No. 24-6402

IN THE SUPREME COURT OF THE UNITED STATES

COLBY MCCOGGLE, PETITIONER

v.

STATE OF FLORIDA, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH DISTRICT COURT OF APPEAL OF FLORIDA

REPLY TO BRIEF IN OPPOSITION

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The Florida appellate court violated Due Process and this Court's precedent. This Court should summarily reverse. However, if this Court considers that remedy inappropriate, it should make clear there is no futility or "ministerial" exception to the Due Process Clause.

The State, in its brief in opposition, does not even attempt to defend Florida's appellate court. That makes sense. After all, the lower court's opinion is legally and factually indefensible. Instead, the State replaces Florida's appellate court and conjures its own novel legal theory to justify the lower court's actions. The State's theory is inapplicable, unpreserved, and unreviewed.

I. IN THE STATE'S VIEW, NONE OF THIS MATTERS BECAUSE THE QUESTION PRESENTED DOES NOT ARISE FREQUENTLY.

The undisputed facts are Petitioner had no sentence imposed, and he was denied Due Process because the sentencing court imposed Petitioner's sentence from chambers.

The State asserts that the issue presented is not important enough to justify review because it will rarely occur. In substance, the State contends that review is unwarranted because the decision below will result in the State only occasionally violating a fundamental constitutional right.

Even if that were correct, this Court has never permitted states to violate the Constitution as long as the "sequence of events [are] unusual and highly unlikely to

repeat." (Br. in Opp. p. 11). It should not do so now. Preventing those inevitable violations of the Due Process Clause is sufficiently important to justify review.

As it must, the State does not cite any law justifying why review should be denied because of the uniqueness of this case's procedural posture. From *Madison v. Marbury* to just last year in *McElrath v. Georgia*[1], this Court has understood even unique cases warrant review.

But this case is not unique. The State's confusion stems from a critical misunderstanding of the facts. Petitioner had *no active sentence*, and a *new sentence* was imposed from chambers. Mandatory sentencing schemes cannot circumvent the constitutional guarantees of Due Process.

II. THE STATE'S ARGUMENT LACKS MERIT.

The State makes a flawed attempt to argue, for the first time, that the opportunity to file a written brief satisfied Due Process. (Br. in Opp. p. 10). This argument fails for several reasons. The sentencing judge did not employ a procedure that provided a fair opportunity to respond. A written submission is inadequate to satisfy the due process required. And Due Process limitations applied to sentencing modifications are inapplicable here.

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[1] *McElrath v. Georgia*, 601 U.S. 87 (2024)

1. *Due Process cannot be waived by requiring a defendant to justify why their rights should be afforded.*

After Petitioner's sentence was vacated and a resentencing hearing granted, the sentencing judge suddenly announced it had changed its mind and would now prefer to avoid the bother of complying with the procedural requirements of imposing a new sentence. (R. 271-74).

The sentencing judge explained, "I was inclined really to give the Defense an opportunity to, you know, file a written brief in opposition to the direction I was going in my case management order." (R. 271-72). In short, the sentencing judge already decided to violate Due Process.

The opportunity to file a written brief was simply to "convince [the sentencing judge] otherwise" to comply with Due Process and provide Petitioner the hearing to which he was entitled. (R. 271). Thus, the written brief served as an unwarranted hurdle to Due Process to which Petitioner was already entitled—a hearing for which Petitioner waited over six years to be held.

The sentencing judge never notified Defense Counsel that if a brief was not filed by a specific date, it would proceed with a written sentencing order.

For the State to now argue that Petitioner waived his due process rights because his counsel failed to file a written brief—by a nonexistent deadline—is simply astonishing. (Br. in Opp. p. 11). It merits no reply.

The sentencing judge did not employ a procedure that provided a fair opportunity; rather, it promised the opportunity to file a written brief and a

subsequent hearing and then decided—without notice or an opportunity to be heard—to issue a written order anyway. *See Wilkinson v. Austin*, 545 U.S. 209, 221 (2005) (Due Process Clause requires compliance with fair procedures when the government deprives an individual of certain "liberty" or "property" interests)

2. Mathews is entirely inapplicable.

The State primarily relies on *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976). (Br. in Opp. pp. 6-7). But *Mathews* does not offer the support Respondent thinks it does. At issue there was the termination of disability benefits. *See Mathews*, 424 U.S. 349. That is plainly not the case here.

By relying on *Mathews,* the State ignores that the Due Process required in the criminal context is greater than that in administrative procedures. *See Mathews*, 424 U.S. at 348.

The State's position can also be dismissed outright for one simple reason: no court has ever held the *Mathews* balancing test is applicable in criminal contexts. It was not considered by the lower court in its decision. It should not be considered now.

3. Even accepting the State's position, their argument fails.

The State's argument that the written brief afforded due process is perplexing. (Br. in Opp. pp. 6-7).

The Eleventh Circuit has held that a written submission is sufficient to satisfy due process for the *modification* of a sentence on collateral review, but it has never

extended such holding to the *imposition* of a new sentence—and the State cites no case in which a court has done so. (Br. in Opp. p. 6-7).

Petitioner was granted a resentencing on collateral review, but once the motion for post-conviction relief was granted, Petitioner's sentence was vacated. He returned to the procedural posture of a defendant facing the imposition of a sentence for the first time.

Employing a balancing test, as the State suggests, Due Process is not satisfied. Petitioner's liberty interest is no less worthy of due process protections because his sentence was vacated. And the burden on the government to comply with Petitioner's Due Process rights is minimal:

> A de novo resentencing hearing—'a brief event, normally taking less than a day and requiring the attendance of only the defendant, counsel, and court personnel'—is not particularly onerous, either financially or administratively.

Kaziu v. United States, 108 F.4th 86, 95 n.1 (2d Cir. 2024) (Calabresi J., concurring) (quoting *United States v. Williams*, 399 F.3d 450, 456 (2d Cir. 2005)) (emphasis added).

4. The State's cases support our position, not theirs.

Yet again, the State improperly equates Petitioner's procedural posture with that of a sentence modification on collateral review. It is surprising that the State persists in this confusion, given it cites *United States v. Thomason*, which clarifies the distinction. (Br. in Opp. pp. 6-7).

The Eleventh Circuit explained that a defendant has a right to a hearing (to be present) "when the defendant's sentence is imposed, which we have ruled 'extends to the imposition of a[n entirely] new sentenc[e]' following vacatur of the previous sentence." *United States v. Thomason*, 940 F.3d 1166, 1171 (11th Cir. 2019) (quoting *United States v. Jackson*, 923 F.2d 1494, 1496 (11th Cir. 1991) and citing Fed. R. Crim. P. 43(a)(3) ("[T]he defendant must be present at ... sentencing.")).

But the same Due Process does not apply to the modification of a sentence "the defendant has a right to be present only if the modification to the sentence constitutes a critical stage where his presence would contribute to the fairness of the procedure . . . and many minor modifications to sentences do not satisfy that requirement." *Thomason*, 940 F.3d at 1166 (citation and internal quotation omitted).

Petitioner's sentence was yet to be imposed. And that alone entitled him to a hearing. Any "ministerial exception" to modifications in sentences is not applicable here. Because, in modification cases, the "necessary process has already occurred." *See United States v. Jackson*, 923 F.2d 1494, 1496-97 (11th Cir. 1991) (holding that defendant did not have a right to a hearing before a correction of a sentence because unlike "an initial sentencing, or even a resentencing where an entire sentencing package has been vacated on appeal," the "necessary process has already occurred.").

Another case cited by the State, *Fatir v. Tomas*, also provides the perfect illustration:

> At the resentencing of Fatir and his co-defendants, the Superior Court "could do only one thing: sentence each defendant to prison for life without benefit of parole." *Hooks*, 429 A.2d at 1314. Neither Fatir nor counsel could have done or said anything to alter that foregone

> conclusion. Indeed, this was not merely a situation in which a sentencing judge was faced with a statute mandating a particular sentence. In such a case, the defendant or his counsel could perhaps attempt to convince the sentencing judge that the statute was unconstitutional or that it should be construed to leave room for discretionary exceptions.

106 F. Supp. 2d 572, 585 (D. Del. 2000) (emphasis added); (Br. in Opp. p. 9).

The State ignores the basic procedural facts in *Fatir*. An appellate court reviewed the sentence, found it constitutional, and remanded with express instructions on imposing a modification to the defendant's sentence.

Here, unlike in *Fatir*, no higher court has determined the constitutionality of the mandatory sentence as applied to Petitioner's case.

This Court should not let the State muddy the waters. A new sentence had to be imposed; Petitioner was sentenced from chambers and never afforded notice, a hearing, or counsel. By denying Petitioner these basic rights, he was denied the procedural protections "stretching back at least 800 years to Magna Carta, which in major part the Due Process Clause seeks to protect." *Kerry v. Din*, 576 U.S. 86, 111 (2015) (Breyer, J. dissenting) (citing *Hurtado v. California*, 110 U.S. 516, 527 (1884)).