once eloquently described the value of three-judge panels, writing:

> "What is the purpose of an appeal? The reason for an appeal 'is not because the appellate judges necessarily have more wisdom about the case than the trial judge (on the contrary they may have less); it is instead that a second look by someone else is always to the good. The Bible says, 'in the multitude of counselors there is wisdom.' So the idea is that it is good to have a panel of three judges examine what one judge has done.'" *Solomon v. Kemp*, 572 F. Supp. 233, 234 (N.D. Ga. 1983) (quoting *Atlanta Coca-Cola Bottling Co. v. Jones*, 224 S.E.2d 25, 28 (1976) (Hall, J., dissenting)).

Not only is the Eleventh Circuit out of step with the rest of the courts in terms of COA procedures, but it is also inconsistent in its own application of its own rules. While its rules provide that COA applications are reviewed "by a single circuit judge," 11th Cir. R. 22-1(c), the Eleventh Circuit will sometimes empanel more than one. Between January 1, 2018 and September 30, 2019, the Eleventh Circuit reviewed 1,078 non-capital COA applications, deciding 3.34 percent by a panel of more than one judge: 1,042 COAs were reviewed by a single judge, two by a two-judge panel, and 34 by a three-judge panel. *See* Udell, "Certificates of Appealability in Habeas Cases in the United States Court of Appeals for the Eleventh Circuit: A Study," at 11. This internal inconsistency in application of COA procedures injects further arbitrariness into the COA process.

Mr. Tomlin's petition is not the first time this Court has been asked to address unusual COA procedures in the Eleventh Circuit. In *Cromartie v. Sellers*, 139 S.Ct. 594 (2018) (mem., cert denial), Mr. Cromartie applied for a COA and was denied by a single judge; he then filed a motion for reconsideration which was considered by a panel of three judges who denied the COA on a two-to-one vote. Had Mr. Cromartie been in the Third, Fourth, Sixth, Seventh, or Ninth Circuits, the single judge voting in his favor would have been enough to grant the COA. Mr. Cromartie asked this Court to resolve the split among the circuits relating to whether COAs can be denied by a split panel despite the dissent of a federal appellate judge; but this Court denied certiorari.

The question whether split panels can deny COAs was also flagged by Justice Sotomayor in her dissent from denial of certiorari in *Jordan v. Fisher*, a capital case in which a split panel of judges in the Fifth Circuit denied the petitioner's request for a COA. In that case, Mr. Jordan sought federal habeas relief on the ground of prosecutorial vindictiveness, as the prosecutor in his case had decided to pursue the death penalty after having agreed to a sentence of LWOP. By a divided vote, the Fifth Circuit denied Mr. Jordan's application for a COA, despite acknowledging that the *en banc* Ninth Circuit had granted habeas relief in a similar case. In a dissent from denial of certiorari, Justice Sotomayor, joined by Justice Ginsburg and Justice Kagan, suggested that disagreement among judges regarding a habeas claim "alone might be thought to indicate that reasonable minds could differ—*had differed*—on the resolution" of a claim. *See Jordan v. Fisher*, 135 U.S. 2647, 2651 (2015) (Sotomayor, J., joined by Ginsburg & Kagan, JJ., dissenting from the denial of certiorari) (emphasis in original). Taken together, the problem of split panels and the more common absence of panels entirely reveal the Eleventh Circuit to be out of step with practically all of the other circuits.

The troubling procedures at the Eleventh Circuit for COA review, as well as for successive petitions, have rendered the habeas corpus process arbitrary and capricious. While all of the circuits differ in terms of their procedure, the circuit with the most distinct and troubling practices is the Eleventh. Undoubtedly, a prisoner in a circuit which uses three-judge panels will have a far greater likelihood of being heard on appeal than a prisoner in the Eleventh Circuit. These differences in

procedures have created a landscape in which prisoners are subjected to arbitrary punishment based on the circuit in which they are appealing.

Moreover, there are a number of other dimensions of arbitrariness in the way in which the Eleventh Circuit reviews applications for COAs. The chance that a prisoner's application for COA will be granted is largely determined by the judge they are randomly assigned. Some federal judges on the Eleventh Circuit grant less than 3 percent of the COAs they decide, while other judges grant over 25 percent. *See* Udell, "Certificates of Appealability in Habeas Cases in the United States Court of Appeals for the Eleventh Circuit: A Study," at 9.

In addition to the significant internal variance between the grant rates of federal judges on the Eleventh Circuit, there is also a substantial difference in grant rates between the circuits. The Eleventh Circuit grants COAs at a far lower rate than other circuits—with an 8 percent grant rate, which is about half of the 14 percent grant rate for the First Circuit. *Ibid.*

Another element of arbitrariness in the Eleventh Circuit COA review process is the length and content of the orders denying COAs. A substantial proportion of the Eleventh Circuit judges' orders denying COAs are extremely short and provide practically no reasoning for the decision to prohibit an appeal. Of 258 denials reviewed in a recent study, 43 percent were fewer than three paragraphs long. *See* "Certificates of Appealability as Rubber Stamps," SSRN No. 3576026 (April 14, 2020), by Luis Angel Valle, Columbia Law School, available at https://ssrn.com/abstract=3576026, at 26 (attached as Appendix R-C to Mr. Tomlin's

Reply Brief).

There are also deep disparities in the rate of review in capital versus non-capital cases in the Eleventh Circuit, despite the fact that the standard of review is the same. The grant rate for non-capital cases is only 8.44 percent while the rate for capital cases is 58.3 percent *See* Udell, "Certificates of Appealability in Habeas Cases in the United States Court of Appeals for the Eleventh Circuit: A Study," at 7.

Finally, there has also been a disturbing drop in the review rate in capital cases in both the Eleventh and Fifth Circuits. "The grant rate in capital cases appears to have decreased sharply in both circuits, with rates dropping from 41% to 13.33% in the Fifth Circuit and from 93.7% to 58.3% in the Eleventh" between the 2016 study included in the *Buck v. Davis* petition for writ of certiorari and a recent study released in 2020. "Despite the drastic decrease in the Eleventh Circuit, the circuit split identified in the *Buck* study persists." *See* Valle, "Certificates of Appealability as Rubber Stamps," at 25.

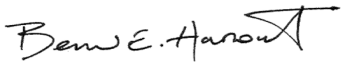
Across the board, the Eleventh Circuit injects arbitrariness into its habeas corpus procedures, erecting barriers that make it much harder for prisoners in Alabama, Georgia, and Florida to be heard on appeal.

Taken together, the Eleventh Circuit's practices on successive habeas petitions and its COA procedures illustrate a troubling pattern and reveal the Eleventh Circuit to be out of step with the other courts of appeals and potentially in violation of due process. These practices should be examined by this Court.

CONCLUSION

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

Respectfully submitted,



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