No. 13-13878-C

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PHILLIP WAYNE TOMLIN,

Petitioner-Appellant,

v.

GARY HETZEL,

Warden, Holman Correctional Facility,

Respondent-Appellee.

PETITIONER-APPELLANT'S BRIEF

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No. 13-13878-C *Tomlin v. Hetzel*

CERTIFICATE OF INTERESTED PERSONS

Undersigned counsel certifies that the following persons may have an interest in the outcome of this case:

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

Alexander, Richard – former Counsel for Petitioner-Appellant;

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

Brasher, Andrew – Solicitor General of the State of Alabama

Bivins, Sonja F. – United States Magistrate Judge;

Daniel, Tracy – former Assistant Attorney General;

Deason, Kristi – former Assistant Attorney General;

Evans, James – former Alabama Attorney General;

Forrester, Nathan – former Deputy Attorney General;

Graddick, Charles – former Alabama Attorney General

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

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

Houts, James – former Assistant Attorney General;

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

King, Troy – former Alabama Attorney General;

Lackey, James – former Counsel for Petitioner-Appellant;

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Marston, Joseph III – former Assistant Attorney General;

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McRae, Ferrill – Mobile County Circuit Court Judge;

Milling, Bert – United States Magistrate Judge

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Shows, Stephen – former Assistant Attorney General;

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Stewart, Sandra – former Assistant Attorney General;

Strange, Luther – Alabama Attorney General;

Thomas, Herman – Mobile County Circuit Court Judge;

Thomas, Kim – Commissioner, Alabama Department of Corrections;

Tomlin, Phillip – Petitioner-Appellant;

Valeska, Don – Former Assistant Attorney General.

STATEMENT REGARDING ORAL ARGUMENT

Petitioner-Appellant Phillip Tomlin respectfully requests oral argument pursuant to Federal Rule of Appellate Procedure 34(a)(1) and Rule 28-1(c) of the Eleventh Circuit Rules. This is a capital case in which the Circuit Court of Mobile County improperly imposed a sentence of life imprisonment without parole. 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 Death Penalty Act, a reinterpretation that would violate 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. 1980), *Ex parte Kyzer*, 399 So. 2d 330 (Ala. 1981), *Ex parte Hays*, 518 So. 2d 768 (Ala. 1986), and *Ex parte Stephens*, 982 So. 2d 1148 (Ala. 2006)—Mr. Tomlin urges this Court to grant oral argument in this case.

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STATEMENT OF JURISDICTION

Jurisdiction was proper in the United States District Court for the Southern District of Alabama under 28 U.S.C. § 2254, because it was the district where Phillip Tomlin was convicted, sentenced to death, and then resentenced to life imprisonment without parole. *See* 28 U.S.C. § 2241(d). The District Court entered a final judgment, denying Mr. Tomlin's habeas petition on August 7, 2013. This Court granted a Certificate of Appealability on June 2, 2014. *Tomlin v. Patterson*, No. 13-13878-C (11th Cir. Jun. 02, 2014) (Appellate ECF No. 9) (order granting certificate of appealability and motion to proceed *in forma pauperis*). Jurisdiction in this Court is proper under 28 U.S.C. §§ 1291, 1294(1), and 2253(a).

STATEMENT OF THE ISSUE

This Court granted a certificate of appealability on the issue:

> Whether the Alabama court's decision—that Tomlin's sentence of life imprisonment without the possibility of parole did not violate the Ex Post Facto Clause—was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court.

Tomlin v. Patterson, No. 13-13878-C (11th Cir. June 02, 2014) (Appellate ECF No. 9).

STATEMENT OF THE CASE

Petitioner-Appellant Phillip Tomlin was convicted of capital murder and, after 26 years on Alabama's Death Row, resentenced to life imprisonment without parole. Mr. Tomlin is currently serving his sentence at Holman Prison in Atmore, Alabama. This federal habeas corpus challenge is properly brought pursuant to 28 U.S.C. § 2254.

A. *Proceedings and Dispositions Below*

Philip Tomlin filed a state habeas corpus challenge, pursuant to Rule 32 of the Alabama Rules of Civil Procedure, on January 3, 2007, and amended his pleading on August 20, 2007. *See* District Court ECF No.12-4 at pp. 13 and 67-85. The Circuit Court of Mobile County denied his Rule 32 petition on November 7, 2008. *Tomlin v. State*, No. CC-93-1494.60 (Cir. Ct. Mobile County), District Court ECF No. 12-4 at pp. 18-25. The Alabama Court of Criminal Appeals rejected his direct appeal from the denial of Rule

32 on June 12, 2009. *Tomlin v. State*, No. CC-93-1494.60 (Ala. Crim. App.), District Court ECF No. 12-10. The Alabama Supreme Court denied a writ of certiorari on March 5, 2010. *Tomlin v. State*, No. CC-93-1494.60 (Ala.), District Court ECF No. 12-13.

Mr. Tomlin filed his federal habeas corpus petition *pro se* in the United States District Court for the Southern District of Alabama on March 11, 2010. *See Pet. for Writ of Habeas Corpus*, District Court ECF No. 1. The habeas corpus petition was referred to a federal magistrate who issued a report and recommendation denying the petition on March 8, 2013. *Tomlin v. Patterson*, No. 1:10-cv-00120-CG-B (S.D. Ala.), District Court ECF No. 24. The District Court adopted the magistrate's report and recommendation on August 7, 2013. *Tomlin v. Patterson*, No. 1:10-cv-00120-CG-B (S.D. Ala), District Court ECF No. 32. By that opinion, the District Court also denied Mr. Tomlin a certificate of appealability to this Court.

Mr. Tomlin then petitioned this Court *pro se* for a certificate of appealability, which this Court granted on June 2, 2014. *Tomlin v. Patterson*, No. 13-13878-C (11th Cir. Jun. 02, 2014), Appellate ECF No. 9 (order granting certificate of appealability and motion to proceed *in forma pauperis*).

This Court appointed undersigned counsel, Bernard E. Harcourt, to represent Mr. Tomlin on this appeal on July 14, 2014. Appellate ECF No. 17.

B. Statement of Facts

In order to properly understand this federal habeas corpus case, it is crucial to state the facts regarding both the history of the 1975 Alabama Death Penalty Act and the criminal proceedings against Phillip Tomlin in strict and detailed chronological order.

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, §§ 13-11-1 *et seq*., Ala. Code 1975 (Appendix Tab 1975 Act).[1] As written, the 1975 Act—which is still in effect today for

[1] The 1975 Alabama death penalty statute 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 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. §§ 13-11-1 *et seq*., Ala. Code 1975 (repealed as to conduct occurring on or after July 01, 1981)—instead of the later recodification in Title 13A, §§ 13A-5-30 *et seq*. Ala. Code 1975 (repealed as to conduct occurring on or after July 01, 1981). This brief will cite to the Title 13 codification. In 1981, Alabama passed a new death penalty statute, 1981

crimes committed before July 1, 1981—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 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 in §13-11-6 that would allow the sentencing court to impose a death sentence.

Ala. Laws 203, that was codified at Ala. Code §13A-5-39 *et seq*. (2013)) (Appendix Tab 1981 Act).

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

b. The First Capital Trial of Phillip Tomlin in 1978

On January 2, 1977, Richard Brune and Cheryl Moore were fatally shot in Mobile County, Alabama. Two years earlier, Richard Brune had fatally shot David Tomlin (Phillip Tomlin's younger brother), and so suspicion immediately fell on Mr. Tomlin.

On September 22, 1977, Phillip Tomlin was indicted for the double intentional murder of Richard Brune and Cheryl Moore under the 1975 Alabama Death Penalty Act. Mr. Tomlin was tried in Mobile County, and, in March 1978, was convicted of double intentional murder under § 13-11-2(10). The jury returned the mandatory sentence of death, as required by the 1975 Act. The court sentencing hearing was conducted in November 1978. The sentencing court, Judge Ferrill McRae, sentenced Mr. Tomlin to death on December 8, 1978.

c. Judicial Interpretations of the 1975 Act

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).

On December 19, 1980, 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. 1980). In their decision, the Alabama Supreme Court also held the mandatory jury verdict of death unconstitutional, in light of the U.S. 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, and instead judicially rewrote the 1975 Alabama Death Penalty Act. Specifically, the court converted the mandatory jury verdict of death into a permissive jury verdict, and enacted a new jury sentencing hearing at which the jury would be allowed to consider as aggravating circumstances all of the fourteen (14) possible capital offenses listed in § 13-11-2, rather than the more limited list of eight (8) aggravating

circumstances listed in § 13-11-6 (which did not include double intentional murder).

On March 6, 1981, in *Ex parte Kyzer*, 399 So. 2d 330 (Ala. 1981), the Alabama Supreme Court further rewrote the 1975 Alabama Death Penalty Act, allowing the sentencing court to also consider as aggravating circumstances at the court sentencing hearing the fourteen (14) capital offenses listed at § 13-11-2, rather than the more limited eight (8) aggravating circumstances specifically listed at § 13-11-6 (which, again, did not include double intentional murder).

Meanwhile, 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 Tab 1981 Act).[2] 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.

[2] The new 1981 death penalty statute, naturally, applies prospectively only and therefore does not apply to the two homicides at the origin of this 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.

On August 26, 1986, the Alabama Supreme Court further rewrote the 1975 Alabama Death Penalty Act to allow the sentencing court to override a jury verdict of life imprisonment without parole under the 1975 Act. *Ex parte Hays*, 518 So. 2d 768 (Ala. 1986).

d. The Second Capital Trial of Phillip Tomlin

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).

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 combined effect of *Beck v. State* (1980), *Ex parte Kyzer* (1981), and *Ex parte Hays* (1986). *State v. Tomlin*, CC-89-000481 (Cir. Ct. Mobile Cnty. 1990), District Court ECF No. 10-1 at pp. 64-73.

On July 26, 1991, the Alabama Court of Criminal Appeals reversed Mr. Tomlin's conviction and sentence of death on the grounds, again, of

prosecutorial misconduct on behalf, again, of Don Valeska. *Tomlin v. State*, 591 So. 2d 550 (Ala. Crim. App. 1991).

e. 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 circumstances under § 13-11-6. The indictment, 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 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 *Beck v. State* (1980), *Ex parte Kyzer* (1981), and *Ex*

parte Hays (1986). On June 21, 1996, that conviction was reversed by the Alabama Court of Criminal Appeals because of juror misconduct. *Tomlin v. State*, 695 So. 2d 157 (Ala. Cr. App 1996).

f. Further Alabama Legislative Action

In 1999, 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 1999 Amendment). That amendment applies to any conduct committed after September 1, 1999.

g. 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 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. 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 sentenced Mr. Tomlin to death under the combined effect of *Beck v. State* (1980), *Ex parte Kyzer* (1981), and *Ex parte Hays* (1986). *State v. Tomlin*,

CC 93-1494 (Mobile County Cir. Ct. 2000), District Court ECF 10-1 at pp. 52-62.

On October 3, 2003, the Alabama Supreme Court vacated Phillip Tomlin's sentenced of death and ordered the Circuit Court of Mobile County to sentence Mr. Tomlin to life imprisonment without parole. *Ex parte Tomlin*, 909 So. 2d 283 (Ala. 2003). The Alabama Supreme Court recognized that there was no aggravating circumstance for consideration by the sentencing court under § 13-11-6. In an insightful concurring opinion, Justice Johnstone of the Alabama Supreme Court declared that:

> [T]his death sentence is illegal for the absence of an "aggravating circumstance[] enumerated in section § 13-11-6." When the court imposes a sentence in excess of that authorized by statute, it exceeds its jurisdiction, and the sentence is consequently void."

Id. at 289 (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 federal habeas corpus challenge.

h. Subsequent Alabama Supreme Court Action

On July 28, 2006, the Alabama Supreme Court expressly overruled its 1981 decision in *Ex parte Kyzer*. *See Ex parte Stephens*, 982 So. 2d 1148

(Ala. 2006). As a consequence of this decision, under the 1975 Alabama Death Penalty Act, the sentencing court may only consider at the court sentencing hearing the eight (8) aggravating circumstances explicitly enumerated in § 13-11-6, which do not include double intentional murder.

C. Statement of the Standard of Review

The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 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).

In addition, this Court reviews *de novo* a District Court's denial of habeas relief. *Gamble v. Sec'y, Fla. Dep't of Corr.*, 450 F.3d 1245, 1247 (11th Cir. 2006). Specifically, this Court applies *de novo* review to the District Court's resolution of questions of law and of mixed questions of law and fact, and to its "conclusion concerning the reasonableness of the state court's application of federal law." *Boyd v. Allen*, 592 F.3d 1274, 1293 (11th Cir. 2010). The District Court's factual findings are reviewed for clear error. *Melson v. Allen*, 548 F.3d 993, 997 (11th Cir. 2008).

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), as well as at the time of Phillip Tomlin's original trial and sentencing (March through December 1978), the 1975 Act did not extend to the conduct and circumstances alleged against

Mr. Tomlin. At that time—in 1977 and 1978—the United States Supreme Court had not yet declared the 1975 Act unconstitutional, and 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 is that the 1975 Act, as written, did not provide for an independent sentence of life imprisonment without parole, but allowed it *only* as a discretionary *downward departure* by the circuit court from a jury's mandatory death sentence. 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, at the time of his original trial in 1978, or 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 *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 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 *Beck v. State* (Ala. 1980) and *Ex parte Kyzer* (Ala. 1981). 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 would prohibit the retroactive application of any such judicial rewritings of the 1975 Act.

Phillip Tomlin's sentence of life imprisonment without parole is the product of forty years of confusion and judicial reinterpretation of a poorly written statute—the 1975 Alabama Death Penalty Act. A plain reading of that statute in the period 1977-1978, before all of the judicial rewritings, demonstrates that Phillip Tomlin did not fall within the scope of the statute. To allow any subsequent judicial reconstruction of the statute by the Alabama Supreme Court to subject Mr. Tomlin to punishment under the 1975 Alabama Death Penalty Act would violate the legal principle

underlying the prohibition on *ex post facto* laws and Mr. Tomlin's right to fair warning guaranteed by the Due Process Clause of the United States Constitution and *Bouie.*

It is important to emphasize here, that the consequences of ruling against Mr. Tomlin would be far-reaching—not only for Mr. Tomlin, but for the jury system. To rule against Mr. Tomlin would create a genuine legal anomaly: it would require a jury death penalty hearing and a potential jury verdict of death *in a case in which a defendant could never be sentenced to death*.

To be as clear as possible: If Mr. Tomlin's sentence of life imprisonment without parole is legal, then a defendant in his situation can be charged with a capital offense and sentenced to death by a jury, *even though he could never be sentenced to death by a court of law.* If Mr. Tomlin's sentence is valid, then, in any similar case, a jury of 12 Alabama citizens would have to weigh and consider an element of the capital offense (double intentional murder) as an aggravating circumstance at a death penalty hearing (*see Beck v. State*, 396 So. 2d at 663), despite the fact that the sentencing court *could not consider* that same element of the capital offense as an aggravating circumstance (*see Ex parte Stephens*, 982 So. 2d at 1153), and thus the sentencing court *could never return a sentence of death*. That

would be an incoherent result, yet it would be logically required if this Court upholds Phillip Tomlin's sentence of life imprisonment without parole. For these reasons, Mr. Tomlin's sentence of life imprisonment without parole cannot stand.

ARGUMENT AND CITATIONS TO AUTHORITY

I. 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* Alabama Answer to Habeas Petition at pp. 25 and 34-35 in District Court ECF No. 12 (acknowledging that Claim 30, the claim at issue here, was raised and decided in Rule 32 proceedings). 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) (recognizing Claim 4, that Mr. Tomlin's sentence was improper).

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.

Id. 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.

It is well established that in order to be entitled to AEDPA deference, a state court decision must be "on the merits" of the federal claim. 28 U.S.C. § 2254(d). The Supreme Court has defined the term "merits" 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)). The Supreme Court added 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.*

In Mr. Tomlin's case, the reasoning of the last state court clearly indicates that it only considered *state law* in holding that the sentence was proper, and therefore inadvertently failed to fully recognize the federal dimension of the claim. The Alabama court's ruling in this case cannot be said to be on the intrinsic rights and wrongs of the federal claim, and is therefore not entitled to AEDPA deference under § 2254(d). This Court must review the claim *de novo*, and should disregard the final state court judgment. Even if the Alabama court's ruling could somehow be described as "on the merits," it also "involves an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d).

II. THE DISTRICT COURT IMPROPERLY RELIED ON *EX PARTE KYZER* (ALA. 1981), A DECISION THAT HAS BEEN EXPRESSLY OVERRULED BY THE ALABAMA SUPREME COURT, THEREFORE THE DISTRICT COURT'S OPINION MUST BE VACATED

The District Court held that Mr. Tomlin's claim was barred by *Ex parte Kyzer*, 399 So. 2d 330 (Ala. 1981). *See Tomlin v. Patterson,* No. 10-00120-CG-B, slip op. at 184-187 (S.D. Ala. March 8, 2013) (report and recommendation of Magistrate Judge), *adopted by Tomlin v. Patterson*, No.

10-00120-CG-B (S.D. Ala. Aug 7, 2013). That holding is clearly erroneous for two reasons. First, *Ex parte Kyzer* was expressly overruled by the Alabama Supreme Court in *Ex parte Stephens*, 982 So. 2d 1148 (2006). Second, this Court had already previously 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).[3] The lower court erred in relying on *Ex parte Kyzer* and, therefore, the decision below must be vacated, and its reasoning ignored.

III. 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 the time*—in other words, the law that placed Phillip Tomlin

3 Moreover, the District Court cited the wrong *Magwood* case in its opinion. While the lower court was correct that the United States Supreme Court in *Magwood v. Patterson*, 561 U.S. 320 (2010) "recognized" the holding in *Kyzer*, the U.S. Supreme Court in *Magwood* remanded to this Court for consideration of whether the fair-warning claim in that case was procedurally defaulted (after determining that the claim was not second or successive). *See Magwood*, 561 U.S. at 342. Naturally, the U.S. Supreme Court would not have remanded Mr. Magwood's case to this Court if it had determined that Mr. Magwood's claim lost on the merits because of *Kyzer;* in fact, this Court found in Mr. Magwood's favor on remand. *See Magwood v. Warden, Ala. Dep't of Corr.*, 664 F.3d 1340, 1349 (11th Cir. 2011).

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 Alabama murder statute, Ala. Code § 13-1-70 (1977) (repealed as to conduct occurring on or after May 17, 1978).

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 has so held. *Ex parte Tomlin*, 909 So. 2d 283 (Ala. 2003); *Ex parte Stephens*, 982 So. 2d 1148 (2006). In fact, even this Court has so held in a perfectly similar case. *Magwood v. Warden, Ala. Dep't of* Corr., 664 F.3d 1340 (11th Cir. 2011).

What this necessarily entails is that the sentencing court could *not* engage in a *downward departure* under the 1975 Act and sentence Phillip Tomlin to life imprisonment without parole. 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 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.

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 Ala. Code § 13-1-70 (1977) (repealed as to conduct occurring on or after May 17, 1978). Consequently, on a plain reading of the statute in 1977 and 1978, 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's sentence of life imprisonment without parole violates his right to fair notice under the Due Process Clause of the United States Constitution. *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964).

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

A. The Plain Words of the 1975 Act

First, 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 of the capital statute 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, Ala. Code 1975 (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:

(1) First, "every word and clause must be given effect":[4] this fundamental canon of construction requires that we read the clause—"and

[4] Black, *Construction and Interpretation of Laws*, § 60 (2d ed. 1911); Sutherland, *Statutory Construction*, § 380 (2d ed. 1904); William N. Eskridge, Phillip P. Frickey, and Elizabeth Garrett, "The Supreme Court's Canons of Statutory Construction," at 389-397, in *Legislation and Statutory Interpretation* (2nd edition) (Foundation Press, 2006) at 389-390.

with aggravation which must also be averred in the indictment"—and especially the words "and" and "also," to have meaning. It requires that the clause not be read as completely redundant—that it not be read to mean that the indictment "must state the capital offense *and must also state the capital offense*." That would give effect neither to those explicit words, nor to the clause itself.

(2) Second, the "purpose rule": this foundational canon of construction requires that we "interpret ambiguous statutes so as best to carry out their statutory purposes."[5] In this case, the only coherent reading of the extra clause, to carry out the purpose of the capital statute, is to limit prosecution only to where there is an 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

[5] Eskridge, Frickey, and Garrett, "The Supreme Court's Canons of Statutory Construction," in *Legislation and Statutory Interpretation* (2nd edition), at 395.

judicial rewriting of the statute in *Beck* and *Kyzer*, 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.

(3) And third, and most importantly under Alabama law as it existed in 1977, the "rule of lenity": this is the fundamental canonical rule that "all doubts concerning [the interpretation of criminal statutes] are to predominate in favor of the accused." *Fuller v. State*, 60. So. 2d 202, 205 (Ala. 1952); *See Anderson v. City of Birmingham*, 88 So. 900, 901 (Ala. 1921); *Locklear v. State*, 282 So. 2d 116 (Ala. Crim. App. 1973). The strong rule of lenity in Alabama, on which 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 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.

To be sure, in 1980 in *Beck v. State*, the Alabama Supreme Court reinterpreted the clause "and with aggravation which must also be averred in the indictment" in § 13-11-2, to be superfluous, redundant, and unnecessary. The Alabama Supreme Court ruled in *Beck* that "the aggravating circumstances [in § 13-11-2] constitute an element of the capital offense and are required to be 'averred in the indictment' (Code 1975, § 13-11-2)." *Beck*, 396 So. 2d at 663. However, this portion of the ruling in *Beck* was entirely unforeseeable, and was "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue." *Bouie*, 378 U.S. at

354. Due process prohibits the retroactive application of the *Beck* reading in Mr. Tomlin's case.

B. The Structure of the 1975 Act

Second, 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 an *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:

(1) First, in the very first section, § 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.

(2) Section 2, however, 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 (*see* Part III.A. above, to ensure that the defendant could be sentenced to death); and second, that the jury return a mandatory sentence of death. In other words, it is only if a defendant can be sentenced to death by the jury and sentencing court that he falls under the ambit of the statute. It is only in cases where a defendant can be sentenced to death that the procedures engage, namely that the jury must return a mandatory death sentence, and then that the sentencing court would hold a sentencing hearing under §§ 13-11-3 and 4.

(3) 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 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. What is clear from this section is that the potential sentence of life imprisonment without parole is only a *downward departure* from the jury's verdict of death.

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*. In other words, life imprisonment without parole was only possible as a *downward judicial departure*.

It is important to emphasize that Section 2 of the statute only talks about a sentence of death. The words "life imprisonment without parole" do not appear. Thus the structure of the 1975 Act makes clear that a defendant must first be found guilty and sentenced to death under Section 2 before he could ever get life imprisonment without parole.

C. The Need to Avoid Legal Incoherence

This is also the only plain 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 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." *Ex parte 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., 399 So. 2d at 337.

Now, in *Kyzer,* the Alabama Supreme Court resolved this incoherence by declaring that the sentencing court, just like the jury, 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). 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. And still today, given that the Alabama Supreme Court has overruled *Kyzer* but not *Beck*, this incoherent outcome remains a possibility. On the Alabama Attorney General's argument, the 1975 Act requires a full-blown jury death penalty sentencing hearing at which an empanelled 12-person Alabama jury would have to consider whether Mr. Tomlin should be sentenced to death, and the jury

could sentence him to death on the basis of an aggravating circumstance (namely, double intentional murder) judicially implied for jury sentencing under *Beck*, but *not* for judge sentencing under *Stephens*—despite the fact that Mr. Tomlin could *never* be sentenced to death. This would be an entirely useless exercise of jury sentencing—and, worse than that, a cruel imposition on the 12 jurors who could sentence to death someone who could never receive the death penalty.

That reading of the statute is incoherent. It is also, as a textual matter, a plainly incorrect reading of the 1975 Act. But more importantly here, it violates 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).

To repeat and emphasize: under the Attorney General and the District Court's reading of this capital statute, a defendant can be charged with capital murder and sentenced to death by a jury *even though he can never be sentenced to death by the sentencing court.* Under the District Court's reading, an Alabama jury must be empaneled and must consider whether to sentence a capital defendant to death, *even though he could never be sentenced to death by the sentencing court.* Under the District Court's

reading, an Alabama jury can consider as an aggravating circumstance an element of the capital offence that the sentencing court *cannot* consider, *in a case where the defendant could never be sentenced to death.* That is an incoherent reading of the law. Its retroactive application to Mr. Tomlin would violate due process of law.

IV. THE NUMEROUS JUDICIAL REINTERPRETATIONS OF THE 1975 ALABAMA DEATH PENALTY ACT DO NOT AFFECT THE PLAIN MEANING OF THE STATUTE IN 1977-1978

Three years after the crime and two years after Phillip Tomlin's original capital trial, the Alabama Supreme Court initiated about three decades worth of judicial reinterpretations of the 1975 Alabama Death Penalty Act. The judicial history is tortured and confusing, but it does not affect the plain meaning of the statute at the time of the crime in 1977.

The multiple reinterpretations have, of course, radically changed the meaning of the 1975 Act today, and have produced the incoherence mentioned earlier. On a reading of the 1975 Act informed by the Alabama Supreme Court decisions in *Beck, Kyzer, Hays,* and *Stephens*, a defendant could be sentenced to death by a jury despite the fact that he could never be sentenced to death by the final sentencing court. On such a reading of the statute, Mr. Tomlin could be sentenced to life imprisonment without parole. However, this reading was unforeseeable and would have been indefensible

in 1977 and 1978, and therefore does not alter in any way the plain meaning of the statute for purposes here.

It is, of course, important to understand what the Alabama Supreme Court did since 1980, and this section sets forth the principal decisions reinterpreting the 1975 Act.

A. Beck v. State (1980)

Following the United States Supreme Court's decision in *Beck v. Alabama*, 447 U.S. 625, 100 S. Ct. 2382 (1980), holding the preclusion clause in the 1975 Act unconstitutional, the Alabama Supreme Court, in *Beck v. State*, entirely rewrote the jury sentencing procedures. The court in *Beck* transformed the mandatory jury verdict of death under § 13-11-2 into a permissive jury verdict and invented a new bifurcated jury sentencing hearing. The court established the set of aggravating circumstances that the jury could consider on the basis of those listed in § 13-11-2 of the 1975 statute. The court declared the jury's verdict binding in the event it could not agree on a death sentence. But the court did not alter, in any way, the court sentencing process required by Sections § 13-11-3 and 13-11-4 in the event of a jury verdict of death.

(1) Permissive Jury Sentencing

First, *Beck v. State* transformed the mandatory jury verdict of death into a permissive jury verdict. The statute, as written, would have required a jury to return a mandatory sentence of death on a guilty verdict. This was clear from § 13-11-2 and § 13-11-3: the first stated that: "If the jury finds the Defendant guilty, they *shall fix* the punishment at death…"; and the second began with "If the jury finds the Defendant guilty of one of the aggravated offenses listed in Section 2 hereof and *fixes* the punishment at death…" Clearly, the 1975 Act provided for a mandatory *jury* verdict of death.

The court in *Beck* refused to simply sever these two passages from the statute pursuant to the severance clause, because the court declared that the Alabama legislature intended to have jury participation in death sentencing. In other words, the element of jury participation was too "important to the general plan and operation of the law in its entirety *as reasonably to lead to the conclusion that it would not have been adopted if the legislature had perceived the invalidity of the part so held to be unconstitutional*." *Beck v. State*, 396 So. 2d at 658 (quoting *A. Bertolla & Sons v. State*, 24 So. 2d 23 (Ala. 1945)).

The court recognized, however, that the failure to sever the mandatory jury verdict of death, even if it were allowed to stand in combination with a

bifurcated sentencing proceeding (i.e. a separate sentencing trial after the guilt phase trial), "would be open to a constitutional challenge." *Beck*, 396 So. 2d at 660. In order to avoid any such constitutional challenge and to promote the legislative intent of passing a constitutional death penalty statute, the court did not sever, but instead rewrote the statute to make it a permissive jury verdict of death.

(2) New Jury Sentencing Procedures

The court in *Beck* then made up, out of whole cloth, a bifurcated jury sentencing procedure, relying on its "inherent power" under the Alabama Constitution's Judiciary Article, Amendment 328 of the Constitution of Alabama. The court established, first, a bifurcated jury hearing. It then ordered that, at that jury sentencing hearing, the jury would consider and weigh aggravating and mitigating circumstances.

(3) Aggravating Circumstances

The court in *Beck* then announced that the aggravating circumstances that the jury could consider at the bifurcated hearing would consist of the 14 elements of aggravation composing the 14 capital offenses listed in § 13-11-2, i.e. the list of aggravated offenses for purposes of guilt determination. In other words, instead of using the eight "aggravating circumstances" listed in § 13-11-6 that the sentencing court was supposed to consider at the court

sentencing hearing, the Alabama Supreme Court decided to use the 14 possible aggravating elements from § 13-11-2.

The court in *Beck* recognized that the list of aggravating circumstances in § 13-11-6 does not include every possible aggravating element from § 13-11-2. The court nevertheless intentionally decided to use the § 13-11-2 list, rather than the § 13-11-6 list, for purposes of the jury sentencing hearing. The court made this clear in the following passage of the *Beck* decision:

> Consequently, the jury verdict that the defendant was guilty of committing the capital offense would mean that the State had already established at least one aggravating circumstance, even though the legislature did not include an aggravating circumstance in Sec. 13-11-6 to correspond with the "aggravation" made a part of each capital offense by Sec. 13-11-2(a).

Beck v. State, 396 So. 2d at 663.

The court added that the jury could also consider any additional § 13-11-6 aggravating circumstances that were proven at the jury hearing above and beyond the aggravating circumstance from the offense that was proved at the guilt phase and used as the primary aggravating circumstance for the jury at the sentencing hearing.

(4) A Reinterpretation of "Averred in the Indictment"

In so doing, the *Beck* court interpreted the clause "averred in the indictment" from § 13-11-2 to refer to the 14 aggravated offenses.

Section 2, as written, required that a capital defendant be "charged by indictment with any of the following offenses *and with aggravation which must also be averred in the indictment…"* (emphasis added). This could have been read to mean either of two things:

i. the indictment must state the aggravated offense listed in Section 2 and indicate the aggravated offense element from Section 2; or

ii. the indictment must state the aggravated offense listed in Section 2 and indicate the aggravation as per Section 6.

Given the use of the words "and … also," the canonical reading of the statute would be the second reading, (ii), because under the first reading, (i), the legislature would not have needed to include the word "also" or, for that matter, the entire clause "and with aggravation which must also be averred in the indictment," since the indictment already included the charged aggravated offense. *See* Part III.A *supra*.

However, the court in *Beck* clearly read this clause redundantly to mean (i): the term "aggravation," according to the court, refers to the elements of aggravation in Section 2.

(5) Binding Jury Verdict of Life Without Parole

The final paragraph of the *Beck* decision suggests that if the jury is unable to unanimously agree on a sentence of death, then the defendant "shall be sentenced to life imprisonment without parole." *Beck v. State*, 396 So. 2d at 663. The Alabama Supreme Court, however, would reinterpret this passage in *Ex parte Hays*, *see infra.* The decision in *Beck*, though, did not alter in any way the court sentencing in the case of a jury verdict of death.

B. Ex parte Kyzer (1981)

The following year, in *Ex parte Kyzer*, the Alabama Supreme Court reinterpreted the 1975 Alabama Death Penalty Act to allow a court, at its death penalty sentencing hearing, to consider all § 13-11-2 offense elements (including §2(10) double intentional murder) as an aggravating factor under § 13-11-6 for purposes of death sentencing.

The court recognized that a "literal and technical reading" of the 1975 statute would have precluded a court from imposing death at the court sentencing hearing in a case where the only aggravation was § 13-11-2(10) double intentional murder. *Ex parte Kyzer*, 399 So. 2d at 337. The court declared, however, that this literal reading would entail an absurd and "completely illogical" result, and that the Alabama legislature could not have intended that outcome. The court stated: "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." *Id*., at 339.

Justice Jones, in his concurring opinion (dissenting on this question of statutory interpretation), correctly warned that the court's ruling in *Kyzer* cast the court "over the brink" of "the separation of power dichotomy." *Ex parte Kyzer*, 399 So. 2d at 340 (Jones, J., concurring). Twenty-five years later, the Alabama Supreme Court would agree.

C. Ex parte Hays (1986)

Five years later, in *Ex parte Hays*, the Alabama Supreme Court reinterpreted the final paragraph of its 1980 opinion in *Beck v. State* to allow for judicial override in the case of a jury sentence of life imprisonment without parole. Despite the plain language of the final paragraph in *Beck*, which had been interpreted by the leading authority, Professor Joseph Colquitt, as barring a court sentence of death if the jury was unable to agree on death, the court in *Ex parte Hays* declared that the first sentence of the paragraph referred only to the *jury's sentence* and was not intended to take away final sentencing authority from the trial court.[6]

[6] Note that the sentencing court would have retained final sentencing authority in any event and that it remained the sentencer—i.e. the authority that orders the sentence—even if it had no possibility of overriding a

The ruling in *Hays* was presented, in part, as a mere gloss on the *Beck* decision, therefore requiring no additional authority or legal support, and, in part, as implied by the fact that the legislature "did expressly empower the trial judge to override the *only* sentence the jury was authorized to recommend under the statute: death." *Ex parte Hays*, 518 So. 2d at 775.

D. Ex parte Stephens (2006)

Many years later, in 2006, in *Ex parte Stephens*, the Alabama Supreme Court overruled the *Kyzer* decision. The court there was addressing the new 1981 Alabama statute, but its ruling applied as well to the 1975 Act. The holding in *Stephens* limited the sentencing court's consideration of aggravating circumstances to the eight (8) aggravating circumstances expressly listed in § 13-11-6.

It is important to emphasize that the 1981 Alabama statute *did not include* double intentional homicide as an aggravating factor. This should be interpreted as an intentional legislative decision to *not include* double intentional homicide as an aggravating circumstance for the court to consider. This is important, because it reveals clearly the legislative intent of the 1975 Act: double intentional murder was not intended to be an

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sentence of life without parole. The court, not the jury, would have remained the institution that mandates the punishment, giving it full and final authority over sentencing.

aggravating circumstance for purposes of death sentencing. The omission was not accidental.

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Overall, this history of judicial reinterpretations of the 1975 Act is somewhat tortured and surprisingly activist. And under some of these reinterpretations, the 1975 Act may well apply to Mr. Tomlin. However, these reinterpretations do nothing to alter the original meaning of the statute: they do not change the fact that, in 1977 and 1978, on a plain reading of the statute, the 1975 Death Penalty Act did not cover the conduct and circumstances alleged against Mr. Tomlin.

V. 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.

1980 – The Alabama Supreme Court decides *Beck v. State*, 396 So. 2d 645 (Ala. 1980), converting the mandatory jury verdict of death into a permissive jury verdict and allowing the jury to consider the 14 § 2 capital offenses as aggravating circumstances at the jury sentencing hearing (including those that are not listed as aggravating circumstances under § 6, i.e. double intentional murder): ***this was unforeseeable and indefensible in 1977-1978.***

1981 – The Alabama Supreme Court decides *Ex parte Kyzer*, 399 So. 2d 330 (Ala. 1981), allowing the trial court to consider the 14 § 2 capital offenses as aggravating circumstances at the court sentencing hearing (including those that are not listed as aggravating circumstances under § 6, i.e. double intentional

murder): ***this was unforeseeable 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.

1986 – The Alabama Supreme Court decides *Ex parte Hays*, 518 So. 2d 768 (Ala. 1986), allowing the trial court to override a jury verdict of life imprisonment without parole under the 1975 statute: ***this was unforeseeable and indefensible in 1977-1978.***

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 unforeseeable 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 unforeseeable 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, trial courts may only consider the 8 aggravating circumstances explicitly enumerated in § 6 (which do not include double intentional murder).

From this chronology, it is clear that the judicial decisions in *Beck v. State* in 1980, *Ex parte Kyzer* in 1981, and *Ex parte Hays* in 1986 were unforeseeable and indefensible reinterpretations that altered the plain meaning of the 1975 Act, in violation of *Bouie* and *Rogers*.

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 are 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

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. Mr. Tomlin's case involves a then-recently enacted statutory provision that should have bound the courts. Under these circumstances, the *Beck* and *Kyzer* decisions were clearly "unexpected and indefensible."

In fact, the decision in *Kyzer* has already been held by this Court to be unexpected and indefensible. *Magwood v. Warden, Ala. Dep't of Corr.*, 664 F.3d 1340, 1349 (11th Cir. 2011). *Beck*, too, is unexpected and indefensible to the extent it failed to simply sever the jury verdict of death and invented, out of whole cloth, a jury penalty hearing at which the jury could consider, as an aggravating circumstance, any of the 14 elements of the Section 2 offenses. These rulings were unforeseeable and conflict with the plain language of the 1975 Act, much less the deferential construction required by the rule of lenity in Alabama.

In sum, Phillip Tomlin's sentence of life imprisonment without parole violates the *ex post facto* principle of fair notice at the heart of the Due Process Clause of the United States Constitution. *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964).

CONCLUSION

Under the 1975 Alabama Death Penalty Act, § 13-11-1, Ala. Code 1975, and all current judicial reinterpretations of that statute, the case against Phillip Tomlin *does not include* any § 13-11-6 aggravating circumstances. As a result, under § 13-11-4 and all current judicial reinterpretations, *no* trial court could ever sentence Mr. Tomlin to death, since no trial court could find "one or more of the aggravating circumstances enumerated in Section 6." § 13-11-4, Ala. Code 1975 (unmodified by *Beck v. State*, 396 So. 2d 645 (Ala. 1980) or any other current judicial reinterpretation).

For this reason, Mr. Tomlin is not death eligible under the 1975 Act and could not be indicted under § 13-11-2(10), Ala. Code 1975. No sentencing court could decide to *depart downward* from the jury's 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 *Beck* (1980), *Kyzer* (1981), *Hays* (1986), or *Stephens* (2006) to support a sentence of life imprisonment without parole would amount to an improper retroactive application of a later judicial decision, 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).

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,000 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Eleventh Circuit Rule 32-4. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word, in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that on October 6, 2014, I electronically filed the foregoing motion with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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