No. _____

In the Supreme Court of the United States

CHARLES LEE BURTON,
Petitioner,

v.

STATE OF ALABAMA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

1. Under *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Caldwell v. Mississippi*, 472 U.S. 320 (1985), is Alabama's capital sentencing scheme constitutional, where the trial court makes the ultimate factual finding necessary to impose the death penalty - weighing the aggravating factors against the mitigating factors - and the jury was relieved of the ultimate weight of its decision by being instructed that its vote regarding life or death was a mere "recommendation?"

2. Does *Hurst* apply retroactively to cases that became final before *Hurst*, *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring v. Arizona*, 536 U.S. 584 (2002)?

3. In light of this Court's holdings that, under evolving standards of decency, only the most culpable offenders may be sentenced to death, does the Eighth Amendment permit the execution of a non-shooter who was neither present for nor directed the shooting, and where the triggerman has since had his death sentence reduced to a life sentence?

TABLE OF CONTENTS

TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iv
PETITION FOR A WRIT OF CERTIORARI 1
OPINIONS BELOW 1
JURISDICTION 1
RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS 2
STATEMENT OF THE CASE 2
REASONS FOR GRANTING THE WRIT 11
I. This Court should grant certiorari because the Alabama Courts' continuing affirmance of Alabama's capital sentencing scheme, in which the trial court makes the factual findings—including whether the aggravating factors outweigh the mitigating factors after a jury is advised that its determination is a mere "recommendation"—is in direct conflict with both *Hurst* and *Caldwell* and with decisions of the Delaware and Florida Supreme Courts 11
A. This Court should grant certiorari in order to halt the Alabama Courts' continued contravention of this Court's commands in *Hurst*. 12
B. This Court should also grant certiorari to resolve the conflict with decisions of the Delaware and Florida Supreme Courts, resulting in vastly different applications of *Hurst*. 18
II. This Court should grant certiorari in order to resolve the question of *Hurst*'s retroactivity to those sentenced to death under an unconstitutional sentencing scheme. 19
III. This Court should grant certiorari because the Alabama Courts' denial of relief on Mr. Burton's Eighth Amendment claim contravenes this Court's recognition that only the most culpable offenders may constitutionally be sentenced to death and that entire classes of defendants may be categorically ineligible for the death penalty under evolving standards of decency. 24
CONCLUSION 34

APPENDICES

VOLUME I

Pet. App. A: Alabama Supreme Court judgment denying Mr. Burton's petition for a writ of certiorari to the Alabama Court of Criminal Appeals, dated April 20, 2018.

Pet. App. B: Alabama Court of Criminal Appeals decision affirming the circuit court's dismissal of Mr. Burton's petition, date February 2, 2018 (last reasoned state court decision).

Pet. App. C: Letter from Clerk of United States Supreme Court noting Justice Thomas's order granting Mr. Burton's application for an extension of time.

Pet. App. D: Mr. Burton's state court petition for post-conviction relief, dated January 11, 2017.

VOLUME II

Pet. App. E: Mr. Burton's brief on appeal to the Alabama Court of Criminal Appeals.

Pet. App. F: Mr. Burton's petition to the Alabama Supreme Court for a writ of certiorari to the Alabama Court of Criminal Appeals.

Pet. App. G: Attachments A, B, C and D to the R. 32 Petition (affidavits from three jurors, and a letter from Mr. Burton apologizing to Mr. Battle's family).

TABLE OF AUTHORITIES

Cases

Alleyne v. United States, 133 S. Ct. 2151 (2013) 13

Apprendi v. New Jersey, 530 U.S. 466 (2000) ..... i, 12, 13, 15

Atkins v. Virginia, 536 U.S. 304 (2002) 24, 25, 26, 33

Burton v. State, No. 16-0812 (Ala. Crim. App. Feb. 2, 2018) 11, 19

Caldwell v. Mississippi, 472 U.S. 320 (1985)..... passim

DeBruce v. Comm'r, 758 F.3d 1263 (11th Cir. 2015) 10

Ex parte Bohannon, 222 So. 3d 525 (Ala. 2016) 11, 12

Ex parte Waldrop, 859 So. 2d 1181 (Ala. 2002) 13, 16

Ex parte Wood, 498 S.W. 3d 926 (Tex. Crim. App. 2016) 25

Ford v. Strickland, 696 F.2d 804 (11th Cir. 1983) 16

Graham v. Florida, 560 U.S. 48 (2010)..... 26, 33

Guardado v. Jones, 138 S. Ct. 1131 (2018)..... 18, 19

Hurst v. Florida, 136 S. Ct. 616 (2016)..... passim

Hurst v. State, 202 So. 3d 40 (Fla. 2016) 19

Kennedy v. Louisiana, 554 U.S. 407 (2008) 26, 33

Kennedy v. State, 472 So. 2d 1092, (Ala. Crim. App. 1984)..... 5, 6

Lee v. State, 244 So. 3d 998 (Ala. Crim. App. 2017) 21

Middleton v. Florida, 128 S. Ct. 829 (2018)..... 18

Mosley v. State, 209 So. 3d 1248 (Fla. 2016)..... 23

People v. Henne, 293 N.E.2d 172 (Ill. App. Ct. 1973) 30

Powell v. State, 153 A.3d 69 (Del. 2016) 16, 20, 21, 22

Rauf v. State, 145 A.3d 430 (Del. 2016) 19, 21

Ring v. Arizona, 536 U.S. 584 (2002) ..... i, 13, 21

Roper v. Simmons, 543 U.S. 551 (2005) 24, 26, 33

State v. Buck, 361 S.E.2d 470 (W. Va.1987) 30

State v. Gamble, 63 So. 3d 707 (Ala. Crim. App. 2010) 30, 31, 32

Teague v. Lane, 489 U.S. 288 (1989) 20

Tison v. Arizona, 481 U.S. 137 (1987) 26

Statutes

28 U.S.C. § 1257(a) 1

Ala. Code § 13A-2-23 (1975) 4

Ala. Code § 13A-5-40(b) (1975) 5, 6

Ala. Code § 13A-5-40(c) (1975) 6

Ala. Code § 13A-5-45(e) (1975) 22

Ala. Code § 13A-5-45(f) (1975) 14

Ala. Code § 13A-5-46(e) (1975) 13, 22

Ala. Code § 13A-5-47(d) (1975) 15

Ala. Code § 13A-5-47(e) (1975) 15, 22

Ala. Code § 13A-5-48 (1975) 13, 14

Ala. Code § 13A-6-2(a)(1) (1975) 5, 6

Other Authorities

Br. of the States of Ala., Del., Ok., Tx, Ut. and Va. as Amici Curiae in Support of Petitioner, *Roper v. Simmons*, 543 U.S. 551 (2005) (No. 03-633), 2004 WL 865268 (Apr. 20, 2004) 29

Brenda Goodman, *Prosecutor Who Opposed a Death Sentence is Rebuked*, N.Y. TIMES, Sept. 15, 2007. 33

Press Release, Office of the Governor, Governor McAuliffe Commutes Sentence of Ivan Teleguz to Life Imprisonment, (Apr. 20, 2017) 27

Ralph Blumenthal, *Governor Commutes Sentence in Texas*, N.Y. TIMES, Aug. 31, 2007. 27

Robert Barnes, *Rick Perry holds the record on executions*, WASH. POST, Aug. 23, 2011 27

Rules

SUP. CT. R. 10 ..... 11, 20, 24

Constitutional Provisions

U.S. Const. amend. V 2

U.S. Const. amend. VI 2, 13

U.S. Const. amend. VIII ..... passim

U.S. Const. amend. XIV 2, 33

PETITION FOR A WRIT OF CERTIORARI

Petitioner Charles Lee Burton respectfully petitions for a writ of certiorari to review the judgment of the Alabama Supreme Court denying his petition for post-judgment habeas corpus relief.

OPINIONS BELOW

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, and is attached as Pet. App. A. The last reasoned state court decision was that of the Alabama Court of Criminal Appeals, which denied Mr. Burton relief on February 2, 2018. That decision is attached as Pet. App. B.

JURISDICTION

The decision of the Alabama Court of Criminal Appeals was entered February 2, 2018.[1] After petitioning for rehearing, Mr. Burton's timely petition for certiorari in the Alabama Supreme Court was denied on April 20, 2018.[2] On March 2, 2018, Justice Thomas granted Mr. Burton's application for an extension of time within which to file a petition for writ of certiorari to August 31, 2018.[3] This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

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[1] Pet. App. B.
[2] Pet. App. A.
[3] Pet. App. C.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment, in relevant part, provides: "No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law."

The Sixth Amendment, in relevant part, provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed."

The Eighth Amendment, in relevant part, provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment, in relevant part, provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On August 16, 1991, six men, Derrick DeBruce, LuJuan McCants, Deon Long, Willie Brantley, Andre Jones and Mr. Burton, went to an AutoZone store in Talladega, Alabama, intending to commit a robbery.[4] After Mr. Burton had exited the store, Derrick DeBruce shot and killed Doug Battle, a customer who entered the store during the robbery.[5] DeBruce and Mr. Burton were separately prosecuted and

[4] (Vol. 4, R. 341-43, 351).
[5] (Vol. 4, R. 359-60).

convicted of capital murder, while the other co-defendants were tried for non-capital murder charges.

During the robbery, the men entered the store at different intervals and positioned themselves throughout the store.[6] Mr. Burton went to the cash register, announced it was a stick-up, and he and others instructed customers and employees to get onto the floor.[7] Mr. Burton then took an employee to the safe at the back of the store, and announced that he was not going to hurt anybody.[8] Meanwhile, his co-defendants had also pulled their guns and were ordering people to get down.[9] DeBruce began cracking jokes and kicking people.[10]

As the co-defendants were taking money from some of the people on the floor, Mr. Battle entered the store. McCants instructed Mr. Battle to get on the floor, and Mr. Battle threw his wallet down at McCants.[11] McCants again instructed Mr. Battle to get on the floor, but Mr. Battle stood motionless.[12] DeBruce then approached Mr. Battle, instructed him to get on the floor and, when he again did not, pistol-whipped him.[13] Mr. Battle, laying face down on the floor, called DeBruce a "punk."[14] The two began cursing at each other.[15]

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[6] (Vol. 4, R. 354).
[7] (Vol. 4, R. 355).
[8] (Vol. 4, R. 355-56).
[9] (Vol. 4, R. 355).
[10] (Vol. 4, R. 355-36).
[11] (Vol. 4, R. 355).
[12] (Vol. 4, R. 357-58).
[13] (Vol. 4, R. 358-59).
[14] (Vol. 4, R. 359).
[15] (*Id.*).

While DeBruce and Mr. Battle argued, Mr. Burton and Long left through the front door,[16] followed shortly thereafter by McCants and Brantley.[17] At Mr. Burton's trial, McCants testified that, after all the robbers except DeBruce had left the store, he heard a gunshot and saw DeBruce run from the store.[18]

As the men drove away from the scene, Mr. Burton asked DeBruce why he shot a man. DeBruce claimed he shot Mr. Battle because he had a gun, and he was trying to protect McCants.[19] Mr. Burton then shook his head and said, "let's get out of here," while everyone else looked at DeBruce.[20] The men went to a house and split up the proceeds of the robbery.[21]

During both the opening and closing arguments, the State conceded that Mr. Burton was not the triggerman.[22] This could hardly be disputed since not only did Mr. Burton not kill Mr. Battle, he did not even witness the shooting, having already left the store.[23] Despite this concession, Mr. Burton was convicted of capital murder.[24]

Under Alabama law, Mr. Burton, or any of the co-defendants, could be held liable for non-capital murder under the facts of this case.[25] As accomplices to a

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[16] (*Id.*).
[17] (Vol. 4, R. 360).
[18] (*Id.*).
[19] (*Id.*).
[20] (Vol. 4, R. 361).
[21] (Vol. 4, R. 365).
[22] (Vol. 4, R. 299; Vol. 7, TR. 883).
[23] (Vol. 4, R. 359-60).
[24] (C. 62; Vol. 7, R. 914).
[25] *See* Ala. Code § 13A-2-23 (1975).

robbery where deadly weapons were employed, any of the men could be held responsible for the death.[26]

However, in order to be eligible for a death sentence, Alabama law required proof beyond a reasonable doubt that Mr. Burton harbored a "particularized intent to kill."[27]

While, as noted, the State conceded that Mr. Burton neither shot Mr. Battle nor was present when the shooting occurred,[28] the State relied on three theories to establish Mr. Burton's specific intent to kill. First, the State argued that Mr. Burton was the leader of the group based on his being the eldest member and because he had been the one to decide whether the robbery would go forward.[29]

Second, through McCants' testimony, the State contended that Mr. Burton foresaw the possibility that someone might need to be hurt, and intended to be the one to do it. However, this testimony was suspect, and the prosecutor did his best to bolster it.[30]

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[26] *Id.*

[27] *Kennedy v. State*, 472 So. 2d 1092, 1105 (Ala. Crim. App. 1984); *see also* Ala. Code §§ 13A-5-40(b), 13A-6-2(a)(1) (1975).

[28] (Vol. 4, R. 299; Vol. 7, TR. 883).

[29] (Vol. 6, R. 831, 835, 839).

[30] McCants, a sixteen year-old accomplice in the robbery, was given a deal to testify against Mr. Burton. (Vol. 4, R. 341, 370). In Mr. Burton's trial, the prosecutor asked him, "Now, what would happen if somebody caused any trouble?" McCants answered, "[Mr. Burton] said let him *take care of it*." *Id.* (emphasis added). On redirect examination, the prosecutor went beyond the scope of redirect, assumed facts not in evidence, and injected his own testimony into the case via the leading question: "[Y]ou said that back up at the car wash that [Mr. Burton] said y'all will hit Auto Zone. If anyone had to *get hurt*, let him do it." *Id.* at 382 (emphasis added). Despite an immediate objection, which the trial judge overruled, the cooperating teenage witness then testified, almost word-for-word as fed to him. However, in a videotaped

Finally, the State contended that Mr. Burton was automatically liable for the intent of the shooter, because he was an accomplice in the underlying robbery.[31] This contention was legally incorrect because, although an accomplice can be vicariously liable for murder, he cannot be liable for capital murder without a particularized intent to kill.[32] This contention was buttressed when the trial court gave an erroneous and confusing instruction on intent, which signaled to the jury that Mr. Burton could be held liable for the intent of the shooter, so long as Mr. Burton merely intentionally participated in the underlying *robbery*.[33]

Although Mr. Burton's trial counsel argued to the jury that Mr. Burton was never at the crime scene, this was refuted by the eyewitness identification of Mr. Burton from the manager of the AutoZone store, fingerprints proving he had been

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statement to police, when McCants was asked if Mr. Burton had instructed him or anyone else to shoot anyone if they were uncooperative, McCants answered "No, sir." (Vol. 1, R. 32, R. 56).

[31] (Vol. 4, R. 302-303; Vol. 7, R. 838, 844, 871).

[32] *Kennedy*, 472 So. 2d at 1092; Ala. Code §§ 13A-5-40(b) & (c), 13A-6-2(a)(1) (1975).

[33] The trial court's instruction on particularized intent read:

> Now the following law of complicity would only apply relative to the intentional killing element of capital murder. If you find that a murder of the intentional killing type of [the victim] was committed by some person or persons other than the Defendant, the Defendant is guilty of that intentional killing type of murder if, but only if, you find beyond a reasonable doubt either that the Defendant intentionally procured, induced, or caused the other person or persons to commit *the crime* <u>*or*</u> that the Defendant intentionally aided or abetted the other person or persons in the commission of *the murder*.

(Vol. 7, R. 900-901) (emphases added). Because the evidence at trial overwhelmingly established the existence of a plan to commit the robbery and aiding and abetting "the murder" was identified as an "or" option, any reasonable juror would have considered "the crime" to "the robbery."

present inside the AutoZone store, and McCants' testimony. Not surprisingly, at the conclusion of the guilt phase of trial, Mr. Burton was found guilty of capital murder.[34]

At the penalty phase, Mr. Burton presented testimony from his step-father, Edward Ellison, that he had seen Mr. Burton's biological father strike him as a child simply for addressing Mr. Ellison as "daddy,"[35] and that Mr. Burton was relinquished to the custody of his abusive father at a young age.[36] Mr. Burton's wife, Hattie Pearl Burton, testified that Mr. Burton acted as a father to at least five of her children, even though they were not his.[37] Mr. Burton's mother, Dorothy Ellison, testified that his parents divorced when Mr. Burton was still quite young and that Mr. Burton's father was an alcoholic.[38] Mrs. Ellison further testified that Mr. Burton went to live with his biological father when he was seven years old and did not have the protection or influence of a mother after that time.[39] Mr. Burton testified that he obtained a GED while in prison.[40]

Unfortunately, against the wishes of Mr. Burton's trial counsel, the trial court forced counsel to call two witnesses—Mr. Burton's co-defendants, Jones and Brantley—that Mr. Burton wanted him to call.[41] The trial court did not inquire as to the reasons for Mr. Burton's request, nor inquire as to why trial counsel did not want

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[34] (Vol. 7, R. 914).
[35] (Vol. 7, R. 1024-25).
[36] (Vol. 7, R. 1025).
[37] (Vol. 7, R. 1028).
[38] (Vol. 7, R. 1031).
[39] (Vol. 8, R. 1032-33).
[40] (Vol. 7, R. 1006).
[41] (Vol. 7, R. 920; Vol. 7, R. 991-992).

to call them. Rather, the Court simply forced trial counsel to call them.[42] When both testified that they did not know Mr. Burton,[43] it was immediately obvious why trial counsel had not wanted to call them.

Their testimony opened the door for the prosecutor to introduce damaging evidence against Mr. Burton, and the prosecutor capitalized on the opportunity. After they testified that they did not even know Mr. Burton, the prosecutor was able to introduce a videotape, previously suppressed as substantive evidence, showing Mr. Burton and the other co-defendants, including Jones and Brantley, together entering a bank in Sylacauga, Alabama.[44] Additionally, the State recalled two eyewitnesses from the AutoZone robbery, each of whom provided in-court identifications of Jones and Brantley.[45]

The State's rebuttal of Mr. Burton's mitigation thus went to Mr. Burton's identity as one of the robbers at the Auto Zone, to his influence on the co-defendants, and to his criminal history.[46] The State offered two aggravating factors: that the capital offense had taken place during the course of a robbery, and that Mr. Burton had a prior felony offense involving the threat or use of violence.[47]

The jury was informed repeatedly, at least 19 times over the course of 16 transcript pages that its vote recommending either life without the possibility of

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[42] (*Id.*).
[43] (Vol. 7, R. 996-997, 1001-1003).
[44] (Vol. 8, R. 1067-71).
[45] (Vol. 8, R. 1042-1047).
[46] (Vol. 7, R. 930-80; Vol. 7, R. 995-99, R. 1001-3, and R. 1008-16; Vol. 8, R. 1042-80).
[47] (Vol. 8, R. 1184-86).

parole or death, was just that: merely a "recommendation."[48] Although Mr. Burton was not the triggerman, and even though the evidence that Mr. Burton had any intent that anyone be killed was weak at best, the jury recommended death.[49] The jury did not specify whether it found both aggravators, or only one.[50]

At the actual sentencing trial, the judge independently found the facts necessary to impose a death sentence under Alabama law—the existence and non-existence of aggravating and mitigating circumstances (ultimately determining that there were no mitigating circumstances, statutory or non-statutory[51]) and whether the aggravating circumstances outweighed the non-existent mitigating circumstances—before sentencing Mr. Burton to death.[52] In so doing, the judge considered additional evidence not presented to the jury, but provided to the court via a presentence report, including a juvenile offense of which the jury had not been informed.[53]

Presentation of the federal issues in the Alabama Courts

On January 11, 2017, Mr. Burton filed a state court petition for post-conviction relief, raising the two federal constitutional issues set forth herein.[54] On March 31, 2017, the circuit court adopted the text of the State's proposed order dismissing the

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[48] (Vol. 8, R. 1120, 1121 (two times), 1123 (two times), 1125, 1130, 1131, 1132, 1133 (six times), 1134, 1135 and 1136 (three times)).
[49] (C. 63).
[50] (*Id.*).
[51] (C. 105).
[52] (C. 106).
[53] (C. 64-71, 103).
[54] Pet. App. D.

petition. On appeal,[55] the Alabama Court of Criminal Appeals affirmed the circuit court's decision on February 2, 2018.[56] Mr. Burton filed a timely petition for a writ of certiorari in the Alabama Supreme Court,[57] which was denied on April 20, 2018.[58]

Although the actual killer, Mr. DeBruce, was also convicted of capital murder and sentenced to death, the Eleventh Circuit eventually overturned his death sentence.[59] After the State chose not to pursue another death sentence, the district court unconditionally granted the petition and ordered that Mr. DeBruce be resentenced to life without the possibility of parole.[60] Thus, the man who intentionally shot and killed Mr. Battle is no longer under a sentence of death, while Mr. Burton, who was not in the building and did not witness the shooting, will, barring this Court's intervention, be executed based on factual findings made by a judge.

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[55] Pet. App. E.
[56] Pet. App. B.
[57] Pet. App. F.
[58] Pet. App. A.
[59] *DeBruce v. Comm'r*, 758 F.3d 1263 (11th Cir. 2015).
[60] *DeBruce v. Dunn*, No. 1:04-cv-02669 (N.D. Ala. Sept. 22, 2015) (Doc. 55).

REASONS FOR GRANTING THE WRIT

I. This Court should grant certiorari because the Alabama Courts' continuing affirmance of Alabama's capital sentencing scheme, in which the trial court makes the factual findings—including whether the aggravating factors outweigh the mitigating factors after a jury is advised that its determination is a mere "recommendation"—is in direct conflict with both *Hurst* and *Caldwell* and with decisions of the Delaware and Florida Supreme Courts.

In denying relief on Mr. Burton's Sixth Amendment jury sentencing claim, the Alabama Court of Criminal Appeals ("ACCA") relied upon the decision of the Alabama Supreme Court ("ASC") in *Ex parte Bohannon*,[61] holding that, because one of the aggravating circumstances presented in the penalty phase (that the murder occurred during the course of a robbery) was necessarily found by the jury in the guilt phase, "the holding in *Hurst* was fully complied with in this case."[62] In doing so, the ACCA relied on *Bohannon*'s erroneous conclusion that "*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."[63]

This Court should grant certiorari because the ACCA's decision not only "conflicts with [*Hurst*]," but also "decided an important federal question in a way that conflicts with the decision of [other] state court[s] of last resort."[64]

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[61] *Ex parte Bohannon*, 222 So. 3d 525 (Ala. 2016).
[62] *Burton v. State*, No. 16-0812, slip op. at 27 (Ala. Crim. App. Feb. 2, 2018).
[63] *Id.* at 24-25 (quoting *Bohannon*, 222 So. 3d at 532).
[64] SUP. CT. R. 10(B), (C).

A. This Court should grant certiorari in order to halt the Alabama Courts' continued contravention of this Court's commands in *Hurst*.

The ASC's decision in *Bohannon*, relied upon by the ACCA in denying relief to Mr. Burton, directly contradicts this Court's holding in *Hurst*.

In *Hurst*, rejecting Florida's attempt to salvage its statute by relying on its advisory jury scheme, this Court held the statute unconstitutional because "[t]he trial court *alone* must find 'the facts … [t]hat sufficient aggravating circumstances exist' and '[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances.'"[65]

Under *Apprendi*, "the relevant inquiry [respecting factors which may be found by a judge rather than a jury] is one not of form, but of effect – does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?"[66] Any factor which increases the maximum penalty is "the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict. Indeed, it fits squarely within the definition of an 'element' of the offense."[67]

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[65] *Hurst*, 136 S. Ct. at 621-22. (emphasis, brackets, and ellipsis in original) (citations omitted).
[66] 530 U.S. at 494; *see also Hurst*, 136 S. Ct. at 621.
[67] *Apprendi*, 530 U.S. at 494 n.19 (citation omitted).

As *Hurst* commands, all such factors must be found by the jury[68] beyond a reasonable doubt[69] and must be *binding* on the court.[70] A trial court's parallel (and ultimate) decision, based on its own findings and a lesser standard of proof, is insufficient.[71]

Under Alabama law, as under Florida law, a finding that an aggravating circumstance exists is *not* the only factual finding necessary to impose a death sentence. No matter how many aggravating circumstances are found,[72] *a defendant cannot receive a death sentence unless the further finding is made that whatever mitigating circumstances exist do not outweigh the aggravation.*[73] In the exact words of the statute, this assessment is not "a mere tallying of aggravating and mitigating circumstances for the purpose of numerical comparison . . . ."[74]

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[68] *Hurst*, 136 U.S. at 622. Alabama's system does not prohibit the trial judge from finding additional aggravating circumstances not found by the jury. *See*, *e.g.*, *Ex parte Waldrop*, 859 So. 2d 1181, 1190 (Ala. 2002). But this practice is comparable to allowing the trial judge to find a defendant guilty of additional counts of capital murder by finding additional aggravating factors unsupported by a jury verdict.

[69] *Hurst*, 136 S. Ct. at 621 ("This right [to trial by jury under the Sixth Amendment], in conjunction with the Due Process Clause, requires that each element of a crime be proved to a jury beyond a reasonable doubt.") (citing *Alleyne v. United States*, 133 S. Ct. 2151, 2156 (2013)).

[70] *Id.* at 622.

[71] *Id.*

[72] Alabama's system allows a judge to find more aggravators than the jury. *Waldrop*, 859 So. 2d at 1190. But this procedure must also be unconstitutional, since elements, which is what aggravators are under *Ring*, must be found by a jury: "Because Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,' the Sixth Amendment requires that they be found by a jury." 536 U.S. at 609 (citing *Apprendi*, 530 U.S. at 494 n.19).

[73] Ala. Code § 13A-5-46(e) (1975).

[74] Ala. Code § 13A-5-48 (1975).

For this reason, even a jury's finding that an aggravating circumstance exists, whether made at the innocence/guilt phase or the penalty phase, cannot by itself render a defendant eligible for a sentence of death. Eligibility for death is not available until it is "determin[ed] whether the proper sentence *in view of all the relevant circumstances in an individual case* is life imprisonment without parole or death."[75]

Moreover, and of key importance, Mr. Burton's jury was relieved of the ultimate burden of knowing its decision was binding, rather than only a recommendation. Indeed, Mr. Burton's jury was repeatedly instructed (at least 19 times) that its penalty-phase verdict was a mere "recommendation."[76] Given the interplay between *Hurst* and *Caldwell*, this Court should grant certiorari to determine whether Mr. Burton is entitled to a new jury sentencing where the jury is the final arbiter of his fate, "and where the jury proceeds with the *appropriate awareness* of its 'truly awesome responsibility.'"[77]

Alabama's sentencing scheme provides that the finding of at least one aggravating circumstance is a *necessary* condition to impose the death penalty – "[u]nless at least one aggravating circumstance as defined in Section 13A-5-49 exists, the sentence shall be life imprisonment without parole,"[78] – but not a *sufficient* condition, in light of Section 13A-5-47(e) – "In deciding upon the sentence, *the trial*

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[75] *Id.* (emphasis added).
[76] (Vol. 8, R. 1120, 1121 (twice), 1123 (twice), 1125, 1130, 1131, 1132, 1133 (six times), 1134, 1135 and 1136 (three times)).
[77] *Caldwell*, 472 U.S. at 341 (emphasis added).
[78] Ala. Code § 13A-5-45(f) (1975).

court shall determine whether the aggravating circumstances *it finds* to exist outweigh the mitigating circumstances *it finds* to exist . . . ."[79]

Thus, a death sentence can be imposed in Alabama only if an aggravating circumstance is found, but the mere finding of such a circumstance, standing alone, is not *sufficient* to justify its imposition.

The *additional* finding that aggravating circumstances outweigh mitigating is equally critical to the finding of aggravation alone in order to "expose the defendant to a greater punishment than that authorized by the jury's guilty verdict."[80] Because this is so, under *Hurst*, that finding must be made by the jury and be binding.

This Court found Florida's system unconstitutional, because "[t]he trial court *alone* must find 'the facts … [t]hat sufficient aggravating circumstances exist' and '[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances.'"[81] *Hurst* thus makes clear that Alabama's system, wherein the court ultimately makes the finding that the aggravating circumstances *outweigh* the mitigating, is constitutionally impermissible.

Alabama's system, like Florida's, improperly places the ultimate finding of these critical elements – the existence of both aggravators and mitigators and the relative weight of the sum of each in relation to the other – in the hands of the court, not the jury.[82] Compounding the unconstitutionality, there is no standard of proof

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[79] Ala. Code § 13A-5-47(e) (1975) (emphasis added).
[80] *Apprendi*, 530 U.S. at 494.
[81] *Hurst*, 136 S. Ct. at 622.
[82] Ala. Code § 13A-5-47(d) and (e) (1975).

for the existence of the aggravators found by the court and the ultimate burden of proof is simply that the aggravating factors "outweigh" the mitigating,[83] with no requirement that they do so beyond a reasonable doubt.[84] The ASC has, in fact, rejected the contention that any particular standard applies to the judicial findings on these points.[85]

Thus, this Court should grant certiorari to resolve a split among the highest courts of Alabama, Florida, and Delaware, and clarify that a scheme like Alabama's violates the Sixth, Eighth and Fourteenth Amendments because a judge, rather than a jury, is vested with making the ultimate finding that the aggravating circumstances outweigh the mitigating. Just as Florida's capital sentencing scheme is unconstitutional because "[t]he trial court *alone* must find 'the facts . . . [t]hat sufficient aggravating circumstances exist' and '[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances,'"[86] so too is Alabama's. Because Mr. Burton's death sentence (and those of countless others) was imposed in violation of his right to trial by jury under the Sixth and Fourteenth

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[83] *Id.*
[84] *Cf. Powell v. State*, 153 A.3d 69, 70 (Del. 2016).
[85] *See Waldrop*, 859 So. 2d at 1190 ("The trial court's subsequent determination that the murders were especially heinous, atrocious, or cruel is a factor that has application only in weighing the mitigating circumstances and the aggravating circumstances, a process that we held earlier is not an 'element' of the offense."); For the proposition that "weighing" is not a fact-finding, *see also id.* at 1189 (holding that "weighing" is not a factual finding) (citing *Ford v. Strickland*, 696 F.2d 804, 818 (11th Cir. 1983) (en banc)). *Ford*'s holding—that "[t]he aggravating and mitigating circumstances are not facts or elements of the crime," 696 F.2d at 818—is unlikely to have survived *Apprendi*, let alone *Ring* and *Hurst*.
[86] 136 S. Ct. at 622.

Amendments, this Court should grant certiorari in order to halt the ASC's continued refusal to recognize and apply this Court's clear dictates in *Hurst* and *Caldwell*.

"It is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere."[87]

Mr. Burton's death sentence "rest[ed] on a determination made by a sentencer" that was not only "*led* to believe that the responsibility for the determining the appropriateness of [Mr. Burton's] death rest[ed] elsewhere,"[88] but was instructed, at least 19 times, that its decision was a mere "recommendation."[89] His jury, therefore, did not merely "*believe* that the responsibility for determining the appropriateness of [Mr. Burton's] death rest[ed] elsewhere."[90] It *knew* it.

Mr. Burton's jury heard not a mere "uncorrected *suggestion* that the responsibility for any ultimate determination of death will rest with others,"[91] as prohibited by *Caldwell*. Rather, it was directly instructed on that fact of Alabama law.

By ignoring the importance of this distinction, the Alabama Courts join the Florida Supreme Court in disregarding the Eighth Amendment, and the commands of *Caldwell*. As Justice Sotomayor has explained:

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[87] *Caldwell*, 472 U.S. at 328-39.
[88] *Id.*
[89] (Vol. 8, R. 1120, 1121 (two times), 1123 (two times), 1125, 1130, 1131, 1132, 1133 (six times), 1134, 1135 and 1136 (three times)).
[90] *Caldwell*, 472 U.S. at 328-39.
[91] *Id.* at 333.

> Relying on the unanimity of the juries' recommendations of death, the Florida Supreme Court post-*Hurst* declined to disturb the petitioners' death sentences, reasoning that the unanimity ensured that jurors had made the necessary findings of fact under *Hurst*. By doing so, the Florida Supreme Court effectively transformed the pre-*Hurst* jury recommendations into binding findings of fact with respect to petitioners' death sentences.[92]

Justice Sotomayor thus emphasized that "the Florida Supreme Court ha[d] (again) failed to address an important and substantial Eighth Amendment challenge to capital defendants' sentences post-*Hurst*."[93] By ignoring the applicability of *Caldwell* to Mr. Burton's case, the Alabama Courts (again) engage in the same failure. As Justice Sotomayor concluded: "This Court can and should intervene in the face of this troubling situation."[94]

B. This Court should also grant certiorari to resolve the conflict with decisions of the Delaware and Florida Supreme Courts, resulting in vastly different applications of *Hurst*.

This Court should also grant certiorari to harmonize the application of *Hurst* by various state courts of last resort.

Both the Delaware and Florida Supreme Courts, considering sentencing schemes nearly identical to Alabama's, have applied this Court's commands in *Hurst* in a manner that conflicts with the ASC's decisions on the issue.

After this Court remanded *Hurst* to the Florida Supreme Court, that Court recognized that this Court's dictates in *Hurst* unequivocally require that "*all* the

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[92] *Guardado v. Jones*, 138 S. Ct. 1131, 1132 (2018) (Sotomayor, J., dissenting from denial of cert.) (quoting *Middleton v. Florida*, 128 S. Ct. 829 (2018) (Sotomayor, J., dissenting from denial of cert.).
[93] *Id.* at 1134 (citation omitted).
[94] *Id.*

critical findings necessary before the trial court may consider imposing a sentence of death must be found unanimously by the jury," and recognized that those "critical findings" include "that the aggravating factors outweigh the mitigating circumstances."[95] The Delaware Supreme Court has also recognized that its sentencing scheme was unconstitutional under *Hurst*, and that "the Sixth Amendment to the United States Constitution require[s] a jury, not a sentencing judge, to find that the aggravating circumstances found to exist outweigh the mitigating circumstances found to exist . . . ."[96]

Thus, of the three states with nearly-identical capital sentencing schemes, only Alabama continues to ignore *Hurst*'s plain language and commands.[97] In order to not only vindicate *Hurst* and ensure compliance with its commands, but also to end its vastly divergent application on a state-by-state basis, this Court should grant certiorari.

II. This Court should grant certiorari in order to resolve the question of *Hurst*'s retroactivity to those sentenced to death under an unconstitutional sentencing scheme.

In denying Mr. Burton relief, the ACCA also relied on the ASC's insistence that *Hurst* does "not apply retroactively to cases on collateral review."[98] Because this determination also "conflicts with the relevant decisions of this Court," and "conflicts

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[95] *Hurst v. State*, 202 So. 3d 40, 44, 53 (Fla. 2016).
[96] *Rauf v. State*, 145 A.3d 430, 433-34 (Del. 2016).
[97] As detailed above, although the Florida Supreme Court recognizes the applicability of *Hurst*, it continues to ignore *Caldwell*, by improperly crediting unanimous advisory verdicts rendered under its unconstitutional system. *See Guardado*, 138 S. Ct. at 132-34 (Sotomayor, J., dissenting from denial of cert.).
[98] *Burton*, No. 16-0812, slip op. at 20-23, 27.

with the decision of [other] state court[s] of last resort" on an important federal question,[99] this Court should grant certiorari to clarify the retroactive application of *Hurst*.

In *Powell*, the Delaware Supreme Court recognized that most of this Court's new holdings involving criminal procedure "will not be applicable to those cases which have become final before the new rules are announced."[100] However, it noted two major exceptions to this general principle, both of which apply to *Hurst*.[101] First, "new substantive rules generally apply retroactively."[102] Second, "new 'watershed rules of criminal procedure . . . implicating the fundamental fairness and accuracy of the criminal proceeding,' will also have retroactive effect."[103] Analyzing the applicability of *Hurst* to Delaware's capital sentencing scheme it conducted in *Rauf*, *Powell* held that both of these exceptions were met, and its decision in *Rauf*, applying *Hurst* and invalidating Delaware's unconstitutional capital sentencing scheme, was retroactive.[104] The same analysis applies with equal force to Alabama's unconstitutional sentencing scheme, and this Court should grant certiorari to avoid a perversely disjointed application of *Hurst*, wherein prisoners condemned to die pursuant to unconstitutional statutes similarly flawed in all material respects are properly resentenced in some states, and executed in others.

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[99] SUP. CT. R. 10(B), (C).
[100] *Powell*, 153 A.3d at 71-72 (quoting *Teague v. Lane*, 489 U.S. 288, 310 (1989)).
[101] *Id.* at 72-74.
[102] *Id.* at 72.
[103] *Id.* at 74.
[104] *Id.* at 73, 74-76.

In mandating retroactivity, the *Powell* Court first found that *Hurst* represented "a new watershed procedural rule for capital proceedings that contributed to the reliability of the fact-finding process."[105] In so doing, it observed that "there is no circumstance in which it is more critical that a jury act with the historically required confidence than when it is determining whether a defendant should live or die."[106]

While *Powell* recognized that this Court had not applied *Ring* retroactively[107] – a point upon which Alabama Courts rely heavily,[108]—this was of little consequence because *Ring* implicated only "the misallocation of fact-finding responsibility (judge versus jury) and not . . . the applicable burden of proof."[109] Because *Hurst* required not only that the jury make the critical determination that the aggravating factors outweigh the mitigating factors, but also that the jury's finding must be binding and beyond a reasonable doubt, the Delaware Supreme Court found that its decision in *Rauf*, applying *Hurst* was substantive and applicable retroactively.[110]

The *Powell* Court also determined retroactivity was required because *Rauf*, which was based on *Hurst*, represents "a new watershed procedural rule for capital

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[105] *Id.* at 74, 76 (citation omitted).
[106] *Id.* at 75 (quoting *Rauf*, 145 A.3d at 481).
[107] *Id.* at 73-74.
[108] *See* Pet. App. B at 20-23 ("Because *Ring* does not apply retroactively on collateral review, it follows that *Hurst* also does not apply retroactively on collateral review." (citing *Lee v. State*, 244 So. 3d 998, 1004 (Ala. Crim. App. 2017) (additional citation omitted)).
[109] *Powell*, 153 A.3d at 73-74.
[110] *Id.* at 74.

proceedings that contributed to the reliability of the fact-finding process."[111] In so doing, it explained that "watershed" rules are those "implicit in the concept of ordered liberty . . . implicating 'fundamental fairness" and, "in the context of a death sentence . . . [those procedures which are] 'central to an accurate determination' that death is a legally appropriate punishment."[112]

In Alabama, although the jury is required to determine, in a non-binding penalty-phase verdict, the *existence* of an aggravating factor "beyond a reasonable doubt,"[113] the statute is silent as to the standard by which the jury must find that the aggravating circumstances *outweigh* the mitigating circumstances.[114] Until very recently, Alabama law—which rested the ultimate sentencing authority in judges—required only that the trial court "determine whether the aggravating circumstances it finds to exist outweigh the mitigating circumstances it finds to exist."[115] Thus, again, not only did the scheme assign that ultimate factual finding to the trial court, but it also allowed the trial court to make that finding by a mere preponderance of the evidence.

Moreover, and most importantly, Mr. Burton's jury was absolved of the true burden of its determination regarding the weighing of the aggravating and mitigating circumstances. Because it was repeatedly instructed that its penalty-phase

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[111] *Id.*
[112] *Id.*
[113] Ala. Code § 13A-5-45(e) (1975).
[114] Ala. Code § 13A-5-46(e)(2).
[115] Ala. Code § 13A-5-47(e).

determination was nothing more than a "recommendation,"[116] it was not a jury that made a valid finding warranting the confidence needed to allow Mr. Burton's execution. As the Delaware Supreme Court observed, "There is no circumstance in which it is more critical that a jury act with the historically required *confidence* than when it is determining whether a defendant should live or die."[117]

Because the states with statutory schemes similar in material respects to that struck down in *Hurst* are making determinations regarding retroactivity in wildly divergent fashions, this Court should grant certiorari to resolve the matter. Indeed, in Delaware, *Hurst* is deemed fully retroactive. Meanwhile, the Florida Supreme Court has fashioned a half-way approach, recognizing the retroactivity of *Hurst* to petitioners who had challenged the state's capital sentencing scheme prior to *Hurst*.[118] Alabama, however, continues to deny any retroactive applicability of *Hurst*. A person in Mr. Burton's same position, had the case arisen in Delaware, would no longer be under a sentence of death, and would be entitled to, at the very least, a new sentencing by a jury properly charged, and making its determination with the full knowledge that its decision is binding. This Court should grant certiorari to resolve this vastly divergent approach, which results in manifestly unjust disparities in the execution of capital sentences.

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[116] (Vol. 8, R. 1120, 1121 (two times), 1123 (two times), 1125, 1130, 1131, 1132, 1133 (six times), 1134, 1135 and 1136 (three times)).
[117] *Rauf*, 145 A.3d at 481.
[118] *Mosley v. State*, 209 So. 3d 1248, 1274 (Fla. 2016).

III. This Court should grant certiorari because the Alabama Courts' denial of relief on Mr. Burton's Eighth Amendment claim contravenes this Court's recognition that only the most culpable offenders may constitutionally be sentenced to death and that entire classes of defendants may be categorically ineligible for the death penalty under evolving standards of decency.

Since the time of Mr. Burton's original conviction, standards of decency regarding capital murder have evolved significantly. Under current standards, a less-culpable co-defendant cannot constitutionally be executed, when his vastly more-culpable co-defendant is not subject to a death sentence. Mr. Burton did not kill the victim, did not direct his co-defendant to do so, and did not witness the shooting, having left the store prior to the murder. Yet, Mr. Burton remains under a sentence of death, while the triggerman, DeBruce, has been relieved of the death penalty and re-sentenced to life without the possibility of parole.

In denying Mr. Burton relief on this claim, the ACCA failed to recognize both the basis, and the evolving nature of, this claim, and its denial of relief both "conflicts with relevant decisions of this Court," and represents "an important question of federal law that has not been, but should be, settled by this Court."[119]

In *Atkins v. Virginia*[120] and *Roper v. Simmons*,[121] this Court held that evolving standards of decency forbade execution of the intellectually-disabled[122] and juveniles,[123] despite the fact that no prior precedents mandated the results of those

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[119] SUP. CT. R. 10(C).
[120] 536 U.S. 304 (2002).
[121] 543 U.S. 551 (2005).
[122] *Atkins*, 536 U.S. at 321.
[123] *Roper*, 543 U.S. at 568-69.

cases. This Court noted that courts should review the full societal evolution of standards of decency in determining what falls outside such bounds.[124]

As Judge Alcala, of the Texas Court of Criminal Appeals, has articulated, this type of claim represents "the same type of categorical ban on the death penalty for certain individuals much in the same way as *Atkins* [*v. Virginia*] has for intellectually disabled offenders."[125] "Applying the same reasoning that applies in the *Atkins* context, applicant may be *actually innocent* of the death penalty because he may be categorically ineligible for that punishment under the particular facts of this case."[126]

The ACCA attempted to avoid this claim by crediting the circuit court's untenable assertion that Mr. "Burton raised this claim on direct appeal."[127] This cannot be so. On direct appeal, Mr. Burton raised only a general disproportionality claim. The claim raised below and preserved for review by this Court, however, is that it is manifestly unjust for Mr. Burton, as a non-shooter, to be executed while the vastly more culpable shooter is no longer under a sentence of death. This claim could not have been ascertained through reasonable diligence, nor did it even exist, during the pendency of Mr. Burton's direct appeal, because the more culpable triggerman had not been resentenced at that time.

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[124] *See Atkins*, 536 U.S. at 318-21.
[125] *See Ex parte Wood*, 498 S.W. 3d 926, 928-29 (Tex. Crim. App. 2016) (Alcala, J., concurring).
[126] *Id.*
[127] Pet. App. B at 8.

Even if Mr. Burton's case is viewed as initially comporting with *Tison v. Arizona*,[128] which Mr. Burton does not concede, under *evolving* standards of decency, putting Mr. Burton to death while the shooter is no longer subject to a death sentence is arbitrary and unreasonable. The ACCA's opinion refuses to recognize either the new fact forming the basis of the claim, or this Court's recognition of classes of defendants categorically ineligible for the death penalty under *evolving* standards of decency.[129]

The ACCA's denial of relief also contravenes this Court's recognition that the Eighth Amendment allows only the most culpable offenders to be sentenced to death.[130] "[D]efendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers."[131]

Pursuant to both *Kennedy* and *Graham*, and given evolving standards of decency in non-shooter cases, putting Mr. Burton to death, while his vastly more culpable co-defendant is no longer subject to a death sentence is unconscionable.

Throughout the country, governors in states that actively employ the death penalty are recognizing that evolving standards of decency counsel against executing a non-shooter. In Texas, then-Governor Rick Perry commuted the sentence of death-row inmate Kenneth Foster, a non-shooter, even though the gunman, Mauriceo

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[128] 481 U.S. 137, 154 (1987).
[129] *See Roper*, 543 U.S. at 568-69; *Atkins*, 536 U.S. at 319.
[130] *See Kennedy v. Louisiana*, 554 U.S. 407, 436-437 (2008).
[131] *Graham v. Florida*, 560 U.S. 48, 69 (2010).

Brown, *had* been executed.[132] Governor Perry—a man who oversaw more executions than any other governor in modern history and opposed barring the death penalty for the intellectually-disabled and juveniles[133]—understood the injustice of executing the non-shooter, even where the shooter had been executed. Mr. Burton's situation is far more unjust in light of the newly available development of the triggerman's death sentence having been vacated.

Even after the circuit court adopted the State's proposed order and dismissed Mr. Burton's petition, the Governor of Virginia commuted Ivan Teleguz's sentence of death to life without the possibility of parole, citing the fact that his more culpable co-defendant, who actually committed the killing, was sentenced to life without the possibility of parole.[134] And, in that case, Teleguz was still vastly more culpable in the crime than was Mr. Burton, in that he *hired* the more culpable defendant

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[132] *See* Ralph Blumenthal, *Governor Commutes Sentence in Texas*, N.Y. TIMES, Aug. 31, 2007, at A14, http://www.nytimes.com/2007/08/31/us/31execute.html.

[133] Robert Barnes, *Rick Perry holds the record on executions*, WASH. POST, Aug. 23, 2011 (https://www.washingtonpost.com/politics/rick-perry-holds-the-record-on-executions/2011/08/17/gIQAMvNwYJ_story.html?) (noting that, at that point, he'd "overseen more executions than any governor in modern history: 234 and counting," which was "more than the combined total in the next two states—Oklahoma and Virginia—since the death penalty was restored 35 years ago . . . He vetoed a bill that would have spared the [intellectually-disabled], and sharply criticized a Supreme Court ruling that juveniles were not eligible for the death penalty.").

[134] Press Release, Office of the Governor, Governor McAuliffe Commutes Sentence of Ivan Teleguz to Life Imprisonment, (Apr. 20, 2017) (https://governor.virginia.gov/newsroom/newsarticle?articleId=20103) ("I am also mindful of the appearance of disproportionate sentences in this case. Michael Hetrick is the person who walked into Stephanie Sipe's home and brutally attacked and murdered her. To save his own life, he negotiated a deal to serve life in prison and avoid the death penalty. There is no question that he is every bit as responsible for Stephanie's murder as Ivan Teleguz.").

specifically to kill the victim,[135] whereas Mr. Burton did not direct DeBruce to commit the murder, did not participate in it, and did not even witness it, as he was out of the building when the shooting took place.

The evolution of standards in such situations is so rapid and pronounced that, even after the conclusion of briefing in the ACCA on appeal, yet another pro-death penalty governor, Arkansas's Asa Hutchinson, announced he would commute a death sentence in the case of Jason McGehee, where "equally culpable co-defendants are serving sentences less than death."[136] In so doing, the Governor stated that "the disparity in sentence given to Mr. McGehee compared to the sentences of his codefendants was a factor in my decision . . . ."[137] Once again, Mr. Burton's case is more compelling. His co-defendant is not "equally culpable," but vastly more so.

And, even between the ACCA's denial of Mr. Burton's appeal and the filing of his petition with the ASC, another sentence was commuted in Texas in similar circumstances. On February 22, 2018, Texas Governor Gregory Abbott commuted the death sentence of Thomas Whitaker to life without the possibility of parole.[138]

In the Whitaker case, Governor Abbott noted that a significant reason he granted the commutation was the fact that "Brashear [the co-defendant], who shot

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[135] *See id.*

[136] *See* Jacob Kauffman, *Arkansas Governor Grants Clemency To Death Row Inmate, Sets Execution For Another*, NAT'L PUB. RADIO, Univ. of Ark. – Little Rock, Aug. 25, 2017 (http://ualrpublicradio.org/post/arkansas-governor-grants-clemency-death-row-inmate-sets-execution-another).

[137] *Id.*

[138] *See*: "Proclamation by the Governor of the State of Texas," Feb. 22, 2018 (Attached as Ex. E for the Court's convenience).

and killed the deceased, was sentenced to life, but [Whitaker], who conspired to kill his parents and brother, but did not actually shoot the gun that caused the murders, was sentenced to death."

As with the other commutations discussed above, Mr. Burton's situation is far more inequitable than Whitaker's in that Whitaker willfully conspired—solely for financial gain—to kill his father, mother, and brother, even arranging to have the codefendant shoot him (Whitaker) in order to cover up his participation,[139] whereas Mr. Burton did not direct DeBruce to commit the murder, did not participate in it, and did not witness it.

Moreover, in its *amicus* brief to the this Court in *Roper*, the State of Alabama admitted that to allow a less culpable co-defendant to be punished with death, while reducing the sentences of two of his co-defendants to life imprisonment without parole, would be "nonsensical[]."[140]

Most compellingly, at least three of the jurors who voted for death in Mr. Burton's case, now knowing that the shooter is off of death row, have stated that they are either hopeful that Mr. Burton's sentence will be commuted, or believe it would

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[139] *See* Meagan Flynn, *Texas governor spares inmate from execution after a father's pleas*, WASH. POST, Feb. 23, 2018. (https://www.washingtonpost.com/news/morning-mix/wp/2018/02/23/a-fathers-pleas-leads-texas-governor-to-spare-inmate-from-execution/?).

[140] Br. of the States of Ala., Del., Ok., Tx, Ut. and Va. as Amici Curiae in Support of Petitioner at *10, *Roper v. Simmons*, 543 U.S. 551 (2005) (No. 03-633), 2004 WL 865268, *10 (Apr. 20, 2004) ("[A]n arbitrary 18-year-old cut-off would result, nonsensically, in a constitutional rule permitting capital punishment for Grayson, who was 19 at the time, but not for Loggins and Duncan, both of whom were 17 but plainly are every bit as culpable - if not more so.").

be reasonable and have no objection to it, especially in light of the fact that Mr. Burton has apologized for his role in the robbery.[141] Such juror concerns about the propriety of carrying out the sentences for which they voted have given pause to government officials. Indeed, only last February, Ohio Governor John Kasich granted a temporary reprieve to a condemned inmate, based in large part on a letter from one of the inmate's original jurors, informing the governor that his decision would be different today, in light of new information.[142]

The State itself even has taken the position that Mr. Burton remaining on death row, when the triggerman, DeBruce, has had his death sentence overturned and is now off of death row "creates an unusual and arguably unjust situation."[143]

An Alabama prosecutor and circuit court judge have also recognized the unconscionable nature of putting someone to death under such circumstances. In *State v. Gamble*[144] the ACCA addressed the issue of whether a less-culpable co-defendant could constitutionally be executed, when his more-culpable co-defendant

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[141] (Pet. App. G (affidavits from three jurors, and a letter from Mr. Burton apologizing to Mr. Battle's family).

[142] *See* Jackie Borchardt, *Ohio governor delays execution of Raymond Tibbetts due to juror's concerns*, Cleveland.com, Feb. 8, 2018 (http://www.cleveland.com/metro/index.ssf/2018/02/ohio_governor_delays_execution.html).

[143] State of Alabama's Petition for Certiorari at 24, *Dunn. v. DeBruce*, 125 S. Ct. 2854 (2015) (No. 14-807) (emphasis added). The injustice of such disparities has been recognized by other courts. *See also People v. Henne*, 293 N.E.2d 172, 174 (Ill. Ct. App. 1973) ("Fundamental fairness and respect for the law dictate that similarly situated defendants may not receive grossly disparate sentences." (citation omitted)); *State v. Buck*, 361 S.E.2d 470, 474 (W. Va.1987) ("If codefendants are similarly situated, some courts will reverse on disparity of sentence alone.") (citation omitted).

[144] 63 So. 3d 707 (Ala. Crim. App. 2010).

was relieved of the death penalty and re-sentenced to life without the possibility of parole. The circuit court had granted relief on this claim under the Eighth and Fourteenth Amendments, finding:

> [T]hat although Gamble and [co-defendant] Presley share criminal liability, Presley bears the greater culpability for the tragic murders of John Burleson and Janice Littleton. Faced with the 'bizarre' result that the more culpable Presley no longer faces execution, while the lesser culpable Gamble remains on death row, this Court finds such a result to be arbitrary, disproportionate, and fundamentally unfair.[145]

As in the other situations detailed herein, Mr. Burton's situation is far more compelling. In *Gamble*, the evidence at trial demonstrated that although Gamble was present at the crime scene and participated enough to invoke criminal liability for capital murder, he nonetheless was less culpable than his co-defendant, Presley, who actually killed two victims.[146] Presley was the triggerman, while Gamble only watched and otherwise participated in the underlying robbery.[147] Gamble was outside of the pawnshop where the robbery transpired when Presley fired his first shot.[148] After Presley's gun jammed, Gamble walked back in, looked at the scene, and went back to the front door. Presley fired another shot, which again jammed, and Gamble re-entered the store, and picked up unspent bullets which had fallen from

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[145] *Gamble*, 63 So. 3d at 724 (quoting circuit court opinion).
[146] *Id.* at 709-10.
[147] *Id.* at 710.
[148] *Id.*

Presley's gun.[149] Presley then fired a final shot at the victims, and Gamble leaned over the counter and looked at them.[150]

Unlike Gamble, Mr. Burton was *not* present when the shooting occurred and did not witness it.[151] He also did not tell DeBruce to shoot the victim, and later shook his head when DeBruce told Mr. Burton and the other co-defendants he had done so.[152]

Thus, as in *Gamble*, the evidence against Mr. Burton established that, although he was culpable in the underlying crime of armed robbery (and felony murder), he was *significantly* less culpable than his co-defendant.

As the circuit court in *Gamble* articulated:

> It is the responsibility and duty of each court that sits in judgment of the constitutional validity of [a] death sentence to ensure that the imposition of the death penalty comports with the requirements of fundamental fairness while avoiding arbitrariness. Proportionality in sentencing between co-defendants is a major, independent element under the Eighth Amendment in assessing a death sentence. (citing *Enmund v. Florida*, 458 U.S. 782, 788 (1982)).[153]

Mr. Burton's case is far more compelling, particularly in light of the continually evolving standards of decency. Under evolving standards of decency, Mr. Burton's

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[149] *Id.*
[150] *Id.*
[151] (Vol. 4, TR. 359-60).
[152] *Id.*
[153] *Gamble*, 63 So. 3d at 723 (quoting the circuit court opinion granting Gamble relief). Although the ACCA reversed in *Gamble*, it affirmed the circuit court's decision granting Gamble a new sentencing due to ineffective assistance of counsel at the penalty phase. *Id.* at 721-22, 729. Neither party appealed to the Alabama Supreme Court.

death sentence is unconstitutional as applied. Mr. Burton thus asks this Court to consider the same concern articulated by the prosecutor in *Gamble*, who publicly stated, "I couldn't lay my head on my pillow at night if I stood by and let a person who didn't kill somebody be executed when the person who did kill somebody was not."[154]

Under the Eighth and Fourteenth Amendments, Mr. Burton's death sentence is arbitrary, capricious and disproportionate. Thus, Mr. Burton's death sentence is unconstitutional. The ACCA's opinion refuses to recognize either the new factual development forming the basis of the claim, or this Court's recognition of classes of defendants categorically ineligible for the death penalty under *evolving* standards of decency.[155] The ACCA's denial of relief also contravenes this Court's has recognition that the Eighth Amendment allows only the most culpable offenders to be sentenced to death.[156]

Pursuant to both *Kennedy* and *Graham*, and given evolving standards of decency in non-shooter cases, putting Mr. Burton to death, while his vastly more culpable co-defendant is no longer subject to a death sentence is unconscionable. The ACCA's opinion failed to recognize the evolving nature of such circumstances, and failed to recognize this Court's commands that only the most culpable offenders should be sentenced to death. This Court should grant certiorari to vindicate its

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[154] *See* Brenda Goodman, *Prosecutor Who Opposed a Death Sentence is Rebuked*, N.Y. TIMES, Sept. 15, 2007, at A9 (http://www.nytimes.com/2007/09/15/us/15penalty.html) (describing the district attorney's fight to have Mr. Gamble's sentence reduced—against the wishes of Alabama's Attorney General—but with the support of his fellow district attorneys).

[155] *See Roper*, 543 U.S. at 568-69; *Atkins*, 536 U.S. at 319.

[156] *Kennedy*, 554 U.S. at 436-437; *Graham*, 560 U.S. at 69.

Eighth Amendment precedents recognizing the applicability of evolving standards of decency in capital sentencing.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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