**IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA**

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| PHILLIP WAYNE TOMLIN,<br><br>Petitioner,<br>v.<br><br>TONY PATTERSON, Warden,<br>Holman Correctional Facility,<br><br>Respondent. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | Civil Action No.<br>10-120-CG-C |

**MOTION FOR RECONSIDERATION**

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Dated: May 16, 2018

**MOTION FOR RECONSIDERATION**

Petitioner Phillip Wayne Tomlin respectfully requests that this Court reconsider its Order filed on April 19, 2018, pursuant to Fed. R. Civ. P. 59 and 60. The motion is timely under Rule 59(e), which permits a party to file a motion to alter or amend a judgment within 28 days of the entry of the judgment. This motion for reconsideration is also timely under Rule 60(c), which requires such a motion to be made "within a reasonable time—and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or date of the proceeding."

Fed. R. Civ. P. 60(b) allows relief from an order under certain circumstances, including any "reason that justifies relief." Fed. R. Civ. P. 60(b)(2), (6). Fed. R. P. 59(e) permits a party to file a "motion to alter or amend a judgment" within 28 days of the entry of the judgment.

It is well established that "[a] motion for reconsideration made after final judgment falls within the ambit of either [Federal Rule of Civil Procedure] 59(e) (motion to alter or amend a judgment) or Rule 60(b) (motion for relief from judgment or order)." *Region 8 Forest Serv. Timber Purchasers Council v. Alcock*, 993 F.2d 800, 806 n.5 (11th Cir. 1993) (citing *Inglese v. Warden*, 687 F.2d 362, 363 n.1 (11th Cir. 1982); *see also Bd. of Trustees of the U. of Ala. v. Houndstooth Mafia Enterprises LLC*, 163 F.Supp.3d 1150, 1163 n.13 (N.D. Ala. 2016). It is also clear that the decision "[w]hether to grant a motion for reconsideration under Federal Rule of Civil Procedure 59(e) or 60(b) is within the discretion of the trial court." *Ballantine v. BancorpSouth Bank*, No. 2:17-CV-01441-KOB, 2018 WL 348008, at * 1 (N.D. Ala. Jan. 10, 2018) (Slip Op.) (citing *Smith v. Casey*, 741 F.3d 1236, 1241 (11th Cir. 2014)).

"A court may relieve a party from an order for mistake, inadvertence, or any other reason that justifies relief. A motion to reconsider 'must demonstrate why the court should reconsider its prior decision and 'set forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision.'" *Id.* (quoting *Fidelity & Deposit of Maryland v. Am. Consertech, Inc*, 2008 WL 4080270, at *1 (S.D. Ala. Aug. 28, 2008)).

"Generally, three grounds justify reconsideration of an order: (1) an intervening change in the law, (2) the availability of new evidence, and (3) the need to correct a clear error or manifest injustice." *United States v. AseraCare Inc.*, No. 2:12-CV-245-KOB, 2015 WL 13658069, at *1 (N.D. Ala. June 25, 2015) (citing *Sussman v. Salem, Saxon & Neilson, P.A.,* 153 F.R.D. 689, 694 (M.D. Fla. 1994)).

Here, the District Court's Order contains clear error and manifest injustice.

## I. THIS COURT'S INTERPRETATION OF THE 1975 ALABAMA DEATH PENALTY STATUTE IS CLEARLY ERRONEOUS

On page 44 of its Order, this Court rejects Mr. Tomlin's interpretation of the 1975 Alabama Death Penalty Act and concludes that "fair-minded jurists could agree that the plain language of the 1975 Act gave Petitioner notice that the minimum sentence he would face upon conviction is life imprisonment without parole if he was not found to be 'death eligible.'" *Slip Op.*, at p. 44.

That conclusion, however, is clearly erroneous and in *direct contradiction* to the *plain and literal* language of §13-11-2(c) of the 1975 Act, which, as applied to Mr. Tomlin, states in unambiguous words, that he could *not* be sentenced to life imprisonment without parole if reindicted:

> [T]he Defendant may be tried again for the aggravated offense, or he may be reindicted for an offense wherein the indictment does not allege an aggravated circumstance. If the Defendant is reindicted for an offense wherein the indictment does not allege an aggravated circumstance, the punishment upon conviction shall be as heretofore or hereafter provided by law, *however the punishment shall not be death or life imprisonment without parole*.

§13-11-2(c) (last sentence; *emphasis added*), 1975 Alabama Death Penalty Act.

The 1975 Act simply and explicitly states what would happen in Mr. Tomlin's case and literally provides that "the punishment shall not be death or life imprisonment without parole." *Id*. As this Court is well aware, the "indictment, which controls Petitioner's present sentence," does not allege an aggravated circumstance. *Slip Op.* at p. 3. Therefore it is inconceivable that Mr. Tomlin had "notice that the minimum sentence" could be life imprisonment without parole—the literal words of the statute say otherwise.

For this reason, and all the explanation and reasons in Mr. Tomlin's Main and Reply briefs, this Court's conclusion is clear error.

## II. THIS COURT'S ORDER IS TRUNCATED AND MISSING SECTION III.C.iii ADDRESSING WHETHER THE STATE COURT'S DECISION IS CONTRARY TO *ROGERS*.

This Court's decision is missing the most important section. After setting forth the "Clearly Established Federal Law" in Section III.A, and addressing first, in subsection (i) *Bouie v. City of Columbia*, *see Slip Op.* at p. 21, and second, in subsection (ii) *Rogers v. Tennessee*, *see Slip Op.* at p. 23, the Court turns in Section III.C to the "AEDPA Analysis of the State Court's Decision." *See Slip Op.* at p. 31. The Court then addresses and holds, in subsection (ii), that "The State Court Decision Is Not Contrary to *Bouie*," *see Slip Op.*

at p. 33, but fails to address in another section whether the state court's decision is contrary to *Rogers v. Tennessee*, 532 U.S. 451 (2001).

Had this Court properly addressed whether the state court decision is clearly contrary to *Rogers*, the Court would have had to conclude that it is. *See* Petitioner's Main Brief, Doc. 46, at p. 37. *Rogers* made clear that the test under *Bouie* is limited to the simple question whether a judicial reinterpretation of a statute is "unexpected and indefensible." *Rogers,* 532 U.S. at 461. It is under that clarified *Rogers* standard that the Eleventh Circuit held that the Alabama Supreme Court's decision in *Ex parte Kyzer*, 399 So.2d 330 (1981), is "unexpected and indefensible," and that this was clearly established Federal law, *see Magwood v. Warden*, 664 F.3d 1340, 1348 (11th Cir. 2011)—and note that *Kyzer* is the only way to get around the explicit and literal language of §13-11-2(c) quoted above.

To be sure, there may be ways to distinguish *Magwood* from Mr. Tomlin's case, but none of those undermine in any way the *key holding*, for present purposes, that *Kyzer* was an unexpected and indefensible reading of the 1975 Act and that this is clearly established Federal law for purposes of the AEDPA. Under *Rogers* and *Magwood*, Mr. Tomlin is entitled to relief.

## CONCLUSION

For these reasons, and all the reasons articulated in his Main and Reply Briefs to this Court, Mr. Tomlin respectfully urges the Court to amend and correct its Order and grant Mr. Tomlin habeas corpus.

Respectfully submitted,

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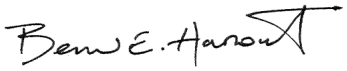
Dated: May 16, 2018

CERTIFICATE OF SERVICE

I hereby certify that on May 16, 2018, I electronically filed this motion with the Court using the ECF process, which automatically serves a copy of the pleading to counsel at the Attorney General's Office, James Roy Houts.



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