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 REPLY BRIEF

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SUMMARY OF THE REPLY ARGUMENT

In its *Supplemental Answer*, the State of Alabama raises two objections to the argument that Petitioner Phillip Tomlin made in his main brief—the first procedural, the second substantive. First, Respondent contends that Mr. Tomlin is procedurally barred from raising his challenge to his conviction and sentence because (1) his Rule 32 petition was time-barred by the statute of limitations (*see* Supplemental Answer, ¶¶ 9 and 11), and (2) he did not raise a federal challenge in state court corresponding to his Claim XXX here (*see id.*, ¶¶ 10 and 12). Second, Respondent argues that the claim fails on the merits.

Neither of these two arguments bars relief in this habeas corpus case.

First, regarding the alleged procedural bar: under long-standing habeas doctrine, the State has the burden of proving that the last state court that considered this claim imposed a procedural bar with respect to it. While it is certainly true that the state courts precluded *other* claims on statute-of-limitations grounds, the Alabama Court of Criminal Appeals did not apply any time bar with respect to the claim in question in this habeas corpus litigation. To the contrary, the Alabama Court of Criminal Appeals specifically addressed the claim without relying on any procedural bar, holding:

> Finally, with regard to [the 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, CR-08-0493, slip op. at 2-3 (Ala. Crim. App. Jun. 12, 2009) (second and third alterations in original).

This ruling of the Court of Criminal Appeals is therefore not on procedural grounds. It is off the mark on substantive grounds, to be sure, because it does not address the federal constitutional violation at all, instead relying on the spurious ground that his claim was already resolved in his direct proceedings; but it surely is *not* a procedural bar on time-limit grounds or failure to present. As a result, the State cannot demonstrate that a procedural bar was actually imposed by the last state court to consider Mr. Tomlin's claim, and the claim is therefore reviewable on the merits by this Court.

The State also argues that Mr. Tomlin failed to fairly present the nature of his claim to the state courts, but that too is rebutted by a simple review of the record in this case. As Mr. Tomlin will demonstrate in this Reply Brief, Mr. Tomlin fairly presented his federal claim to the Alabama state courts, especially in light of his *pro se* status at all relevant times. Table 1 to Petitioner's Supplemental

Appendix summarizes his presentation of his federal claim at every stage of this litigation. *See* Table 1 in Petitioner's Supplemental Appendix at S002.

Second, regarding the merits: nowhere in the Respondent's supplemental brief does the State explain what the key passage of the 1975 Alabama Death Penalty Act—namely, "*and* with aggravation, which must *also* be averred in the indictment," Ala. Code 1975 § 13-11-2 (emphasis added)—means. In fact, the State concedes that § 2 creates "offenses," which actually supports Mr. Tomlin's position, because it now has no place to look—other than § 13-11-6—for the "aggravation" required by § 2. Nor does the State explain anywhere why the Alabama Legislature would have passed a statute that requires, among other absurdities, a jury to pass a death sentence on individuals who cannot be sentenced to death. Barring an explanation of what the "aggravation" could have meant—other than what Mr. Tomlin proposes in his main brief—or why its interpretation is plausible in light of the contortions required to make it sensible, the State of Alabama has not offered a meaningful argument on the merits. The fact that the State can only write that Mr. Tomlin's arguments "have no factual or legal validity" without seriously responding to them demonstrates that Mr. Tomlin is entitled to habeas corpus relief.

ARGUMENT AND CITATIONS TO AUTHORITY

I. PHILLIP TOMLIN, ACTING *PRO SE*, FAIRLY PRESENTED HIS FEDERAL CONSTITUTIONAL CLAIM AT EVERY STAGE OF STATE COURT REVIEW

For ease of presentation, Petitioner will address the State's procedural arguments in reverse order.

The State of Alabama contends in its *Supplemental Answer* that Mr. Tomlin's federal constitutional claim—namely that his conviction and sentence violate his due process right to fair warning under *Bouie v. City of Columbia*, 378 U.S. 347 (1964)—was never properly presented to the state courts. A simple review of the record in this case shows that the State is incorrect, and that Mr. Tomlin fairly presented his federal claim that his sentence violated his right to fair warning to the Alabama state courts, especially in light of his *pro se* status at all relevant times. Table 1 in Petitioner's Supplemental Appendix summarizes Mr. Tomlin's presentation of his federal claim in the state courts. *See* Table 1 in Petitioner's Supplemental Appendix at S002 (Tab 1).

A. THE STANDARD OF FAIR PRESENTATION IS NOT DIFFICULT TO MEET

As a preliminary matter, it is important to emphasize that the amount of detail and legal argumentation required to "fairly present" a federal claim is not substantial. The Eleventh Circuit has stated that it "simply require[s] that petitioners present their claims to the state courts such that the reasonable reader

would understand each claim's particular legal basis and specific factual foundation." *Kelley v. Sec'y for Dep't of Corr.*, 377 F.3d 1317, 1344-45 (11th Cir. 2004) (citing *Picard v. Connor*, 404 U.S. 270, 275 (1971)). Moreover, the standard of fair presentation is more flexible and lenient when a petitioner is proceeding *pro se*. "For purposes of exhaustion, *pro se* petitions are held to a more lenient standard than counseled petitions." Brian R. Means, *Federal Habeas Manual* § 9C:44 (citing *Lieberman v. Thomas*, 505 F.3d 665, 671 (7th Cir. 2007); *Sanders v. Ryder*, 342 F.3d 991, 999 (9th Cir. 2003)). Mr. Tomlin, who was acting *pro se* at all relevant times throughout the state and federal post-conviction proceedings, has more than met the standard required to "fairly present" his claim.

B. The Record of Mr. Tomlin's Presentations in State Court Establishes That Mr. Tomlin Fairly Presented His Claim

Mr. Tomlin, acting *pro se*, first raised his federal constitutional claim regarding fair warning at the state trial court level in state Rule 32 post-conviction proceedings.

1. Rule 32 Trial Court

On August 20, 2007, Mr. Tomlin, acting *pro se*, amended his *pro se* Rule 32 petition to add three additional claims, one of which, "Amendment Three," is the

federal constitutional claim at issue here.[1] "Amendment Three" argued that the failure of the Alabama courts to adhere to the text of the 1975 Alabama Death Penalty Act, as well as the Alabama Constitution, Art.1, Sec. 7 (which contains an *ex post facto* type clause), violated his rights to due process under the Alabama and Federal Constitutions. Specifically, Mr. Tomlin stated in his pleading:

> This is especially proven true where the framers of the Alabama Constitution mandated in Art. I Sec. 7 Ala. Const. 1901, pertinent in part:
>
> > 'That no person shall be accused or arrested, or detained, except in cases ascertained by law, and according to the form which the same has prescribed; and no person shall be punished but by virtue of a law established and promulgated prior to the offense and legally applied.'
>
> Squarely, under the mandatory language of Title 13-11-1, supra, and Art. 1 Sec. 7 supra, the failure of [the] Circuit Court of Mobile [County] to adhere to both of these substantive authorities, **violated Tomlin['s] substantive Right to due process of the law. XIV Amend. U.S.A. Const.**[;] Art . I, Sec. 6, AL 1901 Const.

Petitioner's Supplemental Appendix at S034 (Tab 2); Amendment to the Pending Rule 32 Petition at 28 (bold added).

[1] While Mr. Tomlin originally had counsel in his Rule 32 proceedings, and his original attorney, Richard R. Williams, filed a Rule 32 petition on January 3, 2007, Mr. Tomlin effectively became *pro se* on January 9, 2007, when he filed his own Rule 32 petition. Mr. Tomlin was acting *pro se* on August 20, 2007, when he amended his *pro se* petition.

It is clear from this amended pleading that Mr. Tomlin, acting *pro se*, presented a federal due process claim under the Fourteenth Amendment of the United States Constitution—specifically writing "XIV Amend. U.S.A. Const."—that was based on an *ex post facto* violation claim. Mr. Tomlin specifically cited to the federal Due Process Clause and to the "U.S.A. Const[itution]."

Moreover, the state constitution and federal constitution are coextensive on the use of *ex post facto* principles to claims of judicial revision to legislation, *see Ex parte Alexander*, 475 So.2d 628, 629 (Ala. 1985), and therefore the reference to the Alabama *ex post facto* principle was sufficient to fairly present the federal constitutional claim as well. *See Mulnix v. Sec'y for Dep't of Corr.*, 254 F. App'x 763, 765 (11th Cir. 2007) (citing *Jackson v. Edwards*, 404 F.3d 612, 619 (2d Cir. 2005)), *see also Preston v. Sec'y, Fl. Dept. of Corr.*, 785 F.3d 449, 460 (11th Cir. 2015) (noting that the *Mulnix* rule has been adopted by other circuits and is most likely to apply where the two standards are legally identical, as is the case here).

Nor is there any question that the amended petition was properly before the Rule 32 trial court. The Rule 32 trial court explicitly stated in its ruling that it was considering all of Mr. Tomlin's submissions, including his amendments. *Tomlin v. State*, No. CC-93-1494.60 (Cir. Ct. Mobile Cty. Nov. 07, 2008) (ECF No. 12-4 at 18).

2. *Rule 32 Review by the Alabama Court of Criminal Appeals*

In the Alabama Court of Criminal Appeals, Mr. Tomlin presented the claim in unmistakably federal terms. In his opening brief on appeal from the denial of his *pro se* amended Rule 32 petition, Mr. Tomlin titled his argument, Argument VII-1, as follows:

> "WHEN THE TRIAL COURT SENTENCED THE APPELLANT TO LIFE IMPRISONMENT WITHOUT THE POSSIBILITY OF PAROLE PER ALABAMA SUPREME COURT ORDER, SUCH SENTENCE RAN AFOUL OF **THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION**, **AND WAS AN EX POST FACTO APPLICATION OF LAW.**"

Petitioner's Supplemental Appendix at S101 (Tab 3); Brief of Appellant at 53, *Tomlin v. State*, CR-08-0493 (Ala. Crim. App. 2009) (bold added).

The text of Mr. Tomlin's argument similarly couches the claim in federal constitutional terms. *See id*. at S101-S108 (Brief of Appellant at 53-60). Again, given Mr. Tomlin's *pro se* status, this was more than enough to put the Alabama Court of Criminal Appeals on notice of the federal nature of his claim.

Nor is there any doubt that the Alabama Court of Criminal Appeals addressed this claim, and found it properly presented. If one compares the substantive arguments that Mr. Tomlin made in his brief to the arguments that the Alabama Court of Criminal Appeals stated that it considered, it is clear that they took the subject headings of each of his claims, combined a few for ease of

disposition, and then addressed them all. The following table shows the correspondence:

Arguments in Mr. Tomlin's Brief	**Substantive Arguments the Alabama Court of Criminal Appeals Considered**
Tomlin's Rights were violated when the prosecuting attorney opened the jury door during deliberations, and a subsidiary allegation of ineffective assistance for failing to raise the claim **(Argument II in Tomlin's Brief)**.	Substantive argument considered as **Claim 1** in the Court of Criminal Appeals Opinion. Subsidiary IAC claim considered as part of **Claim 5**.
The trial court did not have subject matter jurisdiction because it was a district court, and that such a trial violated Tomlin's due process rights **(Argument III in Tomlin's Brief)**.	Substantive argument considered as **Claim 2** in the Court of Criminal Appeals opinion.
Ineffective assistance for failure to object to being tried in district court **(Argument IV in Tomlin's Brief)**	Substantive argument considered with the rest of the ineffective assistance claims in **Claim 5.**
The indictment was constructively amended by instructing on inapplicable elements, and various due process violations flowing from the amendments **(Argument V in Tomlin's Brief)**	Substantive argument considered as **Claim 3** in the Court of Criminal Appeals opinion.
Ineffective assistance for failure to object to the constructive amendment **(Argument VI in Tomlin's Brief)**	Substantive argument considered with the rest of the ineffective assistance claims in **Claim 5.**
The trial court imposed an illegal sentence in violation of the Eighth and Fourteenth Amendments because of its ex post facto nature **(Argument VII in Tomlin's Brief)**	Substantive argument considered as **Claim 4** in the Court of Criminal Appeals opinion.

It is clear from this table that the Alabama Court of Criminal Appeals considered each of Mr. Tomlin's claims without holding that these claims were not "fairly presented". Therefore, even if there were room to doubt whether the claim was fairly presented to the Rule 32 trial court, which there is not, the Court of Criminal Appeals's review of the claim excuses any such difficulty. *See, e.g.*, *Sandgathe v. Maass*, 314 F.3d 371, 377 (9th Cir. 2002).

3. *Rule 32 Certiorari Petition in the Alabama Supreme Court*

In the Alabama Supreme Court, Mr. Tomlin similarly claimed that the sentence violated his rights under both the U.S. Constitution's *ex post facto* clause and the Alabama Constitution's *ex post facto* clause, and cited to case law from the Alabama Supreme Court, the Alabama Court of Criminal Appeals, and the U.S. Supreme Court that discussed the *ex post facto* clause. *See* Petitioner's Supplemental Appendix at S126-S129 (Tab 4); Petition for Writ of Certiorari at 7-11, *Ex parte Tomlin*, 1081544 (Ala. Mar. 5, 2010).

More specifically, Mr. Tomlin, after describing the factual background to his claim and specifically noting that he had raised this claim as a federal ex post facto claim in the Court of Criminal Appeals, wrote:

> It can be established through tested case law and the United States Constitution, and the Alabama Constitution of 1901, that Tomlin's claim has merit. Fundamental Law such as Article I, Section 10, Cl. 1, United States Constitution; Article I, Section 7 and 10, Alabama

> Constitution of 1901. Law from this Court in Walker v. State, 433 So.2d 469, 480 (Ala. 1983); Law from the Court of Criminal Appeals in Taylor v. City of Decatur, 465 So. 2d 479 (1985); and United States Supreme Court Case Law, Lyance v. Mathis, 519 U.S. 433 (1997).

Petitioner's Supplemental Appendix at S129 (Tab 4); Petition for Writ of Certiorari at 11, *Ex parte Tomlin*, 1081544 (Ala. Mar. 5, 2010) (bold added). Mr. Tomlin clearly cited both the federal ex post facto clause and a United States Supreme Court case (*Lynce v. Mathis*, 519 U.S. 433 (1997)) that centers on the ex post facto clause in support of his claim. The nature of Mr. Tomlin's claim would therefore have been abundantly clear to any reasonable reader.

Again, Mr. Tomlin's federal claim, given his *pro se* status, was fairly presented to the Alabama Supreme Court.

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As evidenced from this sequence and from Table 1 to Petitioner's Supplemental Appendix (Tab 1 and also attached to this brief), Mr. Tomlin fairly presented the federal nature of his due process fair warning claim to the state courts. The State's argument in its brief that Mr. Tomlin's federal claim of lack of fair warning "was never properly presented to the Alabama courts" (Supplemental Answer at ¶ 11) is unfounded.

II. THE STATE'S ALTERNATIVE ARGUMENT—THAT MR. TOMLIN'S CLAIM WAS PROCEDURALLY BARRED BY THE STATE COURTS—FAILS BECAUSE THE STATE CANNOT SHOW THAT THE STATE COURTS IMPOSED A PROCEDURAL DEFAULT ON THIS CLAIM

To the extent the State contends that Mr. Tomlin's claim is precluded because Mr. Tomlin procedurally defaulted his claim in the state courts, that argument also fails. The state court did not actually impose a procedural bar with respect to this claim, which prevents the State from invoking it now.

A procedural default being a defense, it is the State that has the burden of proving it. *See, e.g.*, *Gordon v. Nagle*, 2 F.3d 385 n.4 (11th Cir. 1993); Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice and Procedure* § 26.2 n.5. The elements of a procedural default that the state must prove for it to be cognizable in federal court are that: [1] The state timely asserts the default; [2] the state procedural rule is clearly applicable; [3] the state procedural rule was actually violated; [4] the state procedural rule is adequate and independent to support the judgment; and [5] *the state court must unambiguously rely on the procedural default*. *See Federal Habeas Corpus Practice and Procedure* § 26.2. The State's procedural default argument fails both because the state failed to timely assert the default, and in fact expressly waived it (element [1]), *see infra* at Part III, and because the Alabama Court of Criminal Appeals did not rely on a procedural bar at all with respect to this claim, much less unambiguously so, as

required for the State to meet its burden of proving procedural default (element [5]).

The Court of Criminal Appeals reasoning on the timeliness issue, in its entirety, is that:

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

Tomlin v. State, CR-08-0493, slip op. at 2 (Ala. Crim. App. June 12, 2009) (Main Brief Appendix Tab 8).

The claim at issue in this federal litigation, however, involves Claim 4, not Claims 1, 3 or 5. The State is therefore in error when it says that "[t]he Alabama appellate court found all of Tomlin's constitutional claims precluded as untimely filed under the post-conviction statute of limitation." (Supplemental Answer at ¶ 9). The Court of Criminal Appeals actually found that three claims not at issue here were precluded—but never made a finding that *all* of his constitutional claims were so precluded. Given that Mr. Tomlin presented his claim to the Court of Criminal Appeals in federal constitutional terms, and the Court of Criminal Appeals explicitly addressed the claim, there is no question that the court did not apply a time bar with respect to the claim. The State's argument that the Alabama Court of Criminal Appeals was addressing Mr. Tomlin's claim solely as a jurisdictional matter under state law is without support in the opinion, nor would

that argument by itself mean that Mr. Tomlin's claim could not have a federal dimension—the grounds for relief in Alabama Rule of Criminal Procedure 32.1 are not mutually exclusive, and the word "jurisdiction" has been given a broader meaning than mere subject-matter jurisdiction.

But even if there was room for doubt as to what the Court of Criminal Appeals did here, that would still not be enough for the State to carry its burden. The State has to prove that the state court *unambiguously* relied on the procedural bar. *See Federal Habeas Corpus Practice and Procedure*, § 26.2[e] ("Absent an 'explicit' statement … a state court's reference to a procedural bar or even a discussion of its applicability to the instant case will not suffice [to create a procedural default]."). Whatever else can be said for the Court of Criminal Appeals decision, it certainly does not *unambiguously* rely on procedural default to bar Mr. Tomlin's claim. Mr. Tomlin's claims are therefore not precluded under the doctrine of procedural default, and this Court should address the merits.[2]

[2] Even if Mr. Tomlin's claims were subject to procedural default, the default should be excused under the miscarriage of justice exception to procedural default because he is actually innocent of the offense of conviction—the implication of Mr. Tomlin's argument on the merits is that he could never have been charged under § 13-11-1 *et seq. See Schlup v. Delo*, 513 U.S. 298 (1995). This argument, however, appears to be foreclosed in this Court by binding appellate precedent. *See Rozzelle v. Sec'y, Florida Dep't of Corr.*, 672 F.3d 1000, 1015 (11th Cir. 2012). Mr. Tomlin believes that *Rozzelle* is wrongly decided, and that the Eleventh Circuit should instead adopt the Eighth Circuit's rationale in *Jones v. Delo*, 56 F.3d 878,

III. THE STATE EXPRESSLY WAIVED ANY RELIANCE ON PROCEDURAL DEFAULT IN THIS COURT

As this Court has already noted, Mr. Tomlin is not raising a new claim, but rather has been granted leave to "expound on his legal theories" in light of the *Magwood* decisions that clarified his arguments. *See Tomlin v. Patterson*, No. 10-120-CG-B, slip op. at 3 n.1, 2015 WL 4931660, at *1 n.1 (S.D. Ala. Aug. 18, 2015) (ECF No. 43). The State, in its answer, expressly waived any reliance on procedural default on this claim. (Answer of Respondent at ¶ 25).

Mr. Tomlin consistently, throughout the state court process, labeled his claim as a federal claim—namely that his sentence violated federal constitutional principles. When Mr. Tomlin included "Ground XXX" in his habeas petition—which claimed at the beginning and end that his sentence violates his rights under the Eighth and Fourteenth Amendments because the State could not aver an aggravating circumstance (*contra* Supplemental Answer at ¶ 12)—the State was doubly on notice that the claim was based on federal law, both from the habeas petition itself, and by the reference to his state pleadings that also clearly stated

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883 (8th Cir. 1995). He therefore desires to preserve this argument for further review.

that the claim was federal. (Petition for Writ of Habeas Corpus at 37-38, 4.1 (ECF No. 1)).[3]

Despite the fact that the State was clearly on notice that Mr. Tomlin was asserting a federal claim, the State represented to this Court that the claim was fully presented and decided by the Court of Criminal Appeals. Therefore, the State cannot be surprised that Mr. Tomlin is in fact asserting a federal claim. (*Contra* Supplemental Answer at ¶¶ 11–12).

Mr. Tomlin clearly labeled his claim as federal in this Court, and the State expressly waived procedural default with respect to it. The State's new procedural default arguments are therefore themselves procedurally defaulted, and should not be considered by this Court.

IV. THE STATE MAKES NO ARGUMENT THAT THE AEDPA STANDARD OF REVIEW SHOULD APPLY ON THE MERITS

For the reasons Mr. Tomlin stated in his Main Brief, AEDPA deference does not apply in the unique circumstances of this case. (*See* Petitioner's Main Brief at 38-42 (ECF No. 46)). This Court, however, can also reach that result because the

[3] Nor was more detail required or even wanted by this Court; the instructions on the face of Mr. Tomlin's habeas petition asked for him to detail the facts, not legal arguments, that supported his claims. (Petition for Writ of Habeas Corpus at 1 (ECF No. 1).) That is precisely what he did.

State has failed to respond at all to Mr. Tomlin's arguments on this point—its *Supplemental Answer* does not mention AEDPA at all. The State has therefore forfeited any contention that AEDPA deference should apply. *See, e.g.*, *United States v. Williams*, 641 F.3d 758, 764 (6th Cir. 2011) (holding that government would not receive benefit of plain error standard of review where it failed to argue for that standard on appeal).

V. MR. TOMLIN IS ENTITLED TO RELIEF ON THE MERITS

The State fails to meaningfully respond to the most important points that Mr. Tomlin made on the merits. Specifically, Mr. Tomlin argued extensively in his main brief that the key phrase "and with aggravation, which must also be averred in the indictment," Ala. Code 1975 § 13-11-2, prevents Mr. Tomlin from being charged with a capital offense. (*See* Petitioner's Main Brief at 24-30). The State's response does not even mention the phrase. The State similarly failed to respond to Mr. Tomlin's contention that the State's interpretation of the statute leads to incoherent results. (*See* Petitioner's Main Brief at 32-34). Mr. Tomlin therefore rests primarily on his Main Brief for his arguments on the merits.

The State, however, has agreed with Mr. Tomlin on one point: in its *Supplemental Answer*, the State agrees that § 13-11-2 creates "offenses." (*See* Supplemental Answer at ¶¶ 20-21, 23-24, 27). This strengthens Mr. Tomlin's

point: the text of § 13-11-2 requires the State to aver "any of the *following offenses*, and with aggravation, which must also be averred in the indictment". (emphasis added). The State has agreed that the "following offenses" are listed in § 13-11-2, but has no answer to the question of what the "aggravation" that must also be averred in the indictment is. The State's own argument therefore demonstrates why Mr. Tomlin is entitled to relief.

To the extent the State makes an argument that the aggravating circumstance that the murders were especially heinous, atrocious, or cruel, § 13-11-6(8), applied to Mr. Tomlin in 1977, the State is doubly incorrect. *First*, Mr. Tomlin has never been found to have committed the murders in a heinous, atrocious, or cruel way under any standard in any non-reversed judgment. And the Alabama courts have long-held that reversed judgments are void and entitled to no weight. *See Ex parte Riley*, 464 So. 2d 92 (Ala. 1985). The State's belief that Mr. Tomlin would have been subject to a finding that the murders were heinous, atrocious, or cruel in 1977 is therefore impermissibly speculative. *Second*, Alabama prior to 1977 had a long-standing practice of borrowing authoritative judicial interpretations of language adopted from other state statutes. *See Ex parte Huguley Water Sys.*, 213 So. 2d 799, 804 (Ala. 1968). That is exactly what the court in *Jacobs v. State*, which Mr. Tomlin cited in his Main Brief, did. 361 So. 2d 607, 630 (Ala. Crim. App. 1977), *aff'd*, 361 So. 2d 640 (Ala. 1978). And under the Florida standard announced in

State v. Dixon, 283 So. 2d 1 (Fla. 1973), Mr. Tomlin's acts simply did not qualify for the aggravating circumstance as a matter of law. The *Dixon* standard was again expressly adopted in *State v. Kyzer*, 399 So. 2d 330, 333 (Ala. 1981), but this was obviously the best interpretation of the meaning of aggravating circumstance in 1977 as well. Therefore, Mr. Tomlin's conduct, viewed from a fair-warning perspective, was not subject to this aggravating circumstance.

In conclusion, the State's arguments on the merits are unpersuasive and should be rejected.

CONCLUSION

For the reasons stated in Mr. Tomlin's Main Brief and here, Mr. Tomlin urges this Court to find his conviction and sentence of life imprisonment without parole 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), and grant Mr. Tomlin's petition for a writ of habeas corpus.

Respectfully submitted,

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November 11, 2015

TABLE 1

Stage	Mr. Tomlin's *pro se* Presentation of Federal Claim	Reference
Rule 32 Trial Court: Mr. Tomlin's Amendments to Rule 32 Petition	"This is especially proven true where the framers of the Alabama Constitution mandated in Art. I Sec. 7 Ala. Const. 1901, pertinent in part: > That no person shall be accused or arrested, or detained, except in cases ascertained by law, and according to the form which the same has prescribed; and no person shall be punished but by virtue of a law established and promulgated prior to the offense and legally applied. Squarely, under the mandatory language of Title 13-11-1, supra, and Art. 1 Sec. 7 supra, the failure of [the] Circuit Court of Mobile [County] to adhere to both of these substantive authorities, violated Tomlin['s] substantive Right to due process of the law. XIV Amend. U.S.A. Const.[;] Art . I, Sec. 6, AL 1901 Const."	S034 Petitioner's Supplemental Appendix
Mr. Tomlin's Brief on Rule 32 to Alabama Criminal Court of Appeals	"When the trial court sentenced the appellant to life imprisonment without the possibility of parole per Alabama Supreme Court order, such sentence ran afoul of the due process clause of the United States Constitution, and was an ex post facto application of law."	S101 Petitioner's Supplemental Appendix
Mr. Tomlin's Cert Petition on Rule 32 at the Alabama Supreme Court	"It can be established through tested case law and the United States Constitution, and the Alabama Constitution of 1901, that Tomlin's claim has merit. Fundamental Law such as Article I, Section 10, Cl. 1, United States Constitution; Article I, Section 7 and 10, Alabama Constitution of 1901. Law from this Court in Walker v. State, 433 So.2d 469, 480 (Ala. 1983); Law from the Court of Criminal Appeals in Taylor v. City of Decatur, 465 So. 2d 479 (1985); and United States Supreme Court Case Law, Lyance v. Mathis, 519 U.S. 433 (1997)."	S129 Petitioner's Supplemental Appendix

CERTIFICATE OF SERVICE

I hereby certify that on November 11, 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:

Andy Scott Poole
Office of the Attorney General
501 Washington Ave
Montgomery, AL 36130

I also hereby certify that because November 11, 2015 is a federal holiday, paper copies of these documents will be sent on November 12, 2015.

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November 11, 2015