No.________________

OCTOBER TERM 2017

IN THE
SUPREME COURT OF THE UNITED STATES

CHARLES BURTON,
Petitioner,

v.

STATE OF ALABAMA,
Respondent

On Petition for a Writ of Certiorari
to the Alabama Supreme Court

APPLICATION TO THE HONORABLE JUSTICE CLARENCE THOMAS
FOR EXTENSION OF TIME TO FILE A PETITION
FOR A WRIT OF CERTIORARI TO THE ALABAMA SUPREME COURT

CAPITAL CASE -- NO EXECUTION DATE PENDING

* * * * * * * * * * * *

To the Honorable Justice Clarence Thomas, Associate Justice of the Supreme Court of the United States and Circuit Justice for the United States Court of Appeals for the Eleventh Circuit, wherein the State of Alabama is situated:

Petitioner, by undersigned counsel, pursuant to Supreme Court Rules 13.5 and 30.2, respectfully requests that this Court grant him a forty-three (43) day extension within which to file

a Petition for a Writ of Certiorari to the Alabama Supreme Court, rendering his petition due on or before Friday, August 31, 2018. This Court has jurisdiction under 28 U.S.C. § 1257(a).

The Federal Defender's office for the Middle District of Alabama was appointed to represent the Petitioner, who is indigent and has pursued all steps in his litigation *in forma pauperis*, in his original federal habeas corpus proceedings. A copy of the order of appointment is attached as attachment A.[1] Undersigned counsel, an Assistant Federal Defender with the Middle District of Alabama, represented the petitioner as lead counsel during the latter years while was in district court, and then also on appeal to the Eleventh Circuit and to this Court. Undersigned counsel thereafter worked in cooperation with Dustin J. Fowler,[2] a volunteer Alabama attorney, in the prosecution of a separate habeas petition brought in the Alabama courts, the denial of which forms the basis for this appeal.[3]

The judgment of the Alabama Supreme Court denying Mr. Burton's petition for a writ of certiorari to the Alabama Court of Criminal Appeals was entered on April 20, 2018. A copy of the judgment is attached as attachment D. The last reasoned state court decision of the Alabama Court of Criminal Appeals is attached as attachment E. A petition for a writ of certiorari is due to be filed in this Court on or before July 19, 2018.

This death penalty case presents two significant issues. The first issue involves the proper application of this Court's precedents in *Enmund v. Florida*, 458 U.S. 782, 788 (1982); *Tison v. Arizona*, 481 U.S. 137, 154 (1987); *Roper v. Simmons*, 543 U.S. 551, 568-69 (2005); and *Atkins*

---

[1] Leslie S. Smith, an attorney with the Federal Defender's office, was originally appointed. (See attachment A). The district court later granted Ms. Smith's motion to withdraw due to her active military service (attachment B) by text order. Other attorneys from the Federal Defender's office subsequently filed notices of appearance, including undersigned counsel. (Attachment C).
[2] Mr. Fowler is not a member of the bar of this Court.
[3] In addition to representing Mr. Burton pursuant to the Criminal Justice Act, undersigned counsel is now a member of the bar of this Court.

v. Virginia, 536 U.S. 304, 321 (2002), where Mr. Burton, a non-shooter who neither directed nor witnessed the shooting, is subject to the death penalty while the actual shooter is not. The second issue involves the proper application of *Ring v. Arizona*, 536 U.S. 584 (2002), and *Hurst v. Florida*, 136 S. Ct. 616 (2016), where the jury was informed that its death verdict was a mere "recommendation" and not binding.

Supreme Court Rule 13.5 permits a Justice of this Court, "for good cause," to extend the time to file a petition for a writ of certiorari for a period not exceeding sixty (60) days. The application must be received by the Clerk at least ten (10) days before the petition is due, except in extraordinary circumstances. Rules 13.5, 30.2. This request for an extension of time is being sent by overnight mail twenty-eight (28) days before the petition is due.

Undersigned counsel believes that there is good cause to justify the requested extension of time. Undersigned counsel is an attorney in the Capital Habeas Unit for the Federal Defender Office in the Middle District. As such, he maintains a substantial caseload of capital habeas clients, and assists a number of other attorneys representing numerous Alabama inmates under death sentences in the Middle District of Alabama. Those attorneys, including undersigned counsel, have numerous cases pending in federal district court, the Eleventh Circuit Court of Appeals, and this Court. Undersigned counsel is also assisting an Alabama attorney on a death penalty appeal, briefing for which is due in early July. Undersigned counsel is also assigned to and/or assisting with some non-capital trial cases due to a recent spike in federal arrests in the Middle District of Alabama and is also assisting other attorneys in the office on a lethal injection challenge in federal district court. In addition, undersigned counsel has had substantial responsibilities and demands on his time assisting his wife through on-going medical treatments.

Wherefore, in order to afford undersigned counsel the opportunity to best apprise this Court of the relevant facts and law, Petitioner respectfully requests that an order be entered extending his time to petition for certiorari by forty-three (43) days, rendering his petition due on or before Friday, August 31, 2018.

Respectfully submitted,

Matt D. Schulz
Supreme Court Bar #306494
Counsel of Record
Assistant Federal Defender
Federal Defenders
Middle District of Alabama
817 S. Court Street
Montgomery, Alabama 36104

Certificate of Service

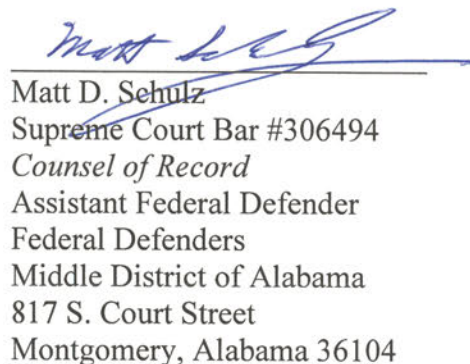
I, Matt D. Schulz, hereby certify that on June 21, 2018 a copy of this Application for Extension of Time to File a Petition for Writ of Certiorari in the above entitled case was mailed, first class postage pre-paid, to counsel for Respondent herein, listed below, in compliance with Rule 29(3) and a copy was emails to counsel on June 21, 2018 as well. I further certify that all parties required to be served have been served.

Andrew Brasher
Solicitor General
ABrasher@ago.state.al.us

J. Clayton Crenshaw
Assistant Attorney General
ccrenshaw@ago.state.al.us

Office of the Attorney General
Capital Litigation Division
501 Washington Avenue
P.O. Box 300152
Montgomery, AL 36130

Counsel for the Commissioner



Matt D. Schulz
Supreme Court Bar #306494
Counsel of Record
Assistant Federal Defender
Federal Defenders
Middle District of Alabama
817 S. Court Street
Montgomery, Alabama 36104

ATTACHMENTS TABLE OF CONTENTS

U.S. District Court order appointing Federal Defender/Leslie Smith	Attachment A
U.S. District Court order granting Attorney Smith's Motion To Withdraw Due to Military Service	Attachment B
Notice of Appearance for Attorney Matt D. Schulz	Attachment C
Alabama Supreme Court Certificate of Judgement *Charles Lee Burton v. State of Alabama*	Attachment D
Alabama Court of Criminal Appeals Memorandum Opinion *Charles Lee Burton v. State of Alabama* CR-16-0812	Attachment E

ATTACHMENT A

FILED
2005 Feb-16 AM 09:14
U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION

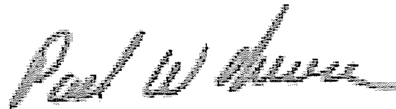
CHARLES L. BURTON, JR.,	)	
	)	
Petitioner,	)	
	)	
v.	)	CV 05-S-0308-M
	)	
DONAL CAMPBELL, Commissioner, Alabama Department of Corrections,	)	
	)	
Respondents.	)	

ORDER

This matter is before the court on the motion of petitioner's counsel for appointment pursuant to the Criminal Justice Act. Upon consideration of the motion it is hereby ORDERED that Leslie S. Smith is APPOINTED under the Criminal Justice Act (18 U.S.C. § 3006A) for the purpose of preparing and filing a habeas petition under 28 U.S.C. § 2254 on behalf of the petitioner and to thereafter represent him concerning the same.

The clerk is DIRECTED to serve a copy of this order upon counsel of record.

As to the foregoing it is SO ORDERED this the 15th day of February, 2005.



PAUL W. GREENE
CHIEF MAGISTRATE JUDGE

ATTACHMENT B

FILED
2008 Feb-22 PM 02:53
U.S. DISTRICT COURT
N.D. OF ALABAMA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION

CHARLES L. BURTON, JR.,	)	
Petitioner,	)	
	)	
vs.	)	Case No.: 4:05-cv-00308-CLS-PWG
	)	DEATH PENALTY CASE
DONAL CAMPBELL, Commissioner,	)	
Alabama Department of Corrections,	)	
	)	
Respondent.	)	

MOTION TO WITHDRAW AS COUNSEL

Comes now, the undersigned counsel for Petitioner, Leslie S. Smith, to submit her Motion to Withdraw for the reason which follows:

Counsel is an officer in the United States Army Reserve, who has been called to active duty for deployment for 400 days, beginning on February 21, 2008. As such, counsel will be unable to continue representing Petitioner and motions this Court to permit her withdrawal.

For the foregoing reason, undersigned counsel respectfully requests that this Motion be granted.

Respectfully submitted,

/s/ Leslie S. Smith
Leslie S. Smith, ASB-0785-T71L
FEDERAL DEFENDERS
MIDDLE DISTRICT OF ALABAMA
201 Monroe Street, Suite 407
Montgomery, AL 36104
Tel. (334) 834-2099
Fax. (334) 834-0353
Leslie_Smith@fd.org

Counsel for Charles L. Burton, Jr.

CERTIFICATE OF SERVICE

I hereby certify that on February 22, 2008, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

Beth Jackson Hughes, Esq.
Assistant Attorney General

Pamela L. Casey
Assistant Attorney General

Office of the Attorney General
11 South Union Street
Montgomery, AL 36130
Tel.: (334) 242-7300
Fax: (334) 353-8440
Email: pcasey@ago.state.al.us

/s/ Leslie S. Smith
Leslie S. Smith, ASB-0785-T71L
FEDERAL DEFENDERS
MIDDLE DISTRICT OF ALABAMA
201 Monroe Street, Suite 407
Montgomery, AL 36104
Tel. (334) 834-2099
Fax. (334) 834-0353
Leslie_Smith@fd.org

Counsel for Charles L. Burton, Jr.

ATTACHMENT C

FILED
2008 Aug-14 PM 12:48
U.S. DISTRICT COURT
N.D. OF ALABAMA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION

CHARLES L. BURTON, JR.,	)	
Petitioner,	)	
	)	
vs.	)	Case No.: 4:05-cv-00308-CLS-PWG
	)	DEATH PENALTY CASE
DONAL CAMPBELL, Commissioner,	)	
Alabama Department of Corrections,	)	
	)	
Respondent.	)	

NOTICE OF APPEARANCE

COMES NOW the undersigned counsel, Matt D. Schulz, and enters his appearance on behalf of Petitioner, Charles L. Burton, Jr., in the above-styled case.

Dated this 14th day of August 2008.

Respectfully submitted,

/s/ Matt D. Schulz
MATT D. SCHULZ
Nebraska Bar No.: 22968
Attorney for Charles L. Burton, Jr.
FEDERAL DEFENDERS
MIDDLE DISTRICT OF ALABAMA
201 Monroe Street, Suite 407
Montgomery, AL 36104
TEL: (334) 834-2099
FAX: (334) 834-0353
Matt_Schulz@fd.org

CERTIFICATE OF SERVICE

I hereby certify that on August 14, 2008, a copy of the foregoing has been electronically filed with the Clerk of the Court using the CM/ECF system, which will electronically send a copy of the same to each of the following:

Beth Jackson Hughes, Esq.
Assistant Attorney General

Pamela L. Casey
Assistant Attorney General

Office of the Attorney General
11 South Union Street
Montgomery, AL 36130
Tel.: (334) 242-7300
Fax: (334) 353-8440
Email: pcasey@ago.state.al.us

/s/ Matt D. Schulz
MATT D. SCHULZ
Nebraska Bar No.: 22968
Attorney for Charles L. Burton, Jr.
FEDERAL DEFENDERS
MIDDLE DISTRICT OF ALABAMA
201 Monroe Street, Suite 407
Montgomery, AL 36104
TEL: (334) 834-2099
FAX: (334) 834-0353
Matt_Schulz@fd.org

ATTACHMENT D

IN THE SUPREME COURT OF ALABAMA

April 20, 2018

1170536

Ex parte Charles Lee Burton. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Charles Lee Burton v. State of Alabama) (Talladega Circuit Court: CC-91-341.61; Criminal Appeals : CR-16-0812).

CERTIFICATE OF JUDGMENT

WHEREAS, the petition for writ of certiorari in the above referenced cause has been duly submitted and considered by the Supreme Court of Alabama and the judgment indicated below was entered in this cause on April 20, 2018:

Writ Denied. No Opinion. Main, J. - Stuart, C.J., and Bolin, Parker, Shaw, Wise, Bryan, Sellers, and Mendheim, JJ., concur.

NOW, THEREFORE, pursuant to Rule 41, Ala. R. App. P., IT IS HEREBY ORDERED that this Court's judgment in this cause is certified on this date. IT IS FURTHER ORDERED that, unless otherwise ordered by this Court or agreed upon by the parties, the costs of this cause are hereby taxed as provided by Rule 35, Ala. R. App. P.

I, Julia J. Weller, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true, and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 20th day of April, 2018.

Julia Jordan Weller

Clerk, Supreme Court of Alabama

ATTACHMENT E

Rel: 02/02/2018
Notice: This unpublished memorandum should not be cited as precedent. See Rule 54, Ala.R.App.P. Rule 54(d), states, in part, that this memorandum "shall have no precedential value and shall not be cited in arguments or briefs and shall not be used by any court within this state, except for the purpose of establishing the application of the doctrine of law of the case, res judicata, collateral estoppel, double jeopardy, or procedural bar."

Court of Criminal Appeals

State of Alabama
Judicial Building, 300 Dexter Avenue
P. O. Box 301555
Montgomery, AL 36130-1555

MARY BECKER WINDOM
Presiding Judge
SAMUEL HENRY WELCH
J. ELIZABETH KELLUM
LILES C. BURKE
J. MICHAEL JOINER
Judges

D. Scott Mitchell
Clerk
Gerri Robinson
Assistant Clerk
(334) 229-0751
Fax (334) 229-0521

MEMORANDUM

CR-16-0812 Talladega Circuit Court CC-91-341.61

Charles Lee Burton v. State of Alabama

WELCH, Judge.

Charles Lee Burton, currently an inmate on death row at Holman Correctional Facility, appeals the circuit court's order summarily dismissing his second petition for postconviction relief filed pursuant to Rule 32, Ala. R. Crim. P.

In 1992, Burton was convicted of murdering Doug Battle during the course of a robbery, an offense defined as capital by § 13A-5-40(a)(2), Ala. Code 1975. The jury unanimously voted that Burton be sentenced to death. The circuit court

sentenced Burton to death. Burton's conviction and sentence were affirmed on direct appeal. See Burton v. State, 651 So. 2d 641 (Ala. Crim. App. 1993), aff'd, 651 So. 2d 659 (Ala. 1994). The United States Supreme Court denied certiorari review. See Burton v. Alabama, 514 U.S. 1115 (1995). This Court issued the certificate of judgment on January 6, 1995.

In 1996, Burton filed his first petition for postconviction relief attacking his capital-murder conviction and sentence of death. In 2001, the circuit court denied that petition. This Court affirmed the circuit court's denial by unpublished memorandum opinion. See Burton v. State, 910 So. 2d 831 (Ala. Crim. App. 2004) (table), and the Alabama Supreme Court denied certiorari review. See Ex parte Burton, 920 So. 2d 1139 (Ala. 2004) (table).[1]

In January 2017, Burton filed a second petition for postconviction relief in the Talladega Circuit Court. The State moved that that petition be dismissed. On March 31, 2017, the circuit court dismissed the petition. Burton moved that the court reconsider its order of dismissal. Burton then filed a notice of appeal to this Court.

On direct appeal, this Court stated the following facts surrounding Burton's conviction:

> "[O]n August 16, 1991, six men -- the appellant, Derrick DeBruce, Deon Long, LuJuan McCants, Willie Brantley, and Andre Jones -- robbed the occupants of the Auto Zone automobile parts store in Talladega, Alabama. During the course of the robbery, a customer, Doug Battle, was shot. He died as a result of a gunshot wound to the lower back, which pierced his chest. The trigger man was Derrick DeBruce.

---

[1]Burton also filed a petition for a writ of habeas corpus in the Northern District of Alabama. That petition was denied. The United States Court of Appeals for the Eleventh Circuit affirmed the lower court's denial of that petition. See Burton v. Commissioner, Alabama Dept. of Corrections, 700 F. 3d 1266 (11th Cir. 2012).

"The manager of the store, Larry McCardle, was at the cash register when an individual he identified as [Burton] entered the store, purchased some items, and asked him for the location of the restroom. McCardle testified that at this time another customer, whom he identified as DeBruce, was in the store. After [Burton] started walking to the restroom, DeBruce pulled a gun and told everyone in the store to get on the floor. At this point, [Burton] grabbed McCardle, pointed a gun at him and told him to take him to the safe. McCardle complied. Moments later McCardle heard yelling and gunshots.

"One of [Burton's] codefendant's, LuJuan McCants, testified that the six men involved in the robbery were at Barbara Spencer's house in Montgomery on April 16 talking about committing a robbery. He said that Deon Long, Charles Burton, and Derrick DeBruce left the Spencer house to get some guns. They agreed to meet at [Burton's] house. They left [Burton's] house in two cars and headed toward Birmingham. They exited the interstate at Sylacauga and proceeded to Talladega. In Talladega, they went to a carwash and discussed robbing the Auto Zone store. They left one car at the carwash and they all proceeded in the other car to the Auto Zone.

"McCants testified that [Burton] organized the criminal activity and that he told the others what to do during the robbery. [Burton] told McCants and Long to watch the door and told them that if he left the store that they should forget the robbery plans. McCants testified that [Burton] also told them that if anyone caused any trouble in the store to let him handle the situation. McCants also testified that everyone who went into the store had a gun except Deon Long. McCants said that they forced everyone in the store to get on the floor and that they then took their valuables. The victim, Battle, walked in while the robbery was in progress and McCants told him to get on the floor. Battle was having some difficulty getting on the floor and an argument

> ensued between DeBruce and Battle. DeBruce hit Battle and he fell to the ground. DeBruce then shot Battle in the back while he was lying face-down on the floor. McCants testified that all of the robbers had either left the store or were about to leave when DeBruce shot Battle. He said that [Burton] was among those who had already left the store at the time of the shooting. After all six left the store, they jumped in their car, picked up the other car at the carwash where they had left it, went to Barbara Spencer's house and divided the money.
>
> "....
>
> "Barbara Spencer testified that before the robbery, the six men had been at her house discussing how to commit a robbery. She said that they left her house in separate cars and that the appellant and Derrick DeBruce were riding together. She testified that they returned to her house later and appeared to be upset. They had a large amount of money and the appellant was telling the others how to divide it. Spencer said that they gave her $100 but that she gave the money to McCants."

<u>Burton</u>, 651 So. 2d at 643-44.

<u>Standard of Review</u>

Burton is appealing the circuit court's summary dismissal of his second petition that he filed pursuant to Rule 32, Ala. R. Crim. P. Rule 32.3, Ala. R. Crim. P., provides: "The petitioner shall have the burden of pleading and proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief."

A circuit court may summarily dismiss a Rule 32 petition

> "[i]f the court determines that the petition is not sufficiently specific, or is precluded, or fails to state a claim, or that no material issue of fact or law exists which would entitle the petitioner to relief under this rule and that no purpose would be

> served by any further proceedings, the court may either dismiss the petition or grant leave to file an amended petition."

Rule 32.7(d), Ala. R. Crim. P.

> "When reviewing a circuit court's summary dismissal of a postconviction petition '"[t]he standard of review this Court uses ... is whether the [circuit] court abused its discretion."' Lee v. State, 44 So. 3d 1145, 1149 (Ala. Crim. App. 2009) (quoting Hunt v. State, 940 So. 2d 1041, 1049 (Ala. Crim. App. 2005))."

Mays v. State, [Ms. CR-15-0978, October 21, 2016] ___ So. 3d ___, ___ (Ala. Crim. App. 2016). "'The sufficiency of pleadings in a Rule 32 petition is a question of law. "The standard of review for pure questions of law in criminal cases is de novo. Ex parte Key, 890 So. 2d 1056, 1059 (Ala. 2003)."'" Spencer v. State, 201 So. 3d 573, 582 (Ala. Crim. App. 2015), quoting Ex parte Beckworth, 190 So. 3d 571, 573 (Ala. 2013). "The plain error rule does not apply to Rule 32 proceedings, even if the case involves the death sentence." Burgess v. State, 962 So. 2d 272, 277 (Ala. Crim. App. 2005).

Furthermore,

> "[W]hen a Rule 32 petition is time-barred on its face, the petition must establish entitlement to the remedy afforded by the doctrine of equitable tolling. A petition that does not assert equitable tolling, or that asserts it but fails to state any principle of law or any fact that would entitle the petitioner to the equitable tolling of the applicable limitations provision, may be summarily dismissed...."

Ex parte Ward, 46 So. 3d 888, 897 (Ala. 2007).

> "'Because the limitations provision is mandatory and applies in all but the most extraordinary of circumstances, when a petition is time-barred on its face the petitioner bears the burden of demonstrating in his petition that there are such

> extraordinary circumstances justifying the application of the doctrine of equitable tolling.' Ex parte Ward, 46 So. 3d [897] at 897 [(Ala. 2007)]. 'A petition that does not assert equitable tolling, or that asserts it but fails to state any principle of law or any fact that would entitle the petitioner to the equitable tolling of the applicable limitations provision, may be summarily dismissed without a hearing.' Id. at 897-98."

Kuenzel v. State, 204 So. 3d 910, 916-17 (Ala. Crim. App. 2015).

With these principles in mind, we review the issues raised by Burton in his brief to this Court.[2]

I.

Burton first argues on appeal that his sentence of death should be set aside because, he says, his more culpable codefendant and triggerman, Derrick Anthony DeBruce, has had his sentence of death reduced to life imprisonment without parole.[3] Therefore, Burton argues, his death sentence is arbitrary, capricious, disproportionate and in violation of his constitutional rights under the Fifth, Sixth, Fourteenth, and Eighth, Amendments of the United States Constitution and a violation of Art 6. I, Section VI and XV of the Alabama

---

[2]Other issues were raised in Burton's postconviction proceedings that were not raised in Burton's brief to this Court. "[W]e will address only those issues presented in [Burton's] brief, the other issues are deemed abandoned." See Holloway v. State, 971 So. 2d 729, 731 (Ala. Crim. App. 2006).

[3]The United States Court of Appeals for the Eleventh Circuit set aside DeBruce's sentence of death after finding that he was deprived of the effective assistance of counsel at his sentencing hearing because counsel failed to investigate and present mitigation evidence. See DeBruce v. Commissioner, Alabama Dept. of Corrections, 758 F.3d 1263 (11th Cir. 2014). It appears that the State did not contest the Eleventh Circuit's ruling and agreed to settle the case by DeBruce receiving a sentence of life imprisonment without the possibility of parole.

Constitution. Thus, Burton argues, the circuit court erred in dismissing this claim.

The State first asserts that Burton's petition was barred by the statute of limitations in Rule 32.2(c), Ala. R. Crim. P., and was procedurally barred because it was a successive petition under Rule 32.2(b), Ala. R. Crim. P. The circuit court made the following findings:

> "Burton's successive petition arises under Rule 32.1(a) of the Alabama Rules of Criminal Procedure, in that it alleges that the constitution of the United States requires a new sentencing proceeding. Because his petition arises under Rule 32.1(a), Burton had to bring this petition within one year after the Court of Criminal Appeals issued a certificate of judgment on direct appeal in 1994. Ala. R. Crim. P. 32.2(c). Burton's Rule 32 petition ignores the statute of limitations time bar.
>
> "....
>
> "It is undisputed that Burton filed a Rule 32 petition in 1996. His present petition is thus a successive Rule 32 petition, and it is therefore barred under Rule 32.2(b) of the Alabama Rules of Criminal Procedure. Id. ('If a petitioner has previously filed a petition that challenges any judgement, all subsequent petitions by that petitioner challenging any judgment arising out of that same trial or guilty-plea proceeding shall be treated as successive petitions under this rule.'). Rule 32.2(b) instructs that Burton's petition must be denied unless it meets one of two criteria: (1) the trial court was without jurisdiction to render judgment or impose sentence, or (2) Burton shows both that good cause exists why the new ground or grounds were not known or could not have been ascertained through reasonable diligence when the first petition was heard, and that failure to entertain the petition will result in a miscarriage of justice. Id. He cannot make this showing.
>
> "....

"A. The trial court possessed jurisdiction to impose sentence.

"The first ground for circumventing the procedural bar on a successive Rule 32 petition is that the trial court 'was without jurisdiction to render a judgment or to impose sentence.' Ala. R. Crim. P. 32.2(b). Burton's petition is premised on the erroneous claim that he is categorically excluded from a death sentence because his co-defendant was more culpable and is not under a sentence of life imprisonment without parole. But this is not a jurisdictional claim. Burton never asserts that the court was without jurisdiction to try, convict, and sentence him, he only argues that he should not have received a death sentence because his co-defendant was more culpable. Further, Burton's sentence is not facially illegal; as an adult convicted of capital murder, Burton could receive the death penalty. Ala. Code § 13A-5-45(A). Thus, as Burton has not offered evidence that the court lacked jurisdiction to judge or sentence him, he has not shown that his case falls into the first exception to Rule 32.2(b) permitting successive petitions.

"....

"B. Burton has not shown that good cause exists as to why this claim was not known or could not have been ascertained through reasonable diligence when his first Rule 32 petition was heard.

"Turning then to the second exception to the Rule 32.2(b) bar, Burton has not and cannot show 'both that good cause exists why the new ground or grounds were not known or could not have been ascertained through reasonable diligence when the first petition was heard, and that failure to entertain the petition will result in a miscarriage of justice.' Ala. R. Crim. P. 32.2(b).

"Burton's claim regarding his co-defendant being more culpable could have been raised in his first

> Rule 32 petition. We know this because Burton raised this claim on direct appeal. In rejecting Burton's argument, the Court of Criminal Appeals stated the following, '[Burton] played a significant part in the robbery-murder. Although he was not the actual person to pull the trigger, [Burton's] degree of participation in the robbery-murder makes the application of the death sentence constitutional in this case.' Burton [v. State, 651 So. 2d [641] at 658-59 [(Ala. Crim. App. 1993)]. Thus, the underlying grounds for this claim were known and could have been raised in Burton's first Rule 32 proceedings. Thus, this claim is barred under the successive petition procedural bar."

(C. 178-81.)

Burton argues that this claim is jurisdictional; therefore, it is not barred based on Rules 32.2(b) and 32.2(c), Ala. R. Crim. App.[4] Burton relies on the case of Gamble v. State, 63 So. 3d 707 (Ala. Crim. App. 201), to support his argument. Indeed, Burton asserts that this Court's holding in Gamble is grounds to vacate his sentence of death. We do not agree. Our holding in Gamble does not support Burton's argument; in fact, the opposite is true.

In Gamble, the State appealed the circuit court's order setting aside Gamble's sentence of death after the court held that Gamble's death sentence was disproportionate to that of his codefendant who received a sentence of life imprisonment without parole. However, this Court reversed the circuit court's order and directed the lower court to reinstate Gamble's sentence of death. We stated:

> "Alabama recognizes that capital-murder codefendants have a right to an individualized sentencing determination and do not have to be

---

[4]"Jurisdictional claims are 'not precluded by the limitations period or by the rule against successive petitions.' Jones v. State, 724 So. 2d 75, 76 (Ala. Crim. App. 1998)." Mitchell v. State, 777 So. 2d 312, 313 n. 2 (Ala. Crim. App. 2000).

sentenced to the same punishment. 'To determine the appropriate sentence, the sentencer must engage in a "broad inquiry into all relevant mitigating evidence to allow an individualized determination."' Ex parte Smith, [213 So. 3d 214 (Ala. 2003)], quoting Buchanan v. Angelone, 522 U.S. 269, 276, 118 S.Ct. 757, 139 L.Ed.2d 702 (1998). As the Alabama Supreme Court stated in Ex parte McWhorter, 781 So. 2d 330 (Ala. 2000):

> "'The law does not require that each person involved in a crime receive the same sentence. Wright v. State, 494 So. 2d 726, 739 (Ala. Crim. App. 1985) (quoting Williams v. Illinois, 399 U.S. 235, 243, 90 S.Ct. 2018, 26 L.Ed.2d 586 (1970)). Appellate courts should "examine the penalty imposed upon the defendant in relation to that imposed upon his accomplices, if any." Beck v. State, 396 So. 2d 645, 664 (Ala. 1980). However, the sentences received by codefendants are not controlling per se, Hamm v. State, 564 So. 2d 453, 464 (Ala. Crim. App. 1989), and this Court has not required or directed that every person implicated in a crime receive the same punishment. Williams v. State, 461 So. 2d 834, 849 (Ala. Crim. App. 1983), rev'd on other grounds, 461 So. 2d 852 (Ala. 1984). "'There is not a simplistic rule that a co-defendant may not be sentenced to death when another co-defendant receives a lesser sentence.'" Id. (quoting Collins v. State, 243 Ga. 291, 253 S.E.2d 729 (1979)).'

"781 So. 2d at 344. The issue whether codefendants should be sentenced to the same punishment based on Alabama's proportionality review was addressed by the Alabama Supreme Court in Ex parte Thomas, 460 So. 2d 216 (Ala. 1984). The Court stated:

> "'The sentences received by co-defendants must be considered by this

> court in determining the appropriateness of a death sentence on appeal, Beck v. State, 396 So. 2d [645] 664 [(Ala. 1980)], but they are not controlling per se. (Appellant's contention that the trial court should have expressly considered the sentences received by appellant's co-defendants is answered in Coulter v. State, 438 So. 2d 336 (Ala. Cr. App. 1982), aff'd, 438 So. 2d 352 (Ala. 1983)). In that case, we affirmed the Court of Criminal Appeals holding the disproportionality question involving consideration of co-defendant sentences is something to be addressed by the appellate courts instead of at the trial level. Accord, Miller v. Florida, 459 U.S. 1158, 103 S.Ct. 802, 74 L.Ed.2d 1005 (1983) (Marshall, J., dissenting from denial of certiorari). Were they [sic], there would be no need for us to make the other inquiries we mandated in Beck.'

"460 So. 2d at 226-27. In Coulter v. State, 438 So. 2d 336 (Ala. Crim. App. 1982), we stated: 'In the sentencing phase of the trial, the fact that an alleged accomplice did not receive the death penalty is no more relevant as a mitigating factor for the defendant than the fact that an alleged accomplice did receive the death penalty would be as an aggravating circumstance against him.' 438 So. 2d at 345. See Ex parte Tomlin, 909 So. 2d 283 (Ala. 2003), citing Coulter, 438 So. 2d at 345: '[Tomlin's codefendant's] sentence cannot properly be used to undermine a mitigating circumstance.' Compare Ex parte Burgess, 811 So. 2d 617 (Ala. 2000) (Supreme Court directed trial court to consider fact that Burgess was the only one of six participants in the murder who was prosecuted for the offense).

"First, we question whether the issue of the proportionality of Gamble's sentence to that of his codefendant's was properly before the Rule 32 court given that the Supreme Court in Thomas held that a

proportionality review is conducted by an appellate court and not a trial court. See § 13A-5-53, Ala. Code 1975. Section 13A-5-53(b), Ala. Code 1975, states that the Alabama Court of Criminal Appeals, subject to review by the Alabama Supreme Court, shall determine: '(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.'

"Second, in Alabama a defendant convicted of capital murder is entitled to an individualized sentencing determination. 'What is important ... is an individualized determination on the basis of the character of the individual and the circumstances of the crime.' Zant v. Stephens, 462 U.S. 862, 879, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). '"Because of 'the need for individualized consideration as a constitutional requirement in imposing the death sentence,' Lockett v. Ohio, 438 U.S. 586, 605 (1978), the focus must be on the defendant."' Gavin v. State, 891 So. 2d 907, 994 (Ala. Crim. App. 2003), quoting Wright v. State, 494 So. 2d 726, 740 (Ala. Crim. App. 1985). Here, the circuit court, when setting aside Gamble's death penalty, based its decision on the fact that his codefendant was sentenced to life imprisonment. As the Florida Supreme Court stated in Farina:

> "'The reason [the codefendant] did not receive the death penalty, however, had nothing to do with the circumstances of the crime or the presence or absence of aggravating or mitigating factors. The basis was purely legal: we had held in Brennan [v. State], 754 So. 2d [1] at 1 [(Fla. 1999)], that the imposition of a sentence of death on a sixteen-year-old defendant constitutes cruel and unusual punishment, and Jeffrey was sixteen years old at the time of these murders. See Farina [v. State], 763 So. 2d [302] at 303 [(Fla. 1999)] (citing Brennan, 754 So. 2d at 5-6). Thus, whereas in Scott [v.

Dugger, 604 So. 2d 465 (Fla. 1992)], a jury analyzed the facts and, considering the aggravating and mitigating circumstances, recommended a sentence of life, in this case, despite a jury recommendation of a sentence of death, and the trial court's imposition of such a sentence, this Court concluded as a matter of law that Jeffery was ineligible for the death penalty. See id. Unlike Scott, Jeffrey's sentence reduction has no connection to the nature or circumstances of the crime or to the defendant's character or record. Under Lockett [v. Ohio], [438 U.S. 586 (1978),] it is irrelevant as a mitigating circumstance in Anthony's case.'

"937 So. 2d at 620.

"Third, Gamble presented this claim to the circuit court in a motion to amend his petition to allege a 'newly-cognizable constitutional claim' that his death sentence was now disproportionate given that his codefendant's death sentence had been vacated based on Roper v. Simmons, supra. However, there is no constitutional right to a proportionality review in death-penalty cases. As the United States Supreme Court stated in Pulley v. Harris, 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984): 'comparative proportionality review is not constitutionally required in every state court death sentence review.... In fact, the United States Supreme Court has specifically rejected the claim that a capital defendant can prove an Eighth Amendment violation "by demonstrating that other defendants who may be similarly situated did not receive the death penalty."' 465 U.S. at 43, 104 S.Ct. 871. In Alabama, § 13A-5-53(b)(3), Ala. Code 1975, provides that a proportionality review be conducted by the appellate court on every death sentence; however, this statute does not apply to the circuit court."

Gamble, 63 So. 3d at 726-29 (footnote omitted).

Although this Court in Gamble did not have occasion to address the procedural defects and their affect on the underlying claim on the merits; this Court has previously addressed the same claim in Samra v. State, 152 So. 3d 456 (Ala. Crim. App. 2012) (table). In Samra, the defendant's codefendant had his sentence of death reduced to life imprisonment based on the United States Supreme Court's decision in Roper v. Simmons, 543 U.S. 551 (2005). In his second postconviction petition, Samra argued that his death sentence should be vacated because his more culpable codefendant had had his sentence of death reduced to life imprisonment. The circuit court found that the petition was barred because it was filed after the expiration of the time period allowed for filing a petition and the issue was not a jurisdictional issue that would be exempt from the time period or the rule barring successive petitions. This Court affirmed the circuit court's dismissal by unpublished memorandum opinion. See Samra, supra. Samra then filed a petition for a writ of habeas corpus petition in the Northern District of Alabama. The federal court affirmed this Court's holding and stated the following:

> "Samra now raises the same Eighth Amendment claim because this Court, and because the ACCA [Alabama Court of Criminal Appeals] not only ruled that the claim was barred by state procedural rules but also denied the claim on its merits, this Court must determine whether the ACCA's merits determination "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings pursuant to § 2254(d)(1)-(2). See Ward [v. Hall], 592 F.3d 1144 [(11th Cir. 2010)] (in order for a state court's procedural ruling to constitute an independent and adequate state rule of decision and thus preclude federal court review, 'the last state court rendering a judgment in the case must clearly and expressly state that it is relying on state procedural rules to resolve the federal claim without reaching the merits of that

claim') (internal quotation marks and citation omitted).

"To that end, Samra contends that the ACCA's decision affirming the death penalty imposed upon him was an unreasonable application of the principle of proportionality in criminal sentencing pursuant to Kennedy v. Louisiana, 554 U.S. 407, 128 S.Ct. 2641, 171 L.Ed.2d 525 (2008); Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002); Harmelin v. Michigan, 501 U.S. 957, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991); Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); Miller v. Alabama, [567] U.S. [460], 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012); and Roper [v. Simmons, 543 U.S. 551 (2005)]. As an initial matter, none of the cases cited by Samra holds that a capital murder defendant has an Eighth Amendment right to have his death sentence vacated solely because his co-defendant received a lesser sentence than the death penalty. See Washington v. Crosby, 324 F.3d 1263, 1265 (11th Cir. 2003) (indicating that a petitioner must cite to Supreme Court precedent that confronts nearly identical facts but reaches the opposite conclusion in order to show that a state court decisions was contrary to law). To the contrary, and as discussed by the ACCA, such a bright-line rule would violate Supreme Court precedent mandating that a defendant is entitled to an individualized sentencing determination. See Lockett v. Ohio, 438 U.S. 586, 605, 98 S.Ct. 2954, 2965, 57 L.Ed.2d 973 (1978) ('Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases.'); Williams v. Illinois, 399 U.S. 235, 243, 90 S.Ct. 2018, 2023, 26 L.Ed.2d 586 (1970) ('[T]here is no requirement that two persons convicted of the same offense receive identical sentences.'); Zant v. Stephens, 462 U.S. 862, 879, 103 S.Ct. 2733, 2743-44, 77 L.Ed.2d 235 (1983) ('What is important ... is an individualized determination on the basis of the character of the individual and the circumstances of

the crime.').

"Thus, while 'proportionality' in criminal sentence has been described by the Supreme Court as 'an abstract evaluation of the appropriateness of a sentence for a particular crime,' Pulley v. Harris, 465 U.S. 37, 42-43, 104 S.Ct. 871, 875, 79 L.Ed.2d 29 (1984) (internal citations omitted), Samra is not arguing that his sentence is 'disproportionate to the crime in the traditional sense.' Id. at 43; 104 S.Ct. at 875. In other words, he does not deny that he killed four people in the course of one scheme or course of conduct, the penalty for which can be death under Alabama law. The type of proportionality review Samra is seeking is 'of a different sort,' see id., 104 S.Ct. at 876, a consideration of the appropriateness of his sentence in light of his co-defendant Duke's lesser sentence. However, and as stated by the ACCA, the Supreme Court has held that '[c]omparative proportionality review is not constitutionally required in every state court death sentence review.' Id. at 50-51, 104 S.Ct. at 879 (considering whether the Eighth and Fourteenth Amendments require a state appellate court, before it affirms a death sentence, to compare the sentence in the case before it with the penalties imposed in similar cases if requested to do so by the prisoner, and holding that they do not). Moreover, as also stated by the ACCA, the Supreme Court has rejected a defendant's attempt to 'prove a[n] [Eighth Amendment] violation by demonstrating that other defendants who may be similarly situated did not receive the death penalty.' McCleskey v. Kemp, 481 U.S. 279, 306-07, 107 S.Ct. 1756, 1775, 95 L.Ed.2d 262 (1987) (emphasis in original).

"This rule is especially appropriate in this case, considering the fact that the reason that Mark Duke did not receive the death penalty had nothing to do with the circumstances of Duke and Samra's crime or the presence or absence of aggravating or mitigating factors. The basis was purely legal. Despite the fact that a jury analyzed the facts and

> considered the aggravating and mitigating circumstances and recommended that Duke be sentenced to death, and the trial court imposed such a sentence, the court later concluded as a matter of law that Duke was ineligible for the death penalty. Duke's sentence reduction has no connection to the nature or circumstances of the crime or to Samra's character or record. Under Lockett, Duke's sentence reduction is irrelevant as a mitigating circumstance in Samra's case. See 438 U.S. at 605, 98 S.Ct. at 2965."

Samra v. Price, [No. 2:07-CV-1962-LSC, September 5, 2014] (not reported in F. Supp. 3d.) See also United States v. Mitchell, 495 F.3d 295 (6th Cir. 2007) ("Getsy's proportionality argument rests on a claim that his death sentence is disproportionate only by comparison to [his codefendant's] life sentence. In Pulley[v. Harris, 465 U.S. 37 (1984)], the Supreme Court considered the precise argument asserted by Getsy -- that the Constitution demands a comparative proportionality review that 'purports to inquire ... whether the penalty is ... unacceptable in a particular case because [it is] disproportionate to the punishment imposed on others convicted of the same crime.'"); United States v. Johnson, 495 F.3d 951 (8th Cir. 2007)("Johnson contends that the Eighth Amendment requires not only proportionality between a sentence and a particular category of crime, but also proportionality between codefendants' sentences. We disagree. The Supreme Court has rejected similar contentions, noting in McCleskey v. Kemp, 481 U.S. 279, 306-07, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987), that a defendant cannot 'prove a constitutional violation by demonstrating that other defendants who may be similarly situated did not receive the death penalty.' Id.; see also United States v. Chauncey, 420 F.3d 864, 876 (8th Cir. 2005) (remarking that 'a defendant's sentence is not disproportionate merely because it exceeds his codefendant's sentence'), cert. denied, 547 U.S. 1009, 126 S.Ct. 1480, 164 L.Ed.2d 258 (2006).").

We agree with the circuit court that this claim was not jurisdictional; therefore, it was barred by the statute of limitations contained in Rule 32.2(c), Ala. R. Crim. P.

Also,

> "[a] successive petition on different grounds shall be denied unless (1) the petitioner is entitled to relief on the ground that the court was without jurisdiction to render a judgment or to impose sentence of (2) the petitioner shows both that good cause exists why the new ground or grounds were not known or could not have been ascertained through reasonable diligence when the first petition was heard, and that failure to entertain the petition will result in a miscarriage of justice."

Burton failed to satisfy the requirements of Rule 32.2(b), Ala. R. Crim. P., when filing a successive petition. Thus, this claim was also barred because it was raised in a successive petition under Rule 32.2(b), Ala. R. Crim. P. Burton was due no relief on this claim.

II.

Burton next argues that Alabama's death penalty statute violates the right to trial by jury under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Specifically, Burton relies on the United States Supreme Court's decision in Hurst v. Florida, 577 U.S. ___, 136 S.Ct. 616 (2016), and argues that because the Supreme Court invalidated Florida's death penalty statute, Alabama's statute, which he claims is identical to Florida's statute warrants that his sentence of death be vacated. Burton argues the following in this brief: (1) "The Hurst Court held that a death penalty system that places the authority to make the findings necessary to impose the ultimate sentence in the hands of a judge, rather than a jury, is unconstitutional. Alabama's system, like Florida's misplaces that authority;" (2) "The Hurst Court held that a death sentence cannot rest upon a judge's finding of an aggravating circumstance, even if the jury also found it. Alabama's system, like Florida's, is unconstitutional because it makes a judge's findings of aggravating the basis of its death sentences;" and (3) "The Hurst Court held that a death sentence cannot rest upon any judicial findings, made independently of the jury, which expose the defendant to a greater punishment than supported by the jury's guilt verdict alone. Alabama's system, like Florida's, is unconstitutional because it makes its death sentences depend on a judge's independent findings that

aggravating circumstances outweigh mitigation."

In Apprendi v. New Jersey, 530 U.S. 466 (2000), the United States Supreme Court held that any fact that increases a penalty above the maximum authorized by statute must be presented to the jury and proven beyond a reasonable doubt. In Ring v. Arizona, 536 U.S. 584 (2002), that holding was extended to death-penalty cases. Recently in Hurst the United States Supreme Court applied its earlier holdings in Apprendi and Ring to the penalty phase of a capital-murder trial and held that "a jury, not a judge, must find the existence of an aggravating factor to make a defendant death-eligible."

The circuit court made the following findings, in part:

> "Even if Burton's Hurst [v. Florida, 577 U.S. ___, 136 S.Ct. 616 (2016),] claim was not procedurally barred, it would be dismissed as being without merit. As discussed above, Burton's petition is barred on Hurst, which is nothing more than an examination of Florida's capital sentencing scheme under the lens of Ring [v. Arizona, 536 U.S. 584 (2002)]. Although Hurst invalidated Florida's scheme, it did nothing to Alabama's. Although Alabama's capital scheme is similar to Florida's, the two have important differences, and Alabama's withstands the Sixth Amendment challenge that Florida's failed in Hurst. Alabama's capital scheme is in compliance with Ring, and therefore remains constitutional post Hurst.
>
> "....
>
> "Alabama's sentencing practices comply with Ring and differ from the procedures that Florida followed in Hurst.
>
> "Alabama employs bifurcated capital sentencing. After the guilt phase of a capital trial, the jury must consider penalty-phase evidence. Ala. Code § 13A-5-46 (1975), if the jury determines that no aggravating circumstances exist, it must recommend life without parole. Id. § 13-5-45(f). But if the jury finds that an aggravating circumstance has been

proven beyond a reasonable doubt, it must determine whether the aggravating circumstance(s) outweigh the mitigating circumstance(s). If so, the jury must recommend death; if not, life without parole. Id. § 13A-5-46(e). Since a jury finding of a single aggravator is all that is necessary to expose a capital defendant to the death penalty, Id. § 13A-5-45(f), this finding is all that Ring requires.

"....

"The fact that the trial court makes the ultimate sentencing determination in a capital case does not bring Alabama's capital scheme into conflict with Ring and its progeny. A trial court cannot impose a death sentence unless the jury first determines that at least one aggravating circumstance exists. See Id. § 13A-5-45(f). That the trial court independently weighs the aggravating and mitigating circumstances is immaterial for Sixth Amendment purposes, as courts across the country have routinely held."

(C. 184-87.)

This Court recently addressed a Hurst claim raised in a postconviction proceeding.

"Lee next argues that the circuit court erred in finding that Hurst does not apply retroactively to his case. According to Lee, Hurst did not announce a new rule, but instead, applied the Rule established in Ring v. Arizona, 536 U.S. 584, 589, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), and Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), to new facts. Therefore, the holding in Hurst is applicable and can be raised in his collateral proceedings. The State, not surprisingly, agrees that Hurst merely applied the rule of law established in Ring and Apprendi but argues that, because Ring and Apprendi were decided before Lee's direct appeal became final, his claim is procedurally barred. See Rule 32.2(a)(4) and 32.2(b), Ala. R. Crim. P. This Court agrees with

the State.

"It is well settled that a new case applying an old rule will not operate to exempt a petitioner from the application of the procedural bars established in Rule 32.2, Ala. R. Crim. P. Clemons v. State, 123 So. 3d 1, 12 (Ala. Crim. App. 2012) ('Because the Supreme Court did not establish new law ... but rather applied law that was established long before Clemons's trial and before his first Rule 32 petition, Clemons's claim was procedurally barred because he could have raised it at trial, on appeal, Rules 32.2(a)(3) and (a)(5), Ala. R. Crim. P., or in his first Rule 32 proceedings, 32.2(b), Ala. R. Crim. P.'); Fitts v. Eberlin, 626 F. Supp.2d 724, 733 (N.D. Ohio 2009) ('Given that no new rule exists that applies to [the petitioner's] case, [his] plea for equitable tolling ... must fail.').

"Here, the parties agree that the Supreme Court did not establish a new rule in Hurst; rather, '"[t]he Court in Hurst did nothing more than apply its previous holdings in Apprendi and Ring to Florida's capital-sentencing scheme."' (Lee's brief, at 18 (quoting State v. Billups, [Ms. CR-15-0619, June 17, 2016] ___ So. 3d ___, ___ (Ala. Crim. App. 2016)). Both this Court and the Alabama Supreme Court have recognized that Hurst merely applied the rule established in Apprendi and Ring to new facts: the State of Florida's death-penalty scheme. See State v. Billups, ___ So. 3d at ___ ; Phillips v. State, [Ms. CR-12-0197, Oct. 21, 2016] ___ So. 3d ___, ___ (Ala. Crim. App. 2016); Ex parte Bohannon, ___ So. 3d at ___ ('Hurst applies Ring and reiterates that a jury, not a judge, must find the existence of an aggravating factor to make a defendant death-eligible.'). Because the decision in Hurst did not create a new rule, Lee's Ring/Hurst claim was subject to the procedural bars contained in Rule 32.2, Ala. R. Crim. P. Clemons, 123 So. 3d at 12. Specifically, Lee's Ring/Hurst claim was procedurally barred under Rule 32.2(a)(4), Ala. R. Crim. P., because it was raised on direct appeal and in a previous Rule 32 petition. Lee v. State, 898

So. 2d 790, 858 (Ala. Crim. App. 2001). Further, because Lee raised a Ring claim in his previous Rule 32 petition, his current Ring/Hurst claim is successive and, thus, procedurally barred under Rule 32.2(b), Ala. R. Crim. P.

"Lee, however, argues that his Ring/Hurst claim is not subject to the procedural bars contained in Rule 32.2, Ala. R. Crim. P., because his claim implicates the circuit court's jurisdiction. Lee is incorrect. In Hunt v. State, 940 So. 2d 1041, 1057 (Ala. Crim. App. 2005), the petitioner 'argue[d] that the procedural default rules in Rule 32, Ala. R. Crim. P., do not exclude claims that raise a jurisdictional defect and that the Apprendi [/Ring], claim, he ... raise[d] [was] a jurisdictional issue'; therefore, the circuit court erroneously denied relief. This Court disagreed and held that the decisions in Apprendi and Ring do not apply retroactively and that the circuit court properly denied relief. Hunt, 940 So. 2d at 1057. Similarly, the Court's decision in Hurst, which merely applied its decision in Ring to a new set of facts, does not implicate the circuit court's jurisdiction and thus does not excuse the application of the procedural bars contained in Rule 32.2, Ala. R. Crim. P.

> "'Because the Supreme Court did not establish new law in [Hurst] but rather applied law that was established ... before [Lee's appeal became final] and before his first Rule 32 petition, [Lee's] claim was procedurally barred because [it was raised] on appeal, Rules 32.2(a)([4]) and [because it was raised] in his first Rule 32 proceedings, 32.2(b), Ala. R. Crim. P.' Clemons, 123 So. 3d at 12. Therefore, the circuit court did not err by summarily dismissing Lee's successive Rule 32 petition.

"Further, even if the Hurst decision did announce a new rule, the circuit court correctly

dismissed Lee's petition because that rule would not apply retroactively and, thus, would not be applicable in Lee's postconviction proceedings. In Reeves v. State, [Ms. CR-13-1504, June 10, 2016] ___ So. 3d ___, ___ (Ala. Crim. App. 2016), this Court explained:

> "'The United States Supreme Court's opinion in Hurst was based solely on its previous opinion in Ring, an opinion the United States Supreme Court held did not apply retroactively on collateral review to cases that were already final when the decision was announced. See Schriro v. Summerlin, 542 U.S. 348, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004). Because Ring does not apply retroactively on collateral review, it follows that Hurst also does not apply retroactively on collateral review. Rather, Hurst applies only to cases not yet final when that opinion was released, such as Johnson, supra, a case that was still on direct appeal (specifically, pending certiorari review in the United States Supreme Court) when Hurst was released. Reeves's case, however, was final in 2001, 15 years before the opinion in Hurst was released. Therefore, Hurst is not applicable here."'"

Lee v. State, [Ms. CR-15-1415, February 10, 2017] ___ So. 3d ___, ___ (Ala. Crim. App. 2017). See Lambrix v. Secretary, Florida Department of Corrections, 851 F.3d 1158, 1165 n. 2 (11th Cir. 2017) ("[T]here is no Hurst claim, much less a viable one, because under federal law Hurst, like Ring, is not retroactively applicable on collateral review.").

Moreover, the Alabama Supreme Court in Ex parte Bohannon, 222 So. 3d 525 (Ala. 2016), held that Hurst did not invalidate Alabama's death-penalty statute.

> "Bohannon contends that, in light of Hurst, Alabama's capital-sentencing scheme, like Florida's, is unconstitutional because, he says, in Alabama a

jury does not make 'the critical findings necessary to impose the death penalty.' 577 U.S. ___, 136 S.Ct. at 622. He maintains that Hurst requires that the jury not only determine the existence of the aggravating circumstance that makes a defendant death-eligible but also determine that the existing aggravating circumstance outweighs any existing mitigating circumstances before a death sentence is constitutional. Bohannon reasons that because in Alabama the judge, when imposing a sentence of death, makes a finding of the existence of an aggravating circumstance independent of the jury's fact-finding and makes an independent determination that the aggravating circumstance or circumstances outweigh the mitigating circumstance or circumstances found to exist, the resulting death sentence is unconstitutional. We disagree.

"Our reading of Apprendi, Ring, and Hurst leads us to the conclusion that Alabama's capital-sentencing scheme is consistent with the Sixth Amendment. As previously recognized, Apprendi holds that any fact that elevates a defendant's sentence above the range established by a jury's verdict must be determined by the jury. Ring holds that the Sixth Amendment right to a jury trial requires that a jury 'find an aggravating circumstance necessary for imposition of the death penalty.' Ring, 536 U.S. at 585. Hurst applies Ring and reiterates that a jury, not a judge, must find the existence of an aggravating factor to make a defendant death-eligible. Ring and Hurst require only that the jury find the existence of the aggravating factor that makes a defendant eligible for the death penalty—the plain language in those cases requires nothing more and nothing less. Accordingly, because in Alabama a jury, not the judge, determines by a unanimous verdict the critical finding that an aggravating circumstance exists beyond a reasonable doubt to make a defendant death-eligible, Alabama's capital-sentencing scheme does not violate the Sixth Amendment.

"Moreover, Hurst does not address the process of

weighing the aggravating and mitigating circumstances or suggest that the jury must conduct the weighing process to satisfy the Sixth Amendment. This Court rejected that argument in Ex parte Waldrop, holding that the Sixth Amendment 'do[es] not require that a jury weigh the aggravating circumstances and the mitigating circumstances' because, rather than being 'a factual determination,' the weighing process is 'a moral or legal judgment that takes into account a theoretically limitless set of facts.' 859 So. 2d at 1190, 1189 [(Ala. 2002)]. Hurst focuses on the jury's factual finding of the existence of an aggravating circumstance to make a defendant death-eligible; it does not mention the jury's weighing of the aggravating and mitigating circumstances. The United States Supreme Court's holding in Hurst was based on an application, not an expansion, of Apprendi and Ring; consequently, no reason exists to disturb our decision in Ex parte Waldrop with regard to the weighing process. Furthermore, nothing in our review of Apprendi, Ring, and Hurst leads us to conclude that in Hurst the United States Supreme Court held that the Sixth Amendment requires that a jury impose a capital sentence. Apprendi expressly stated that trial courts may 'exercise discretion -- taking into consideration various factors relating both to offense and offender -- in imposing a judgment within the range prescribed by statute.' 530 U.S. at 481. Hurst does not disturb this holding."

Bohannon, 222 So. 3d at 532-33.

Furthermore, like Apprendi and Ring errors, a Hurst error may be harmless. The Florida Supreme Court in Hall v. State, 212 So. 3d 1001 (Fla. 2017), held that a Hurst violation was harmless error. 212 So. 3d at 1033. The Hall court stated:

"[W]e must consider whether any Hurst error during Hall's penalty phase proceedings was harmless beyond a reasonable doubt. In Hurst v. State, [202 So. 3d 40 (Fla. 2016),] this Court explained the standard by which harmless error should be evaluated:

> "'Where the error concerns sentencing, the error is harmless only if there is no reasonable possibility that the error contributed to the sentence. See, e.g., Zack v. State, 753 So. 2d 9, 20 (Fla. 2000). Although the harmless error test applies to both constitutional errors and errors not based on constitutional grounds, 'the harmless error test is to be rigorously applied,' [State v.] DiGuilio, 491 So. 2d [1129,] 1137 [(Fla. 1986)], and the State bears an extremely heavy burden in cases involving constitutional error. Therefore, in the context of a Hurst error, the burden is on the State, as the beneficiary of the error, to prove beyond a reasonable doubt that the jury's failure to unanimously find all the facts necessary for imposition of the death penalty did not contribute to Hurst's death sentence in this case. We reiterate:
>
>> "'"The test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence. The focus is on the effect of the error on the trier-of-fact.
>
> "'DiGuilio, 491 So. 2d at 1139. 'The question is whether there is a reasonable possibility that the error affected the [sentence].' Id.

"Id. at 68 (third alteration in original). Finally, in Davis v. State, 41 Fla. L. Weekly S528, 207 So.

3d 142, 2016 WL 6649941 (Fla. Nov. 10, 2016), we determined that a Hurst error was harmless beyond a reasonable doubt and reiterated that '[a]s applied to the right to a jury trial with regard to the facts necessary to impose the death penalty, it must be clear beyond a reasonable doubt that a rational jury would have unanimously found that there were sufficient aggravating factors that outweighed the mitigating circumstances.' Id. at S539, 174."

212 So. 3d at 1033-34.

Even if Hurst applied to Burton's case he would not be entitled to relief. Two aggravating circumstances were argued in the penalty phase. One aggravating circumstance -- that the murder occurred during the course of a robbery -- was also an element of the capital murder offense and had been determined, by the jury's guilty verdict in the guilty phase, to exist beyond a reasonable doubt. Thus, according to the Alabama Supreme Court's holding in Ex parte Bohannon, the holding in Hurst was fully complied with in this case.

The circuit court correctly found that Burton's Hurst claims were barred in this postconvition proceedings because Hurst did not apply retroactively to cases on collateral review. Burton is due no relief on this claim.

For the forgoing reasons, we affirm the circuit court's summary dismissal of Burton's second postconviction petition for relief under Rule 32, Ala. R. Crim. P.

AFFIRMED.

Windom, P.J., and Kellum, Burke, and Joiner, JJ., concur.