No. 10-120-CG-B

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

PHILLIP WAYNE TOMLIN,

Petitioner,

v.

TONY PATTERSON,

Warden, Holman Correctional Facility,

Respondent.

PETITIONER'S MAIN BRIEF

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QUESTION PRESENTED

At the time of the alleged offense in January 1977, Petitioner Phillip Tomlin could *not* be charged with a capital offense under a plain reading of the 1975 Alabama Death Penalty Act, Ala. Code. §§ 13-11-1 *et seq*. It was only four years later, in April 1981, that Mr. Tomlin became eligible to be charged for a capital offense under the 1975 Alabama Death Penalty Act, as a result of the Alabama Supreme Court's opinions in *Ex parte Kyzer*, 399 So. 2d 330 (Ala. 1981), and *Beck v. State*, 396 So. 2d 645 (Ala. 1981), which *judicially* expanded the scope of the 1975 Alabama Death Penalty Act. Today, the Alabama Supreme Court has expressly stated that its opinions in *Kyzer* and *Beck* were an unexpected and indefensible judicial expansion of the 1975 Alabama Death Penalty Act, *see Ex parte Stephens*, 982 So. 2d 1148 (Ala. 2006).

Thus, the question presented is whether the fair warning requirement of the Due Process Clause of the Fourteenth Amendment precludes the State of Alabama from charging Mr. Tomlin with a capital offense and imposing a sentence of life imprisonment without parole under the 1975 Alabama Death Penalty Act.

STATEMENT REGARDING ORAL ARGUMENT

Petitioner Phillip Tomlin respectfully requests oral argument pursuant to Civil Local Rule 7(h). The issues raised by Mr. Tomlin's challenge are unique and intricate, in large part because of the substantial confusion resulting from nearly forty years of judicial reinterpretation of the 1975 Alabama Death Penalty Act. Mr. Tomlin presents a meritorious claim that his sentence of life imprisonment without parole rests on a retroactive judicial reinterpretation of the 1975 Alabama Death Penalty Act, a reinterpretation that violates his ex post facto right to fair notice protected by the Due Process Clause of the United States Constitution. Because of the complexities of the 1975 Alabama Death Penalty Act and the numerous inconsistent decisions by the Alabama Supreme Court following the 1975 Act—including *Beck v. State*, 396 So. 2d 645 (Ala. 1981), *Ex parte Kyzer*, 399 So. 2d 330 (Ala. 1981), and *Ex parte Stephens*, 982 So. 2d 1148 (Ala. 2006)—Mr. Tomlin believes that oral argument would be helpful to the Court in order to decide this unique case.

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STATEMENT OF THE ISSUE

In this Court's order dated August 18, 2015, the Court granted Mr. Tomlin's motion to supplement his claim that his sentence was imposed in violation of the fair warning principle of the due process clause (Claim 30 of his § 2254 habeas corpus petition) in light of the Eleventh Circuit's then-recent decision in *Magwood v. Warden, Alabama Department of Corrections*, 664 F.3d 1340 (11th Cir. 2011). *Tomlin v. Patterson*, No. 10-120-CG-B, 2015 WL 4931660 (S.D. Ala. Aug. 18, 2015) (ECF No. 43). This Court's order neatly resolves the procedural issues in the remand order from the Court of Appeals for the Eleventh Circuit. *See Tomlin v. Patterson*, No. 13-13878-C, slip op. at 5, 2015 WL 4310045, at *2 (11th Cir. July 16, 2015) [hereinafter *Tomlin Panel Opinion*] (remand issues (1) and (3)).

It is now incumbent on the parties to brief, and this Court to decide, the merits of Mr. Tomlin's claim that his conviction for capital murder and sentence of life imprisonment without parole violates the fair warning requirement of the Due Process Clause under *Bouie v. City of Columbia*, 378 U.S. 347 (1964). *See Tomlin Panel Opinion*, No. 13-13878-C, slip op. at 5-6, 2015 WL 4310045 at *2 (in remanding issue (4), asking this Court to "decide the ex post facto and due process, fair warning claims" raised by Mr. Tomlin).

STATEMENT OF THE CASE

Petitioner Phillip Tomlin raises a due process fair warning challenge to his conviction of capital murder under Ala. Code § 13-11-2(10), and his sentence of life imprisonment without parole. His legal claim, in a nutshell, is the following:

> In 1977, at the time of the offense, under a plain reading of the 1975 Alabama Death Penalty Act, Mr. Tomlin could *not* have been *charged* with capital murder because he was not death eligible, insofar as there was no aggravating circumstance that applied in his case. Mr. Tomlin could have been charged with two counts of murder under Alabama's ordinary murder statute, Ala. Code § 13-1-70 (1977) and sentenced to two terms of life imprisonment (which has the possibility of parole); however, he could not be charged with capital murder under the capital statute, the 1975 Alabama Death Penalty Act, Ala Code. §§ 13-11-1 *et seq*., because there were no applicable § 13-11-6 aggravating circumstances in his case.
>
> It is only as a result of subsequent judicial expansions of the 1975 Alabama Death Penalty Act—starting on March 6, 1981, with the Alabama Supreme Court decisions in *Ex parte Kyzer* (Ala. 1981) and *Beck v. State*, 396 So. 2d 645 (Ala. 1981)—that Mr. Tomlin became eligible to be charged with a capital offense and sentenced to death or life imprisonment without parole.
>
> However, those subsequent judicial decisions were entirely unforeseeable at the time of the offense in 1977, and in fact have been expressly held to be unexpected and indefensible by the Alabama Supreme Court in *Ex parte Stephens*, 982 So. 2d 1148 (Ala. 2006), and by the Eleventh Circuit in *Magwood v. Warden, Alabama Department of Corrections*, 664 F.3d 1340, 1349 (11th Cir. 2011).
>
> Accordingly, the Alabama Supreme Court's judicial expansion in 1981 was "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 would prohibit the retroactive application of any such judicial rewritings of the 1975 Act to Mr. Tomlin's case.

The reason that, on a plain reading of the 1975 Alabama Death Penalty Act, Mr. Tomlin was *not* eligible to be charged with a capital offense is that there is no aggravating circumstance under § 13-11-6 that applies in his case. Mr. Tomlin is not now and never was death eligible, and therefore could not be subject to a possible sentence of death or life imprisonment without parole. As originally enacted, and on a plain reading in 1977, the 1975 Act required the jury in a capital case to impose a mandatory sentence of death in the event of conviction: "If the jury finds the Defendant *guilty*, they *shall fix the punishment at death*." § 13-11-2 (emphasis added). The Death Penalty Act contained a *mandatory jury verdict of death*. As a result, persons charged under the statute had to be death eligible. If a defendant could not be sentenced to death under any circumstance, as is the case for Mr. Tomlin, that defendant could *not* be indicted under the 1975 Alabama Death Penalty Act. He would have had to have been charged with non-capital murder.

To best understand Mr. Tomlin's fair warning challenge, it is important to patiently trace the history of the 1975 Alabama Death Penalty Act, before proceeding to a detailed statement of Mr. Tomlin's judicial proceedings. By way of framing, though, it is crucial to keep the following key dates in mind:

1972 – *Furman v. Georgia* strikes down the death penalty in all states

1975 – Alabama passes 1975 Alabama Death Penalty Act

1977 – Ricky Brune and Cheryl Moore are murdered (Jan. 2, 1977)

– Phillip Tomlin is indicted under 1975 Act (Sept. 22, 1977)

1980 – United States Supreme Court address constitutionality of 1975 Alabama Death Act in *Beck v. Alabama*, 447 U.S. 625 (1980)

1981 – Alabama Supreme Court rewrites 1975 Alabama Death Penalty Act in *Ex Parte Kyzer* and *Beck v. State*.

1993 – Phillip Tomlin is reindicted under 1975 Act (May 28, 1993)

2006 – Alabama Supreme Court overrules *Kyzer* and relevant parts of *Beck* in *Ex parte Stephens*, 982 So. 2d 1148 (Ala. 2006).

A. *The History of the 1975 Act and the Judicial Decisions*

a. The Passage of the 1975 Alabama Death Penalty Act

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, Ala. Code §§ 13-11-1 *et seq*. (Appendix Tab 1, 1975 Act).[1]

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[1] The 1975 Alabama Death Penalty 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 (Appendix Tab 2, 1978 Transfer). The general practice of parties and courts in dealing with this statute has been to cite to the Title 13 codification—i.e. Ala. Code

As written, the 1975 Alabama Death Penalty Act—which is still in effect today for crimes committed before July 1, 1981[2]—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 verdict of death and impose a sentence of life imprisonment without parole. After a jury returns the mandatory death sentence, the sentencing court must conduct a sentencing hearing under §§ 13-11-3 and 4, weigh the aggravating 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 life imprisonment without parole. The sentencing court can only sentence the defendant to death if it finds the existence of one or more aggravating 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 Alabama Death Penalty Act as written. A provision in § 13-11-2

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§§ 13-11-1 *et seq*.,—instead of the later recodification in Title 13A, Ala. Code §§ 13A-5-30 *et seq*. This brief follows that general practice in citing to the Title 13 codification.

[2] As will be explained, in 1981, Alabama passed a new death penalty statute for conduct occurring after July 1, 1981, 1981 Ala. Laws 203, that was codified at Ala. Code §13A-5-39 *et seq*. (2013)) (Appendix Tab 3, 1981 Act). The 1975 Act is still in effect as to all conduct taking place before July 1, 1981. *See* Ala. Code § 13A-5-57.

guaranteed this by requiring the prosecution to "aver[] in the indictment" not only the capital offense charged under §13-11-2, but also the aggravating circumstance(s) in §13-11-6 that would allow the sentencing court to impose a death sentence later on. 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 aggravating circumstance and whether the case should proceed to a possible *mandatory* jury verdict of death.

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. But in order to ensure that the sentencing court would have an aggravating circumstance to consider at sentencing, the 1975 Alabama Death Penalty 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 the aggravating circumstance from § 13-11-6 that was the basis for a death sentence by the court. The statute required the grand jury to make sure that a capital defendant *could* be sentenced to death to protect both the accused and the members of the jury from the jury's mandatory death verdict.

The 1975 Alabama Death Penalty Act includes a list of fourteen (14) capital offenses in § 13-11-2, which includes double intentional murder under provision § 13-11-2(10). It also includes, in § 13-11-6, a list of eight (8) aggravating circumstances. It is important to note here that, under the 1975 Act, the list of eight (8) aggravating circumstances does *not* include double intentional murder. The statute was intentionally written to contain some *different* capital offenses from aggravating circumstances, and some *different* aggravating circumstances from capital offenses, as evidenced by the following table of correspondences. In this table, the highlighted entries represent either aggravated offenses that were not included as aggravating circumstances, or aggravating circumstances that were not included as aggravated offenses:

§ 13-11-2 aggravated offenses	**§ 13-11-6 aggravating 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	Disruption or hindrance of lawful governmental

intended to prevent witness from testifying [2(n)]	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 aggravating circumstances *separately* and, in many cases, *differently*. It was not a mistake that certain aggravated offenses were not in and of themselves aggravating 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 aggravating circumstance for sentencing consideration. That aggravating circumstance was only added by the legislature eighteen years later in 1999.

What is clear from the 1975 Alabama Death Penalty Act is that, in order for anyone to be subject to the statute, there had to exist at least one aggravating circumstance so that the jury could return its mandatory verdict of death, and the

sentencing court could possibly impose that jury verdict of death after a hearing and having found, under § 13-11-6, at least one aggravating circumstance.

It is important to note here that, in Mr. Tomlin's case, there is no aggravating circumstance under § 13-11-6, so he is not death eligible.

b. United States Supreme Court Review

On June 20, 1980, the United States Supreme Court declared the 1975 Alabama Death Penalty 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 United States 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 Alabama Death Penalty Act was clear; the United States Supreme Court did not, however, address the mandatory jury death verdict because the issue was not raised.

c. 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 from the 1975 Act. *Beck v.*

State, 396 So. 2d 645, 655 (Ala. 1981). In that decision, the Alabama Supreme Court also held the *mandatory* jury verdict of death unconstitutional, in light of the United States Supreme Court's rejection of mandatory death penalty sentencing schemes in *Woodson v. North Carolina*, 428 U.S. 280 (1976). However, the Alabama Supreme Court was unwilling to sever the jury clause from the statute.

Instead, in a couple of opinions decided the same day, March 6, 1981, including *Ex parte Kyzer*, 399 So. 2d 330 (Ala. Mar. 6, 1981) and *Beck v. State*, 396 So. 2d 645 (Ala. Mar. 6, 1981) (modifying original opinion of Dec. 19, 1980), the Alabama Supreme Court judicially rewrote and expanded the 1975 Alabama Death Penalty Act.

First, the Alabama Supreme Court converted the mandatory jury verdict of death into a permissive jury verdict of death. The court made room for the jury to disagree about a 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, unexpectedly and out of whole cloth, that the jury and the sentencing court could consider as aggravating

circumstances all of the fourteen (14) possible capital offenses listed in § 13-11-2, instead of the more limited list of eight (8) aggravating circumstances listed in § 13-11-6 (which did not include double intentional murder). 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 as per *Kyzer* and *Beck*, Mr. Tomlin became death eligible because, even though there still was no aggravating circumstance under § 13-11-6, his aggravated offense under § 13-11-2 was now considered an aggravating circumstance; as a result, Mr. Tomlin could be charged with capital murder because he was now death eligible.

d. 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 (Appendix 3, 1981 Act). The new 1981 death penalty statute, naturally, applies prospectively only and therefore does not apply to Mr. Tomlin's case. It does, however, provide insight into the legislative intent

regarding the 1975 Alabama Death Penalty Act, since it makes clear that the Alabama legislature's failure to include double intentional murder as an aggravating circumstance in §13-11-6 was not inadvertent. Indeed, it was repeated deliberately in 1981.

The 1981 death penalty statute again deliberately did *not* include double intentional murder as an aggravating circumstance under the equivalent of § 13-11-6 for the penalty phase jury and sentencing court hearings. It was only in 1999 that the Alabama legislature amended the 1981 Alabama death penalty statute, §§ 13A-5-39 *et seq*., to include double intentional murder as an aggravating circumstance for consideration at both the jury and court penalty phase hearings (Appendix Tab 4, 1999 Amendment). That amendment applies to any conduct committed after September 1, 1999.

e. The Alabama Supreme Court Strikes *Kyzer* and *Beck* and Rewrites the 1975 Act

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 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 this decision, under the 1975 Alabama Death Penalty Act, the jury and the sentencing court may only consider, at any sentencing hearing, the eight (8) aggravating 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 were *indefensible*: the 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 brutal repudiation of *Kyzer* and *Beck*.

It is also important to note here that, as a legal matter, the Eleventh Circuit has already declared that *Ex parte Kyzer* was "an unexpected and indefensible construction of narrow and precise statutory language." *Magwood v. Warden, Ala. Dep't of Corr.*, 664 F.3d 1340, 1349 (11th Cir. 2011).

B. *The Judicial Proceedings in Mr. Tomlin's Case*

Let's turn now to the history of Mr. Tomlin's case.

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 immediately fell on Mr. Tomlin.

a. The First Capital Trial of Phillip Tomlin in 1978

On September 22, 1977, Phillip Tomlin was indicted by a grand jury of Mobile County for the double intentional murder of Richard Brune and Cheryl Moore under the 1975 Alabama Death Penalty Act. (Appendix Tab 5, 1977 Indictment)

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

> 3. The Grand Jury of said County further charge, that, before the finding of this indictment, PHILLIP WAYNE TOMLIN, whose name is to the Grand Jury otherwise unknown than as stated, 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.[3]

As is clear from this count of the indictment, the State of Alabama understood and interpreted the 1975 Act as requiring that the aggravating circumstance be averred in the indictment and considered by the grand jury. That is why the indictment averred the aggravating circumstance in the indictment: "*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.*"

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[3] § 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 aggravating circumstance of "heinous, atrocious or cruel" respectively.

The aggravating circumstance averred in the indictment was the "heinous, atrocious and cruel" ("HAC") aggravation, which, already by the time of the indictment in September 1977, had been deemed to be inapplicable to a case like that of Mr. Tomlin's. *See Jacobs v. State*, 361 So. 2d 607, 630 (Ala. Crim. App. July 26, 1977), *aff'd*, 361 So. 2d 640 (Ala. 1978) (holding that the HAC aggravating circumstance had to be construed as the Florida courts had in *State v. Dixon*, 283 So. 2d 1 (Fla. 1973) (cited in *Kyzer*, 399 So. 2d at 334), where it applied only to torturous murders); *Godfrey v. Georgia*, 446 U.S. 420 (1980); *Kyzer*, 399 So. 2d at 333. In other words, already before Mr. Tomlin was indicted, it was clear that the HAC aggravation did not apply to him. And there is no dispute that the HAC aggravation does not apply in Mr. Tomlin's case and should not have been alleged in the indictment or used at trial.

In any event, 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 court sentencing hearing was conducted in November 1978. The sentencing court, Judge Ferrill McRae, sentenced Mr. Tomlin to death on December 8, 1978. Judge McRae found two aggravating circumstances: double intentional murder and HAC.

On September 23, 1988, the Alabama Supreme Court reversed Mr. 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).

b. The Second Capital Trial of Phillip Tomlin

In January and February 1990, Mr. Tomlin was retried in Mobile County for double intentional murder under § 13-11-2(10). Mr. Tomlin was convicted of capital murder. The sentencing jury returned a unanimous verdict of life imprisonment without parole. The sentencing court, Judge Ferrill McRae, overrode the jury's verdict and sentenced Mr. Tomlin to death under the judicially expanded interpretations of the 1975 in *Ex parte Kyzer* (1981), *Beck v. State* (1981), and *Ex parte Hays* (1986).[4] *State v. Tomlin*, CC-89-000481 (Cir. Ct. Mobile Cnty. 1990) (ECF No. 10-1 at 64-73).

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

[4] *Ex parte Hays*, 518 So. 2d 768 (Ala. 1986) had added the possibility of a judicial upward override to the 1975 Alabama Death Penalty Act, despite the fact that the original statute had never even contemplated the possibility of a jury verdict other than death.

c. The Third Capital Trial of Phillip Tomlin

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). The indictment did *not* aver any aggravating circumstance under § 13-11-6. The indictment, which is at issue here and under which Mr. Tomlin is presently sentenced, reads 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.

(Appendix Tab 6, 1993 Indictment).

Mr. 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 jury verdict of life imprisonment without parole. The sentencing court, Judge Edward McDermott, overrode the unanimous life verdict and sentenced Mr. Tomlin to death on January 21, 1994 under the combined effect of *Kyzer*, *Beck*, 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. Crim. App. 1996).

d. The Fourth Capital Trial of Phillip Tomlin

In June 1999, Phillip Tomlin was again retried for double intentional murder under § 13-11-2(10), pursuant to the May 28, 1993 indictment (Appendix Tab 6, 1993 Indictment). Mr. Tomlin was convicted of capital murder on June 4, 1999.

This is the conviction that is at issue in this case.

Mr. Tomlin received the benefit of the unanimous jury verdict of life imprisonment without parole from the second trial. However, on August 8, 2000, after a lengthy sentencing hearing, the sentencing court, Judge Herman Thomas, overrode the unanimous jury verdict of life imprisonment without parole and again sentenced Mr. Tomlin to death under the combined effect of *Kyzer*, *Beck*, and *Hays* (1986). *State v. Tomlin*, CC 93-1494 (Cir. Ct. Mobile Cnty. 2000) (ECF No. 10-1 at 52-62).

On October 3, 2003, the Alabama Supreme Court vacated Phillip Tomlin's sentence of death and ordered the Circuit Court to sentence Mr. Tomlin to life imprisonment without parole. *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 aggravating circumstances under § 13-11-6, *id.* at 285, but decided the case

on an entirely independent ground (that the override was improper), without reaching the Section 6 issue. *Id.* at 286-88. In an insightful concurring opinion, Justice Johnstone of the Alabama Supreme Court would have also found the sentence invalid on the ground that "this death sentence is illegal for the absence of an 'aggravating circumstance[] enumerated in section § 13-11-6.'" *Id.* at 289 (Johnstone, J., concurring) (quoting *Ferguson v. State*, 565 So. 2d 1172, 1173 (Ala. Crim. App. 1990)) (citations omitted).

On May 10, 2004, the Circuit Court of Mobile County sentenced Phillip Tomlin to life imprisonment without parole. This is the sentence that is at issue in this case and that, along with the conviction in 1999, gives rise to the instant § 2254 federal habeas corpus challenge.

SUMMARY OF THE ARGUMENT

On a plain reading of the 1975 Alabama Death Penalty Act at the time of the charged offense (January 2, 1977), the 1975 Act did not extend to the conduct and circumstances alleged against Mr. 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 Alabama Death Penalty Act. At the 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, Mr. Tomlin could not have been indicted with a capital offense under § 13-11-2(10) and could not have been sentenced to life imprisonment without parole.

The reason that Mr. 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 life imprisonment without parole ("LWOP"), but allowed LWOP *only* as a discretionary *downward departure* by the circuit court from a jury's *mandatory* verdict of death. In order to be charged under the 1975 Alabama Death Penalty Act, and in order to receive a sentence of life imprisonment without parole, *a defendant had to be death eligible*. For that, there had to exist an aggravating circumstance under § 13-11-6 that the sentencing court could find 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 life imprisonment without parole.

This is clear from the words and the structure of the 1975 Act as originally written: the statute required a *mandatory* jury sentence of death and it *only* allowed for a sentence of life imprisonment without parole as a *downward departure* from the jury's verdict of death. The jury could *not* recommend a sentence of life imprisonment without parole, and the circuit court 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.

There is no dispute that, in Phillip Tomlin's case, there exists no aggravating circumstance under § 13-11-6, and that Mr. Tomlin could not be sentenced to death under the 1975 Act. Mr. Tomlin is *not* death eligible. Consequently, Mr. Tomlin did not fall within the ambit of the 1975 Act at the time of the offense in 1977 and of his original trial in 1978—nor at the time of his reindictment in 1993. In fact, because it was abundantly clear in 1993 that there was no aggravating circumstance in his case, Mr. Tomlin *also could not have been reindicted and charged with a capital offense* under § 13-11-2(10) on May 28, 1993. Mr. Tomlin could only have been charged with two counts of first degree murder under

Alabama's then-murder statute, Ala. Code § 13-1-70 (1977), and sentenced to two terms of life imprisonment *with the possibility of parole*.

The only way in which Mr. Tomlin would possibly fall under the ambit of the 1975 Alabama Death Penalty Act is by application of a subsequent judicial reinterpretation of the statute, such as the Alabama Supreme Court's judicial rewritings of the 1975 Act in *Kyzer* and *Beck*. Those judicial decisions, however, were entirely unforeseeable at the time of the offense and prosecution in 1977 and 1978. 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 therefore prohibits the retroactive application of any such judicial rewritings of the 1975 Act.

ARGUMENT AND CITATIONS TO AUTHORITY

I. A PLAIN READING OF THE 1975 ALABAMA DEATH PENALTY ACT DEMONSTRATES THAT PHILLIP TOMLIN DOES NOT FALL WITHIN THE AMBIT OF THE CAPITAL STATUTE

The crime occurred on January 2, 1977. Phillip Tomlin was originally indicted on September 22, 1977, and tried on March 20-25, 1978. The law that applied *at that time*—in other words, the law that placed Phillip Tomlin on fair notice of the crimes and punishments of the State of Alabama—was the Alabama Code of 1975, which included the 1975 Alabama Death Penalty Act, §§ 13-11-1 *et*

seq., and the ordinary Alabama murder statute, Ala. Code § 13-1-70 (1977) (repealed as to conduct occurring on or after May 17, 1978) (Appendix Tab 7, Alabama Murder Statute).

It is undisputed today that, under the 1975 Alabama Death Penalty Act (and any and all existing judicial interpretations), the case against Phillip Tomlin *did not and does not include any aggravating circumstance* to support a sentence of death. *See Ex parte Tomlin*, 909 So. 2d 283, 285 (Ala. 2003); *Magwood v. Warden, Ala. Dep't of Corr*., 664 F.3d 1340, 1349 (11th Cir. 2011). For this reason, it is undisputed that Mr. Tomlin *cannot be sentenced to death* under the 1975 Alabama Death Penalty Act. All the parties agree, and the Alabama Supreme Court and Eleventh Circuit have so held. *Ex parte Tomlin*, 909 So. 2d 283 (Ala. 2003); *Ex parte Stephens*, 982 So. 2d 1148 (2006); *Magwood v. Warden, Ala. Dep't of Corr*., 664 F.3d 1340 (11th Cir. 2011).

What this necessarily entails is that Mr. Tomlin could not have been charged with a capital offense under the statute and could not have received a sentence of life imprisonment without parole. That sentence could only be imposed in one way: as a court ordered *downward departure* from a *mandatory* jury death verdict. The 1975 Act only allowed for a sentence of life imprisonment without parole as a *downward departure* by *the sentencing court* from the jury's *mandatory death sentence*. The 1975 Act did not provide for an autonomous sentence of life

imprisonment without parole. In order to be charged under the 1975 Act and to ever receive a sentence of life imprisonment without parole, a defendant had to be *death eligible* and first sentenced to death by the jury—and for that, there had to exist an aggravating circumstance listed in § 13-11-6 that the sentencing court could find in order to impose the jury's mandatory death verdict or to depart downward.

As a result, on a plain reading of the 1975 Act as written, Phillip Tomlin could *not* be charged with capital murder under §§ 13-11-1 *et seq*., and could only be charged with two counts of first-degree murder under § 13-1-70. On a plain reading of the statute in 1977, Phillip Tomlin could only have been at jeopardy of two life sentences *with the possibility of parole* and could not have been subject to a sentence of life imprisonment *without parole*.

Mr. Tomlin advances three related arguments to support this plain reading of the 1975 Act:

A. 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 aggravating 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 aggravating 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 aggravating 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:

First, "every word and clause must be given effect":[5] 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.

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5 *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).

Second, the "purpose rule": this foundational canon of construction requires that we "interpret ambiguous statutes so as best to carry out their statutory purposes."[6] 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 aggravating circumstance that would allow a sentencing court to sentence a defendant to death.

It is important to emphasize, in relation to the legislative purpose, that neither the original 1975 Alabama Death Penalty Act, nor the rewritten 1981 death penalty statute, listed double intentional murder as an aggravating circumstance under § 13-11-6 and its equivalent in 1981, § 13A-5-49. The fact that the Alabama legislature *deliberately* did not include double intentional murder as an aggravating circumstance in 1981, after all of the judicial rewriting of the statute in *Kyzer* and *Beck*, clearly indicates a *legislative* purpose in 1975 to exclude from the ambit of the original statute, the 1975 Alabama Death Penalty Act, a double intentional homicide that did not include any aggravating circumstances under § 13-11-6.

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."

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

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 Mr. Tomlin was entitled to rely, would command that the statute be read as requiring that an aggravating circumstance be averred in the indictment in order to protect defendants. Under the rule of lenity, the statute must be construed in Mr. 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 aggravating circumstance that would allow a court to sentence Mr. Tomlin to death under § 13-11-4. And the fact is, the one-count indictment issued on May 28, 1993 does *not* aver an aggravating circumstance:

> 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.

(Appendix Tab 6, 1993 Indictment). This indictment simply does not aver a § 13-11-6 aggravating circumstance because there is none in Mr. Tomlin's case—on this, there is no disagreement. Accordingly, Mr. Tomlin could not be sentenced

to death by the jury, and the sentencing court could not *depart downward.* Mr. Tomlin did not fall within the ambit of the 1975 Alabama Death Penalty Act.

B. 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 straight death penalty statute with a *discretionary optional downward departure*: the sentence of life imprisonment without parole 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:

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 life imprisonment without parole if the procedures spelled out in § 13-11-2 are followed. The statute is clear that a sentence of death or life imprisonment without parole 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, life imprisonment without parole cannot be imposed on a defendant except as per the rules set out in Section 2.

Second, Section 2 is entirely silent about the sentence of life imprisonment without parole. 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 aggravating circumstance (to ensure that the grand jury determine whether the defendant could be sentenced to death);[7] 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.

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 life imprisonment without parole. In order to sentence a defendant to death, the court has to find one or more aggravating circumstances under § 13-11-6. For this

[7] While this Court need not reach the issue, the Act's requirement that the State aver an aggravating circumstance had an additional function—it required the trial jury to find the existence of that aggravator at the guilt phase. This step further prevented incoherence by allowing juries to impose a sentence of death only in cases where the facts could conceivably support a death sentence.

reason in § 13-11-2 the statute requires that the prosecutor allege the aggravating 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.

In sum, the structure of the 1975 Act makes clear that life imprisonment without parole was only possible as a *downward departure* in case the sentencing court wanted to grant mercy. Under the statute, there was no upward override, there was only a potential downward departure. But in order for that downward departure to function, it had to be the case that the person *could be sentenced to death*.

C. The Need to Avoid Legal Incoherence

Mr. Tomlin's 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 Mr. Tomlin's case, double intentional homicide) as the aggravating 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 Mr. Tomlin suggests it must. As a matter of fact, the incoherence actually played out in Mr. 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 Alabama Death Penalty Act, in violation of *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964).

II. THE SENTENCE OF LIFE IMPRISONMENT WITHOUT PAROLE VIOLATES MR. TOMLIN'S RIGHT TO FAIR NOTICE GUARANTEED BY *BOUIE V. CITY OF COLUMBIA* (1964)

The only way in which Mr. Tomlin would be subject to the 1975 Alabama Death Penalty Act and to a sentence of life imprisonment without parole would be if a subsequent judicial reinterpretation of the 1975 Act prevailed.

The *Bouie* standard, as interpreted in *Rogers v. Tennessee*, 532 U.S. 451 (2001), requires that when a "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 construction] must not be given retroactive effect." *Rogers v. Tennessee,* 532 U.S. 451, 457 (2001) (quoting *Bouie*, 378 U.S. at 352).

To understand the *Bouie* violation in Mr. Tomlin's case, it is important to identify, on the basis of the following precise chronology, the unexpected and indefensible judicial reinterpretations of the 1975 Act:

1975 – Alabama enacts a death penalty statute with a mandatory jury verdict of death, §§ 13-11-1 *et seq*., against the backdrop of *Furman v. Georgia*, 408 U.S. 238 (1972). The statute contains a list of 14 capital offenses in § 2 (including double intentional murder as § 2(10)) but a list of only 8 aggravating circumstances in § 6 for judge sentencing (*not including* double intentional murder).

1977 – The crime occurs on January 2, 1977. Mr. Tomlin is indicted for double intentional murder on September 22, 1977, under § 13-11-2(10).

1978 – Phillip Tomlin goes to trial in March 1978, is convicted under § 13-11-2(10), and sentenced to death in December 1978.

1981 – The Alabama Supreme Court decides *Ex parte Kyzer*, 399 So. 2d 330 (Ala. 1981) and *Beck v. State*, 396 So. 2d 645 (Ala. 1981), converting the mandatory jury verdict of death into a permissive jury verdict and allowing the jury and court to consider the 14 § 2 capital offenses as aggravating circumstances at sentencing (including those that are not listed as aggravating circumstances under § 6, i.e. double intentional murder): ***this was unexpected and indefensible in 1977-1978, and overruled in Stephens in 2006***.

– Alabama enacts a revised death penalty statute. 1981 Ala. Laws 203 (codified at Ala. Code §13A-5-39 *et seq*. (2013)). That statute still deliberately does *not* include double intentional murder as an aggravating circumstance under the equivalent of § 6 for the penalty hearings. That statute applies to prospective conduct.

1989 – Phillip Tomlin is retried a second time; conviction reversed.

1993 – Phillip Tomlin is reindicted under § 13-11-2(10). It is agreed by everyone that there are no § 6 aggravating circumstances.

1999 – At a fourth retrial, Phillip Tomlin is convicted of double intentional murder under § 13-11-2(10). He receives the benefit of the prior unanimous jury verdict of life imprisonment without parole. The trial court overrides the unanimous jury verdict and sentences Mr. Tomlin to death. ***This entire procedure was unexpected and indefensible in 1977-1978.***

– Alabama amends the new 1981 Alabama death penalty statute, §§ 13A-5-39 *et seq*., to finally include double intentional murder as an aggravating circumstance under the equivalent of § 6 at the jury and court sentencing hearings. That amendment applies to prospective conduct only.

2003 – The Alabama Supreme Court decides *Ex parte Tomlin*, 909 So. 2d 283 (Ala. 2003) and orders the trial court to sentence Phillip Tomlin to life imprisonment without parole.

2004 – Mr. Tomlin is sentenced to life imprisonment without parole. ***This entire procedure was unexpected and indefensible in 1977-1978.***

2006 – The Alabama Supreme Court decides *Ex parte Stephens*, 982 So. 2d 1148 (Ala. 2006), expressly overruling *Ex parte Kyzer*, 399 So. 2d 330 (Ala. 1981). Henceforth, under the 1975 Alabama death penalty statute, juries and trial courts may only consider the 8 aggravating circumstances explicitly enumerated in § 6 (which do not include double intentional murder).[8]

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[8] It could be argued that *Ex parte Stephens* does not overrule *Beck* regarding its ruling that the sentencing jury may consider § 13-11-2 aggravated offenses as aggravating circumstances, because *Stephens* involved the 1981 Act and not the 1975 Act (and the 1981 Act was more explicit about jury sentencing). However, the Eleventh Circuit seems to have ruled out that argument in *Magwood*, 664 F.3d at 1346 n.6. Note that, if the Eleventh Circuit had not so held, matters would be

From this chronology, it is clear that the judicial decisions in *Ex parte Kyzer* and *Beck v. State* in 1981 were unforeseeable and indefensible reinterpretations that altered the plain meaning of the 1975 Act, in violation of *Bouie* and *Rogers.*

The Eleventh Circuit has already held that *Kyzer* "was an 'unforseeable and retroactive judicial expansion of narrow and precise statutory language.'" *Magwood v. Warden*, 664 F.3d at 1343 (citing *Bouie v. City of Columbia*, 378 U.S. 347 (1964)). In *Rogers v. Tennessee*, 532 U.S. 451 (2001), the Supreme Court applied the "unexpected and indefensible" test to a judicial abrogation of the common-law year-and-a-day rule in the context of homicide law in Tennessee, but did not find a *Bouie* violation. In holding that Mr. Rogers had not been deprived of fair warning, the Supreme Court principally relied on the fact that the year-and-a-day rule was an obsolete and outmoded relic of the common law, had been abolished by the vast majority of other jurisdictions, had only the most tenuous foothold in Tennessee law, and was not part of any state statute. *Rogers,* 532 U.S. at 462–67. None of those factors is present in Mr. Tomlin's case. The canons of statutory construction, particularly the rule of lenity, were firmly established in Alabama at the time of the conduct, and to this day have a cherished place in

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even more favorable to Petitioner, since Mr. Tomlin would be death eligible at the jury-sentencing phase, but not at the judge-sentencing hearing, which is completely illogical and impermissible.

Alabama law. *See, e.g., Ex parte Bertram*, 884 So. 2d 889, 891 (Ala. 2003). This case does not involve an outmoded and obsolete common-law rule that a state supreme court had the power to modify retroactively. Mr. Tomlin's case involves a then-recently enacted statutory provision that should have bound the courts. Under these circumstances, the *Kyzer* decision was clearly "unexpected and indefensible." In fact, the decision in *Kyzer* has already been held by the Eleventh Circuit to be unexpected and indefensible. *Magwood v. Warden, Ala. Dep't of Corr.*, 664 F.3d 1340, 1349 (11th Cir. 2011).

In sum, Phillip Tomlin's 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. *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964).

III. The Final State Court Did Not Address Mr. Tomlin's Claim on the Merits, and Therefore This Court Must Apply *De Novo* Review to the Issue Presented

The State of Alabama agrees that Mr. Tomlin properly presented his federal claim to the Alabama courts. *See* Answer of Respondent at 11, 34–35 (ECF No. 9) (acknowledging that Claim 30, the claim at issue here, was raised and decided in Rule 32 proceedings); *see also Tomlin v. Patterson*, No. 10-120-CG-B 2015 WL 4931660, at *1 (S.D. Ala. Aug. 18, 2015) (ECF No. 43) (recognizing the State agrees). In addition, the final state judgment recognized that Mr. Tomlin's federal

claim was properly presented to the state court. *See Tomlin v. State*, CR-08-0493, slip op. at 2 (Ala. Crim. App. Jun. 12, 2009) (Appendix Tab 8) (recognizing Claim 4, that Mr. Tomlin's sentence was improper).

The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104–32, 110 Stat. 1214 (AEDPA), generally requires a federal court on a 28 U.S.C. § 2254 petition to grant substantial deference to a state court's resolution of a federal claim. In ordinary cases, an application for a writ of habeas corpus shall be granted if a state court's decision was (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "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).

But this deference is not required in every case. In order to be entitled to AEDPA deference, the state court's decision must be "on the merits" of the federal claim. 28 U.S.C. § 2254(d). The Supreme Court has stated that "the word 'merits' is defined as '[t]he intrinsic rights and wrongs of a case as determined by matters of substance….'" *Johnson v. Williams*, 133 S. Ct 1088, 1097 (2013) (quoting Black's Law Dictionary 1199 (9th ed. 2009)) (alteration in original). The court went on to state that "[i]f a federal claim is rejected as a result of sheer inadvertence, it has not been evaluated based on the intrinsic right and wrong of

the matter." *Id.* The Alabama court's ruling in this case cannot be said to be on the intrinsic rights and wrongs of the federal claim at issue here, and is therefore not entitled to AEDPA deference under 28 U.S.C. § 2254(d).

Despite the fact that Mr. Tomlin's federal due process claim is properly preserved and exhausted, the final state judgment does not address it on the merits. The state court's reasoning, in its entirety, is that:

> Finally, with regard to [the federal due process claim that Tomlin's sentence 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, Appendix Tab 8 at 2–3 (second and third alterations in original).

This is not, by any stretch, a ruling on the merits of Mr. Tomlin's federal claim; the last state court merely held that the sentence was proper because the state sentencing court was *ordered*, as a matter of state law, by the Alabama Supreme Court, to impose life imprisonment without parole. That does not begin to address the federal claim. In fact, the Alabama Supreme Court's order to impose life imprisonment without parole *predates* Mr. Tomlin effectively raising his

federal claim. Clearly, the state court failed to address the intrinsic rights and wrongs of the matter.

Even if this decision can somehow be said to be on the merits of Mr. Tomlin's claim, it would also be contrary to, or an unreasonable application of *Bouie* and *Rogers*, as well as basic principles of adjudication of federal claims, thus entitling Mr. Tomlin to *de novo* review of his claim. *See, e.g.*, *Frantz v. Hazey*, 533 F.3d 724, 735 (9th Cir. 2008) (en banc) (if petitioner shows that state court decision is not entitled to deference under § 2254(d)(1), court must review claim *de novo*). The Supreme Court has refused to apply AEDPA deference in numerous situations where a review of the state court's decision confirms that it has clearly failed to apply the correct law to decide a federal claim. *See Lafler v. Cooper*, 132 S. Ct. 1376, 1390 (2012) ("[T]he [state court] identified respondent's ineffective-assistance-of-counsel claim but failed to apply *Strickland* to assess it …. After stating the incorrect standard … the state court then made an irrelevant observation about counsel's performance at trial …. By failing to apply *Strickland* … the state court's adjudication was contrary to clearly established federal law. And in that circumstance the federal courts in this habeas action can determine the principles necessary to grant relief."); *Williams v. Taylor*, 529 U.S. 362, 405–06 (2000) ("If a state court were to reject a prisoner's claim of ineffective assistance of counsel on the grounds that the prisoner had not established by a preponderance of the

evidence that the result of his criminal proceeding would have been different, that decision would be 'diametrically different,' 'opposite in character or nature,' and 'mutually opposed' to our clearly established precedent…"); *see also Frantz*, 533 F.3d at 734 ("mistakes in reasoning or in predicate decisions of the type in questions—use of the wrong legal rule or framework—do constitute error under the 'contrary to' prong."). When, as here, the state court used reasoning showing that it has failed to apply any concept of federal law at all in response to a properly presented federal claim, its decision is not entitled to AEDPA deference.

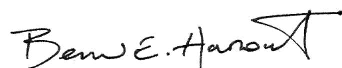
Under either theory, Mr. Tomlin is entitled to *de novo* review of this habeas claim.

CONCLUSION

Under the 1975 Alabama Death Penalty Act, Ala. Code § 13-11-1 *et seq.*, and all current judicial reinterpretations of that statute, the case against Phillip Tomlin *does not include* any § 13-11-6 aggravating circumstances. Mr. Tomlin was *not* death eligible, and as a result, on a plain reading of the 1975 Act at the time of the offense, could not be convicted of capital murder. For this reason, Mr. Tomlin could not be indicted under Ala. Code § 13-11-2(10). No sentencing court could decide to *depart downward* from the jury's mandatory verdict of death and impose a sentence of life imprisonment without parole on Mr. Tomlin. Any

reliance on any portion of the Alabama Supreme Court's decisions in *Ex parte Kyzer* (1981) or *Beck v. State* (1981) to support a sentence of life imprisonment without parole would amount to an improper retroactive application of a later judicial expansion, in violation of the legal principle underlying the prohibition against *ex post facto* laws, the right to fair warning, and the right to Due Process clearly established in *Bouie v. City of Columbia*, 378 U.S. 347 (1964).

Respectfully submitted,



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September 28, 2015

Certificate of Service

I hereby certify that on September 28, 2015, I electronically filed the foregoing brief 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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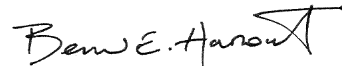

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