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

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PETITIONER'S APPENDICES - VOLUME I

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August 31, 2018

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PET. APP. A

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

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

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).

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

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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.

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[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."

Burton, 651 So. 2d at 643-44.

Standard of Review

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

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[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

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[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.

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.

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

June 28, 2018

Mr. Matt Schulz
Federal Defenders, Middle District of Alabama
817 South Court Street
Montgomery, AL 36104

Re: Charles Lee Burton
v. Alabama
Application No. 17A1409

Dear Mr. Schulz:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Thomas, who on June 28, 2018, extended the time to and including August 31, 2018.

This letter has been sent to those designated on the attached notification list.

Sincerely,

Scott S. Harris, Clerk

by

Jacob C. Travers
Case Analyst

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

NOTIFICATION LIST

Mr. Matt Schulz
Federal Defenders, Middle District of Alabama
817 South Court Street
Montgomery, AL 36104

Clerk
Court of Criminal Appeals of Alabama
300 Dexter Avenue
Montgomery, AL 36104

PET. APP. D

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

ORIGINAL

IN THE CIRCUIT COURT OF TALLADEGA COUNTY, ALABAMA CRIMINAL DIVISION

2017 JAN 11 PM 3:53

BRIAN [illegible]
CIRCUIT CLERK

CHARLES LEE BURTON, **Petitioner,**	)	
v.	)	**Case No. CC-1991-341.61**
STATE OF ALABAMA, **Respondent.**	)	

PETITION FOR RELIEF FROM ILLEGAL SENTENCE PURSUANT TO RULE 32 OF THE ALABAMA RULES OF CRIMINAL PROCEDURE

Charles Lee Burton, now incarcerated on Death Row at Holman Correctional Facility in Atmore, Alabama, petitions this Court pursuant to Rule 32 of the Alabama Rules of Criminal Procedure, for relief from his unconstitutionally disproportionate, and thus illegal, sentence of death imposed pursuant to Alabama's unconstitutional, judge-based death penalty scheme. Mr. Burton's death sentence is arbitrary and disproportionate under the Eighth and Fourteenth Amendments to the United States Constitution. Additionally, Alabama's death penalty sentencing scheme as applied to Mr. Burton violates the Sixth, Eighth and Fourteenth Amendments. Mr. Burton seeks a ruling from this Court invalidating his death sentence and either modifying his sentence to one of life without parole or setting this matter for a jury trial on whether a sentence of death should be imposed.

STATEMENT OF FACTS

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, with the intent to rob the store.[1] At the conclusion of the robbery, with Mr. Burton already out of the store, Derrick DeBruce shot and killed the victim in this case, Mr. Doug Battle, a customer who had entered the store during the robbery.[2] Derrick DeBruce and Mr. Burton were prosecuted and convicted separately on capital murder charges, while the other co-defendants were tried on non-capital murder charges.

During the robbery, the men entered the store at different intervals and went to different parts of the store.[3] Mr. Burton went to pay for something at the cash register, announced it was a stick-up, and he and others then instructed customers and employees to get onto the floor.[4]

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[1] (Vol. 4, TR. 341-43, 351). Transcript references are to the Reporter's Transcript in the underlying case, CC-1991-341.

[2] (Vol. 4, TR. 359-60).

[3] (Vol. 4, TR. 354).

[4] (Vol. 4, TR. 355).

Mr. Burton then took a store employee to the back of the store where the safe was, and announced that he wasn't going to hurt anybody.[5] Meanwhile, the other co-defendants had also pulled their guns and were telling customers and employees to get down on the floor.[6] Derrick DeBruce began cracking jokes and kicking some of the people on the floor.[7]

As the men were taking money from some of the people on the floor, Mr. Battle, a customer, entered the store. LuJuan McCants instructed Mr. Battle to get on the floor, and Mr. Battle threw his wallet down at McCants.[8] McCants again instructed Mr. Battle to get on the floor, but Mr. Battle stood motionless.[9] Derrick DeBruce then came toward Mr. Battle, instructed him to get on the floor and, when he again did not comply, DeBruce hit him on the back of his head with a pistol.[10] Mr. Battle

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[5] (Vol. 4, TR. 355-56).

[6] (Vol. 4, TR. 355).

[7] (Vol. 4, TR. 355-36).

[8] (Vol. 4, TR. 355).

[9] (Vol. 4, TR. 357-58).

[10] (Vol. 4, TR. 358-59).

then lay face down on the floor, and called Derrick DeBruce a "punk."[11] The two then started cursing at each other.[12]

At this point, Mr. Burton and Deon Long were leaving out of the front of the store.[13] McCants and Brantley followed after them.[14] At Mr. Burton's trial, McCants testified that, after all the co-defendants but DeBruce had left the store, McCants heard a gunshot go off, and Derrick DeBruce then ran from the store.[15]

As the men drove away from the scene of the crime, Mr. Burton asked DeBruce why he shot a man, and DeBruce claimed he shot Mr. Battle because he had a gun, and DeBruce was trying to protect McCants.[16] McCants testified that Mr. Burton then shook his head, and said, "let's get

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[11] (Vol. 4, TR. 359).

[12] (*Id.*).

[13] (*Id.*).

[14] (Vol. 4, TR. 360).

[15] (*Id.*).

[16] (*Id.*).

out of here," while everyone else looked at DeBruce.[17] The men then went back to a house, and split up the money from the robbery.[18]

During both the opening and closing arguments in Mr. Burton's trial, the State conceded that Mr. Burton was not the triggerman who killed the victim, Doug Battle, in this case.[19] In fact, not only did Mr. Burton not kill Mr. Battle, but he did not even witness the shooting and he had already left the store when the shooting occurred.[20] Still, Mr. Burton was convicted of capital murder.[21]

Under Alabama law, Mr. Burton, or any of the codefendants, could be held liable for non-capital murder under the facts of this case.[22] As accomplices to a robbery where deadly weapons were employed, any of the men could be held responsible for the death.[23]

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[17] (Vol. 4, TR. 361).

[18] (Vol. 4, TR. 365) (Willie Brantley's father, who was identified as "Sportio" (Sportio was also Derrick DeBruce's brother), helped to split up the money.) *Id.*

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

[20] (Vol. 4, TR. 359-60).

[21] (Vol. 1, p. 62 (Clerk's Record); Vol. 7, TR. 914).

[22] *See* Ala. Code § 13A-2-23 (1975).

[23] *Id.*

However, in order to apply the death penalty to a specific defendant, Alabama law requires the State to prove that the specific defendant harbored a "particularized intent to kill."[24]

In Mr. Burton's case, the State conceded that Mr. Burton neither shot Mr. Battle, nor was even present in the building when the shooting occurred. To show intent to kill, the State relied upon three main theories. First, the State contended that Mr. Burton was the leader of the group, because Mr. Burton was the oldest member of the group, and had been the one to determine whether the robbery would go forward or not.[25]

Second, through the testimony of co-defendant LuJuan McCants, the State contended that Mr. Burton allegedly foresaw the possibility that someone may 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 inappropriately bolster it.[26]

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[24] *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).

[25] (Vol. 6, TR. 831, 835, 839).

[26] LuJuan McCants, a sixteen year-old accomplice in the robbery, was given a deal to testify against Mr. Burton. (Vol. 4, TR. 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

The State's third theory was that Mr. Burton was automatically liable for the intent of the shooter, because Mr. Burton was an accomplice in the underlying robbery.[27] This contention was legally incorrect. Although an accomplice can be held liable for murder even if he himself did not intend that a person be killed, the accomplice would not be liable for capital murder unless he had a particularized intent to kill.[28]

The State's third theory was buttressed when the trial court gave an erroneous 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*.[29]

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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 improperly overruled, the cooperating teenage witness then testified, almost word-for-word as fed to him. However, in a videotaped 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. 16, State Court - Collateral Appeal (Supplement, Clerk's Record, p. 56 - Exhibit 10b of the Supplemental Index submitted by the Respondent)).

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

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

[29] The trial court's flawed 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

Although Mr. Burton's trial counsel argued to the jury that Mr. Burton was not present at the crime scene, this argument was refuted by the eyewitness identification of Mr. Burton from the manager of the AutoZone store, fingerprint evidence demonstrating Mr. Burton's presence in the AutoZone store, and McCants' testimony that Mr. Burton was a participant. At the conclusion of the guilt phase of trial, Mr. Burton was found guilty of capital murder.[30]

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,"[31] and that Mr. Burton was relinquished to the custody of his abusive father at a

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> 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* or that the Defendant intentionally aided or abetted the other person or persons in the commission of *the murder*.

(Vol. 7, TR. 900-901) (emphasis added). Because the reference to "the murder" came second, the instruction encouraged a misapplication of the proper standard. The evidence at trial overwhelmingly went toward establishing the plan to commit the robbery. Thus, a reasonable juror would have considered "the crime" to be referencing "the robbery," given the way the instruction read.

[30] (Vol. 7, TR. 914).

[31] (Vol. 7, Tab #R-19, TR. 1024-25).

young age.[32] Mr. Burton's wife, Hattie Pearl Burton, testified that Mr. Burton acted as a father to at least five of her children, even though the children were not his.[33] 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.[34] 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 protective influence of a mother after that time.[35] Mr. Burton himself testified, and the State did not rebut his testimony on this point, that he obtained a GED while in prison.[36]

Unfortunately, against the wishes of Mr. Burton's trial counsel, the trial court forced counsel to call two witnesses that Mr. Burton had indicated he wanted to call.[37] The trial court did not inquire as to the reasons Mr. Burton wanted to call the witnesses, and did not explore why trial counsel did not want to call them. Rather, the Court simply mandated

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[32] (Vol. 7, Tab # R-19, TR. 1025).

[33] (Vol. 7, TR. 1028).

[34] (Vol. 7, TR. 1031).

[35] (Vol. 8, Tab #R-19, TR. 1032-33).

[36] (Vol. 7, Tab #R-19, TR.1006).

[37] (Vol. 7, TR. 920; Vol. 7, TR. 991-992).

that trial counsel call them.[38] The two witnesses were two of Mr. Burton's co-defendants, Andre Jones and Willie Brantley.[39] Both men took the stand and testified that they did not know Mr. Burton.[40] It immediately became obvious why trial counsel had not wanted to call them. The calling of these two witnesses opened the door for the prosecutor to introduce damaging evidence against Mr. Burton, and the prosecutor capitalized on this evidence in his closing arguments as he asked for the death penalty. After both co-defendants testified that they did not even know Mr. Burton, the prosecutor was able to introduce a videotape showing Mr. Burton and the other co-defendants, including Jones and Brantley, entering a Bank in Sylacauga, Alabama together.[41] Additionally, the State recalled two eyewitnesses from the AutoZone robbery, both of whom provided in-court identifications of Jones and Brantley.[42]

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, his influence on

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[38] (*Id.*).

[39] (*Id.*).

[40] (Vol. 7, TR. 996-997, 1001-1003).

[41] (Vol. 8, TR. 1067-71).

[42] (Vol. 8, TR. 1042-1047).

the codefendants, and to Mr. Burton's criminal history.[43] 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.[44]

The jury was informed repeatedly that, under the law, its vote recommending either life without the possibility of parole, or death, was merely a "recommendation."[45] Although Mr. Burton was not the triggerman, and even though the evidence that Mr. Burton had any intent that anyone be killed was weak, the jury recommended death.[46] The jury did not state whether it specifically found one or both offered aggravators.[47]

The judge then independently found and weighed the aggravating and mitigating circumstances, determined that there were no mitigating circumstances, statutory or non-statutory,[48] and sentenced Mr. Burton to

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[43] (Vol. 7, Tab #R-18, TR. 930-80; Vol. 7, Tab #R-19, TR. 995-99, TR. 1001-3, and TR. 1008-16; Vol. 8, Tab #R-20, TR. 1042-80).

[44] (Vol. 8, 1184-86).

[45] (Vol. 8, 1130-36).

[46] (Vol. 1, p. 63).

[47] (*Id.*).

[48] (Vol. 1, p. 105).

death.[49] In so doing, the judge considered additional aggravating and mitigating circumstances not presented to the jury, but presented to the court via a presentence report, including a juvenile offense involving the stabbing of another boy.[50]

Although the vastly more culpable co-defendant, DeBruce, was also convicted of capital murder and sentenced to death, his death sentence was overturned by the Eleventh Circuit Court of Appeals.[51] The State of Alabama eventually dropped any attempt to appeal that reversal, and the district court unconditionally granted his petition, and ordered that he be resentenced to life without the possibility of parole.[52] 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, remains on death row.

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[49] (Vol. 1, p. 106).

[50] (Vol. 1, p. 64-71, 103).

[51] *DeBruce v. Comm'r*, 758 F.3d 1263 (11th Cir. 2015).

[52] *DeBruce v. Dunn*, No. 1:04-cv-02669 (N.D. Ala.), Doc. 55. (Public records available via Alacourt do not show that DeBruce yet has been resentenced. However, an inmate search via the Alabama Department of Corrections website no longer lists him as being housed on death row).

PROCEDURAL HISTORY

Mr. Burton was convicted of capital murder in the Talladega County Circuit Court on April 16, 1992.[53] The jury recommended a death sentence[54] and the Court sentenced Mr. Burton to death on May 8, 1992.[55]

An appeal was timely filed and the Alabama Court of Criminal Appeals affirmed on December 30, 1993.[56] The Alabama Supreme Court affirmed on September 16, 1994.[57] On May 15, 1995, the U.S. Supreme Court denied Mr. Burton's Petition for a Writ of Certiorari.[58]

Mr. Burton filed a petition for post-conviction relief in State court, pursuant to Rule 32 of the Alabama Rule of Criminal Procedure, on December 4, 1996.[59] The circuit court dismissed/denied Mr. Burton's Petition, as Amended on July 17, 2001.[60] Mr. Burton appealed to the

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[53] (Vol. 1, TR. 62, 65; Vol. 7, TR. 914).

[54] (Vol. 1, TR. 63).

[55] (Vol. 1, TR. 74-75).

[56] *Burton v. State*, 651 So. 2d 641 (Ala. Crim. App. 1993).

[57] *Ex parte Burton*, 651 So. 2d 659 (Ala. 1994)(rehearing denied December 9, 1994).

[58] *Burton v. Alabama*, 514 U.S. 1115 (1995).

[59] (Vol. 1, C. 9) (Case No. CC-1991-341.60).

[60] (Vol. 1, C. 8) (Case No. CC-1991-341.60).

Alabama Court of Criminal Appeals, which affirmed the decision,[61] and denied rehearing on April 23, 2004.[62] The Alabama Supreme Court denied relief without opinion on September 24, 2004.[63]

Mr. Burton filed a petition for a writ of habeas corpus in the Northern District of Alabama on February 8, 2005.[64] The district court denied this petition on March 27, 2009.[65]

Mr. Burton appealed to the Eleventh Circuit, which denied the appeal on November 7, 2012, and on February 8, 2013, denied Mr. Burton's timely petition for rehearing and rehearing *en banc*.[66] Mr. Burton appealed to the United States Supreme Court, which denied his appeal on October 7, 2013.[67] Mr. Burton is party to a federal case challenging the State of Alabama's method of execution,[68] and no execution date has been set.

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[61] *Burton v. State*, 910 So. 2d 831 (Ala. Crim. App. 2004).

[62] *Burton v. State*, 919 So. 2d 1235 (Ala. Crim. App. 2004).

[63] *Ex parte Burton*, 920 So. 2d 1139 (Ala. 2004).

[64] *Burton v. Comm'r*, No. 4:05-cv-00308-CLS-PWG (N.D. Ala.) (Doc. #1).

[65] *Id.* (Doc. #33).

[66] *Burton v. Thomas*, 700 F.3d 1266 (11th Cir. 2012).

[67] *Burton v. Thomas*, 134 S. Ct. 249 (2013).

[68] *Grayson v. Dunn, et al.*, No. 12-cv-316-WKW (M.D. Ala.).

GROUNDS SUPPORTING PETITION FOR RELIEF

I. Because Mr. Burton's co-defendant, who was vastly more culpable in the crime than Mr. Burton, has had his death sentence overturned, Mr. Burton's death sentence is arbitrary, capricious, and disproportionate, in violation of Mr. Burton's rights under the Fifth, Sixth, Fourteenth and Eighth Amendments to the United States Constitution.

In *State v. Gamble*[69] the Alabama Court of Criminal Appeals addressed the issue of whether a less-culpable co-defendant could constitutionally be executed, when his more-culpable co-defendant was relieved of the death penalty and re-sentenced to life without the possibility of parole.

The circuit court granted Gamble relief on this claim under the Eighth and Fourteenth Amendments, finding:

> This Court finds that although Gamble and [his 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.[70]

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[69] 63 So.3d 707 (Ala. Crim. App. 2010).

[70] *Gamble*, 63 So.3d at 724 (quoting circuit court opinion).

Although the Alabama Court of Criminal Appeals reversed this decision, the Court simultaneously affirmed the circuit court's decision granting Gamble a new sentencing due to ineffective assistance of counsel at the penalty phase.[71] Neither party appealed to the Alabama Supreme Court. Thus, the Alabama Supreme Court has never had the opportunity to resolve this issue.

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.[72] Presley had been the one to fire the shots that killed the victims, while Gamble only watched and otherwise participated in the underlying robbery.[73] Gamble was outside of the pawnshop where the robbery transpired when Presley fired his first shot.[74] 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

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[71] *Id.* at 721-22, 729.

[72] *Id.* at 709-10.

[73] *Id.* at 710.

[74] *Id.*

up unspent bullets which had fallen from Presley's gun.[75] Presley then fired a final shot at the victims, and Gamble leaned over the counter and looked at them.[76]

In Mr. Burton's case, similar circumstances exist, with Mr. Burton having even less participation with the shooting itself. Unlike Gamble, Mr. Burton was *not* present when the shooting occurred and did not witness it.[77] He also did not tell DeBruce to shoot the victim, and shook his head when DeBruce told Mr. Burton and the co-defendants he had done so.[78]

Thus, as in *Gamble*, the evidence against Mr. Burton at trial demonstrated that, although culpable in the underlying crime of armed robbery, he was *significantly* less culpable than his co-defendant DeBruce.

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

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[75] *Id.*

[76] *Id.*

[77] (Vol. 4, TR. 359-60).

[78] *Id.*

> sentence. (citing *Enmund v. Florida*, 458 U.S. 782, 788 (1982)).[79]

The principle of *Enmund* also weighs heavily in favor of relief in Mr. Burton's case. In *Enmund* the Court held that the death penalty is unconstitutional for one who "does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed."[80] Although the State twisted some testimony to make it appear that Mr. Burton had contemplated that a murder could take place, the weight of the evidence did not support that conclusion. Even if Mr. Burton's case is viewed as comporting with *Tison v. Arizona*,[81] where the Supreme Court held, based upon society's *then-prevailing* views, that the death penalty was constitutionally permissible for major participants in a violent felony who did not actually kill and lacked any specific intent to kill, under current evolving standards of decency, putting Mr. Burton to death while the shooter is now off of death row is arbitrary and unreasonable. Such persons should be categorically ineligible for the death penalty under evolving standards of decency, and Alabama's capital murder scheme is

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[79] *Gamble*, 63 So.3d at 723 (quoting the circuit court opinion granting Gamble relief on this issue).

[80] 458 U.S. at 797.

[81] 481 U.S. 137, 154 (1987).

unconstitutional, as applied to Mr. Burton, in that it does not properly narrow the class of persons eligible for the death penalty to the "worst of the worst," as required for the death penalty to be properly applied.[82]

Indeed, in a similar situation in Texas, then-Governor Rick Perry commuted the sentence of death-row inmate Kenneth Foster, a non-shooter, even though the gunman, Mauriceo Brown, *had* been executed.[83] Moreover, in its *Amicus* brief to the United States Supreme Court in the *Roper* case, 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[]."[84] The State of Alabama has also taken the position, specifically regarding this case, that Mr. Burton remaining on death row, when the triggerman, DeBruce, has had his death sentence overturned

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[82] See *Roper v. Simmons*, 543 U.S. 551, 568-69 (2005); *Atkins v. Virginia*, 536 U.S. 304, 319 (2002).

[83] *See* Ralph Blumenthal, Governor Commutes Sentence in Texas, New York Times, August 31, 2007, at A14. http://www.nytimes.com/2007/08/31/us/31execute.html

[84] Brief of the States of Alabama, Delaware, Oklahoma, Texas, Utah, and Virginia as Amici Curiae in Support of Petitioner, *Roper v. Simmons*, 2004 WL 865268 at *10 ("an 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.").

and is now off of death row "creates an unusual and arguably unjust situation."[85]

Additionally, 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 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.[86]

Mr. Burton thus asks this Court to consider the same concern articulated by the prosecutor in Gamble's case, 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."[87]

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[85] State of Alabama's Petition for Certiorari, *Dunn. v. DeBruce*, 125 S. Ct. 2854, U.S. Supreme Court No. 14-807 (2015), p. 24.

[86] *See* attachments A, B, C and D – affidavits from three jurors in Mr. Burton's case, and a letter from Mr. Burton apologizing to Mr. Battle's family.

[87] *See* Brenda Goodman, Prosecutor Who Opposed a Death Sentence is Rebuked, New York Times, September 15, 2007, at A9. http://www.nytimes.com/2007/09/15/us/15penalty.html.

The prosecutor in Gamble's case, Shelby County District Attorney Robert Owens, sought to have Gamble's sentence reduced, even in the face of retribution from Alabama's Attorney General, but was supported by his fellow district attorneys. *See id.*

Under the Eighth and Fourteenth Amendments to the United States Constitution, and Sections VI and IV of the Alabama Constitution, Mr. Burton's death sentence is arbitrary, capricious and disproportionate. This Court should grant this petition, and order that Mr. Burton be resentenced to life in prison without the possibility of parole.[88]

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[88] This claim is cognizable at this stage. As an initial matter, DeBruce's removal from death row, and the events signaling a change in evolving standards of decency in such cases, are new circumstances that did not exist during Mr. Burton's initial review. Alabama Rule 32.2(b)(2) allows this court to hear a successive petition if "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." These factors are both met. Moreover, Mr. Burton's argument that persons such as him, who are less culpable than the major actor in a murder who is now off of death row, should be categorically ineligible for execution pursuant to evolving standards of decency and fundamental fairness, represents "the same type of categorical ban on the death penalty for certain individuals much in the same way as [*Atkins v. Virginia*, 536 U.S. 304, 321 (2002)] has for intellectually disabled offenders." *See Ex parte Wood*, 498 S.W. 3d. 926, 928-29 (Tx. Crim. App. 2016) (Alcala, J., concurring). "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." *Id.* Finally, Rule 32.2(b)(1) also authorizes this court to hear this petition. Rule 32.2(b)(1) allows this court to hear a successive petition if "the petitioner is entitled to relief on the ground that the court was without jurisdiction to render a judgment or to impose sentence." "Whether a sentence is excessive ... is a jurisdictional issue, which is not precluded by the limitations period or by the rule against successive petitions. If a sentence imposed by the trial court exceeds that allowed by law, then this issue may be raised in a Rule 32 petition." *Jones v. State*, 724 So. 2d 75, 76 (Ala. Crim. App. 1998).

II. Alabama's Death Penalty System Violates the Right to Trial by Jury under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

On January 12, 2016, the United States Supreme Court issued a ruling in *Hurst v. Florida*, holding unconstitutional Florida's death penalty statute, which vests the trial court with sole authority to sentence a defendant to death.[89] Prior to *Hurst*, the Florida Supreme Court ("FSC") had repeatedly held that *Ring v. Arizona*[90] did not have any effect in its jurisdiction, because Florida's system included a jury verdict on punishment,[91] albeit non-binding on the sentencing court,[92] and because the U.S. Supreme Court had upheld the Florida system prior to *Ring* and had not explicitly overruled those prior cases in *Ring*.[93]

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[89] No. 14-7505, 136 S. Ct. 616 (2016).

[90] 536 U.S. 584 (2002).

[91] *See, e.g., Kormondy v. State*, 845 So. 2d 41, 54 (Fla. 2003) ("[T]he Supreme Court [in *Ring*] found unconstitutional a death penalty scheme where the jury did not participate in the penalty phase of a capital trial. That, of course, is not the situation in Florida where the trial court and the jury are cosentencers under our capital scheme.") (citation omitted).

[92] *Hurst*, 136 S. Ct. at 622 ("It is true that in Florida the jury recommends a sentence, but . . . its recommendation is not binding on the trial judge.'") (quoting *Walton v. Arizona*, 497 U.S. 639, 648 (1990)).

[93] *See, e.g., Bottoson v. Moore*, 833 So. 2d 693, 695 (Fla. 2002) ("Significantly, the United States Supreme Court repeatedly has reviewed and upheld Florida's capital sentencing statute over the past quarter of a century, and although Bottoson contends that there now are areas of 'irreconcilable conflict' in that precedent, the Court in *Ring* did not address

The Alabama Supreme Court ("ASC") has similarly held that *Ring* does not impact Alabama's death penalty system, because of jury participation in finding an aggravating circumstance[94] and because the U.S. Supreme Court upheld Alabama's system in *Harris v. Alabama*,[95] a pre-*Ring* decision which it has not yet explicitly overruled.[96]

The U.S. Supreme Court's ruling in *Hurst* now demonstrates that the ASC's decision upholding Alabama's system even after *Ring*, like the FSC's similar decision, was in error. Therefore, Alabama must acknowledge and correct the unconstitutionality of its own system and resentence Mr. Burton to life without parole.

A. *Hurst* applies with equal force to Alabama's system, which parallel's Florida's in all the relevant respects.

In its 1995 decision in *Harris v. Alabama*, the U.S. Supreme Court described Alabama's death penalty system as equivalent to Florida's in all relevant respects, even noting that the only main difference revolved

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this issue.") (footnote omitted); *King v. Moore*, 831 So. 2d 143, 144 (Fla. 2002) (same).

[94] *Ex parte Waldrop*, 859 So. 2d 1181, 1188 (Ala. 2002); *Ex parte Bohannon*, — So. 3d —, No. 1150640, 2016 WL 5817692, at *4-5 (Ala. Sept. 30, 2016).

[95] 513 U.S. 504 (1995).

[96] *Ex parte Waldrop*, 859 So. 2d at 1189; *Ex parte Bohannon*, 2016 WL 5817692, at *3 (quoting *Ex parte Waldrop*, 859 So. 2d at 1189).

around the fact that, in Florida, the judge at least was required to give "great weight" to the jury's recommendation, while in Alabama, the judge must only "consider" it:

> Alabama's capital sentencing scheme is much like that of Florida. . . . Both require jury participation in the sentencing process but give ultimate sentencing authority to the trial judge. . . .
>
> The two States differ in one important respect. The Florida Supreme Court has opined that the trial judge must give "great weight" to the jury's recommendation and may not override the advisory verdict of life unless "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ." . . . The Alabama capital sentencing statute, by contrast, requires only that the judge "consider" the jury's recommendation, and Alabama courts have refused to read the *Tedder*[97] standard into the statute.[98]

The Court based this comparison on the Alabama Court of Criminal Appeals' description of Alabama's system as derived from Florida's.[99] The Court of Criminal Appeals held in the underlying case, *Harris v. State,* that "the constitutionality of Alabama's statutory sentencing scheme was approved by the U.S. Supreme Court in *Proffitt v. Florida,* 428 U.S. 242, 252 . . . (1976), and the jury verdict override provisions were specifically found constitutional in *Spaziano v. Florida,* 468 U.S. 447, 457–67 . . .

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[97] *Tedder v. State,* 322 So. 2d 908 (Fla. 1975).

[98] *Harris,* 513 U.S. at 508-9 (citations omitted).

[99] *Id.* at 508 (citing *Harris v. State*, 632 So. 2d 503, 538 (1992)).

(1984)."[100] Neither of these cases had Alabama's system under review,[101] yet the Court of Criminal Appeals recognized the equivalence between Alabama's system and Florida's.

The ASC has agreed with this comparison: "Alabama's procedure permitting judicial override is almost identical to the scheme used in Florida."[102] The State of Alabama has also equated the two systems. In *Harris*, the State argued that "the Alabama statute is essentially the same as Florida's capital sentencing statute which has been found by this Court to be constitutional."[103] More recently, the State has reiterated this position: "States like Florida and Alabama responded to *Furman*[104] by creating hybrid systems under which the jury recommends an advisory

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[100] 632 So. 2d at 538.

[101] *Proffitt* did not mention Alabama at all, much less the constitutionality of its death sentencing provisions. *Spaziano* referenced Alabama only in its discussion of the applicability of the holding in *Beck v. Alabama*, 447 U.S. 625 (1980), that capital juries must be permitted to consider lesser included offenses, where the facts would support them. 468 U.S. at 454-57. As to the death penalty scheme, the *Spaziano* opinion references Alabama's system anonymously as one of the three allowing override, *id.* at 463-64, but does not otherwise discuss that feature.

[102] *Ex parte Harrell*, 470 So. 2d 1309, 1317 (Ala. 1985).

[103] Br. of Resp't, 1994 WL 514669, at *13 n.5, *Harris v. Alabama*, 513 U.S. 504 (1995) (No. 93-7659).

[104] *Furman v. Georgia*, 408 U.S. 238 (1972).

sentence, but the judge makes the final sentencing decision."[105]

Alabama cannot now repudiate the equivalence of the two State's systems. The U.S. Supreme Court's description of the Florida system in *Hurst* shows that these comparisons are valid and render Alabama's system equally unconstitutional.

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.

In *Hurst*, the State of Florida argued that Florida's death sentencing procedures are distinguishable from Arizona's and, therefore, not rendered unconstitutional under *Ring*.[106] In rejecting that distinction the U.S. Supreme Court described the relevant components of Florida's system, which are comparable to the unconstitutional elements of Arizona's system:

> The analysis the *Ring* Court applied to Arizona's sentencing scheme applies equally to Florida's. Like Arizona at the time of *Ring*, Florida does not require the jury to make the critical

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[105] Brief of *Amici Curiae* Alabama and Montana in Support of Respondent at 4, *Hurst v. Florida*, No. 14-7505, 136 S. Ct. 616 (2016), 2015 WL 4747983. *See also id.* at 7 ("Three states – Delaware, Florida, and Alabama – allow a judge to impose a sentence regardless of a jury's recommendation. *See* Ala. Code § 13A-5-47; Fla. Stat. § 921.141; Del. Code tit. 11, § 4209(d).").

[106] *See, e.g.*, 136 S. Ct. at 622.

> findings necessary to impose the death penalty. Rather, Florida requires a judge to find these facts. Fla. Stat. § 921.141(3). Although Florida incorporates an advisory jury verdict that Arizona lacked, we have previously made clear that this distinction is immaterial: "It is true that in Florida the jury recommends a sentence, but it does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation is not binding on the trial judge. A Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona." *Walton v. Arizona,* 497 U.S. 639, 648, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990); *accord*, *State v. Steele,* 921 So. 2d 538, 546 (Fla. 2005) ("[T]he trial court alone must make detailed findings about the existence and weight of aggravating circumstances; it has no jury findings on which to rely").
>
> As with Timothy Ring, the maximum punishment Timothy Hurst could have received without any judge-made findings was life in prison without parole. As with Ring, a judge increased Hurst's authorized punishment based on her own factfinding.[107]

Comparing these components side-by-side to provisions in Alabama's death penalty statute shows that the same infirmities plague Alabama's system:

1) "Florida does not require the jury to make the critical findings necessary to impose the death penalty" – neither does Alabama, *see* Ala. Code 1975, § 13A-5-47(d);[108]

2) "Florida requires a judge to find these facts" ("the critical findings necessary to impose the death penalty") – so does Alabama, *see* Ala. Code 1975, § 13A-5-46(e)[109] and

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[107] 136 S. Ct. at 621-22.

[108] "After deliberation, the jury shall return an *advisory* verdict . . . ." (Emphasis added.)

[109] "Based upon the evidence presented at trial, the evidence presented

§ 13A-5-47(3);[110]

3) "Florida incorporates an advisory jury verdict" – as does Alabama, *see* Ala. Code 1975, § 13A-5-47(d);[111]

4) "in Florida the jury . . . does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances" – nor do Alabama juries, *cf.* Ala. Code 1975, § 13A-5-46(e) (requiring a jury verdict only), *with* § 13A-5-47(d) (requiring "specific written findings" by the court); and

5) "its [the jury's] recommendation is not binding on the trial judge" – nor is it in Alabama, *see* Ala. Code 1975, § 13A-5-47(e).[112]

Because of these provisions, the Supreme Court has concluded (1) that "'[a] Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona,'"[113] (2) that "the maximum punishment [a capitally convicted

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during the sentence hearing, and the presentence investigation report and any evidence submitted in connection with it, *the trial court shall enter specific written findings* concerning the existence or nonexistence of each aggravating circumstance enumerated in Section 13A-5-49, each mitigating circumstance enumerated in Section 13A-5-51, and any additional mitigating circumstances offered pursuant to Section 13A-5-52." (Emphasis added.)

[110] "[T]he trial court shall consider the recommendation of the jury contained in its advisory verdict . . . ."

[111] "After deliberation, the jury shall return an advisory verdict . . . ."

[112] "While the jury's recommendation concerning sentence shall be given consideration, it is not binding upon the court."

[113] 136 S. Ct. at 622 (quoting *Walton v. Arizona,* 497 U.S. at 648).

defendant in Florida] could have received without any judge-made findings was life in prison without parole,"[114] and (3) that Florida "judge[s imposing a death sentence] increase[a defendant's] authorized punishment based on [their] own factfinding."[115] This judicial fact-finding violates the right to trial by jury.[116]

Because Alabama's death penalty system operates in the same way as Florida's in all respects relevant to an analysis under *Hurst*, its system is equally unconstitutional. Therefore, Mr. Burton's death sentence was imposed in violation of his right to trial by jury under the Sixth and Fourteenth Amendments and must be vacated in favor of a sentence of life without parole.

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[114] *Id.*

[115] *Id.*

[116] *Id.* ("As with Timothy Ring, the maximum punishment Timothy Hurst could have received without any judge-made findings was life in prison without parole. As with Ring, a judge increased Hurst's authorized punishment based on her own factfinding. In light of *Ring*, we hold that Hurst's sentence violates the Sixth Amendment.")

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 aggravation the basis of its death sentences.

Florida raised a number of points of purported distinction between its system and Arizona's, all of which the Supreme Court rejected. In the most relevant point addressed to the system itself,

> Florida argues that when Hurst's sentencing jury recommended a death sentence, it "necessarily included a finding of an aggravating circumstance."[117] . . . The State contends that this finding qualified Hurst for the death penalty under Florida law, thus satisfying *Ring*. "[T]he additional requirement that a judge *also* find an aggravator," Florida concludes, "only provides the defendant additional

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[117] Because the Court rejects this "implicit finding" argument, the holding by the United States Court of Appeals for the Eleventh Circuit in *Lee v. Commissioner, Alabama Department of Corrections*, based on the same argument is undercut. In *Lee*, the Eleventh Circuit stated:

> Nothing in *Ring* – or any other Supreme Court decision – forbids the use of an aggravating circumstance implicit in a jury's verdict. Indeed, *Ring* itself specifically left open and did not decide the question of whether the aggravator used to impose a death sentence could be implicit in the jury's verdict. *See Ring*, 536 U.S. at 609 n.7, 122 S. Ct. at 2443 n.7 ("We do not reach the State's assertion that any error was harmless because a pecuniary gain finding was implicit in the jury's guilty verdict.").

726 F.3d 1172, 1198 (11th Cir. 2013). As is evident from the quotation from *Ring*, such an implicit finding would be relevant only to harmless error analysis (in circumstances where such analysis is permissibly employed), not constitutionality analysis.

protection."[118]

The Supreme Court explained why this duplication was inadequate:

> The State fails to appreciate the central and singular role the judge plays under Florida law . . . the Florida sentencing statute does not make a defendant eligible for death until "findings *by the court* that such person shall be punished by death." The 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." "[T]he jury's function under the Florida death penalty statute is advisory only." The State cannot now treat the advisory recommendation by the jury as the necessary factual finding that *Ring* requires.[119]

Any fact that "expose[s] the defendant to a greater punishment than that authorized by the jury's guilt verdict"[120] is an "element"[121] that must be proved beyond a reasonable doubt and found by a jury.[122] Elements of an offense cannot be left to the fact-finding of a judge. This must be all the more true where a judge's fact-finding is not bound to any particular standard of proof, as in Alabama.[123] Florida's argument (and Alabama's)

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[118] *Id.*

[119] *Id.* (internal citations omitted) (emphases and brackets in original).

[120] *Apprendi*, 530 U.S. at 494. *See also Hurst*, 136 S. Ct. at 621.

[121] *Apprendi*, 530 U.S. at 494 n.19 (citation omitted).

[122] *Id.* at 490 and 494.

[123] Section 13A-5-47(d), Ala. Code 1975, describes what findings the court must make, but does not give any guidance as to the proof required to make those findings.

would be equivalent to a system in which juries rendered only partial verdicts, "leaving it to the judge to apply the law to th[e] facts and render the ultimate verdict of 'guilty' or 'not guilty.'"[124]

That a defendant found guilty of a capital crime under Alabama's death penalty statute is **not** thereby eligible for a death sentence, without further proceedings, is evident from the fact that numerous aggravating factors do **not** overlap with an aggravating circumstance. These include:

> 13A-5-40(a)(5) (murder of a law enforcement officer);
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> 13A-5-40(a)(8) (murder during sexual abuse);
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> 13A-5-40(a)(9) (murder during arson or by means of explosives);
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> 13A-5-40(a)(11) (murder of a state or federal official);
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> 13A-5-40(a)(12) (murder during aircraft hijacking);
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> 13A-5-40(a)(14) (murder of a witness);
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> 13A-5-40(a)(15) (murder of a victim less than fourteen);
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> 13A-5-40(a)(16) (murder by firing into a dwelling);
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> 13A-5-40(a)(17) (murder by firing into an occupied vehicle);
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> 13A-5-40(a)(18) (murder by firing from a vehicle); and
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> 13A-5-40(a)(19) (murder of a victim under a protective order).

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[124] *United States v. Gaudin*, 515 U.S. 506, 512-13 (1995). In *Gaudin*, the government argued that the right to trial by jury applies to finding "*only the factual components* of the essential elements." *Id.* at 511 (quoting Brief for the United States) (emphasis in original). The U.S. Supreme Court rejected such a system as unconstitutional.

The ASC acknowledged as much in *Ex parte Stephens*,[125] in revisiting its earlier opinion in *Ex parte Kyzer*:[126]

> In *Kyzer*, the Court noted that "[a] literal and technical reading of the statute" would preclude the consideration of an aggravating circumstance other than those identified by statute. 399 So. 2d at 337. This would mean that some defendants, such as Kyzer, could be convicted of capital murder without being eligible for a death sentence. This Court rejected that conclusion as "completely illogical." *Id.* It is, however, the Court's responsibility to give effect to the plain meaning of a statute, not to substitute its own judgment as to what is logical or illogical. *Munnerlyn v. Alabama Dep't of Corr.*, 946 So. 2d 436, 438 (Ala. 2006).[127]

But a system cannot, consistent with due process and equal protection under the law, operate one way for half of those charged under it and another way for the other half, without some rational basis for distinguishing between the two categories.[128] No rational explanation has

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[125] 982 So. 2d 1148 (Ala. 2006).

[126] 399 So. 2d 330 (Ala. 1981).

[127] 982 So. 2d at 1153 n.6. Thus, for some defendants, Alabama's capital sentencing scheme patently does not require a jury finding of aggravation or a jury recommendation of death at any stage in order for the judge to impose death.

[128] *Clark v. Jeter*, 486 U.S. 456, 461 (1988) ("In considering whether state legislation violates the Equal Protection Clause of the Fourteenth Amendment, U.S. Const., Amdt. 14, § 1, we apply different levels of scrutiny to different types of classifications. At a minimum, a statutory classification must be rationally related to a legitimate governmental purpose. . . . [C]lassifications affecting fundamental rights . . . are given the most exacting scrutiny") (citations omitted).

ever been given that would allow some capital defendants to be treated differently from others, depending on the aggravating factors charged against them.[129] So, either a defendant is eligible for a death sentence following the innocence/guilt phase, or not. The *Kyzer* Court, acknowledging this inconsistency, thought it illogical to conclude that all capital defendants found guilty as charged are not thereby eligible for the death penalty at the conclusion of the first phase of trial.[130]

But since, as is evident from the above and from the Court's later clarification in *Ex parte Stephens*, many capitally-charged defendants *would not* be death-eligible based on the jury's finding of an aggravating factor during the innocence/guilt phase,[131] it must be that *no* defendant

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[129] In fact, the ASC in *Ex parte Kyzer*, postulated that the failure to duplicate some aggravating factors must have been an oversight by the Legislature. 399 So. 2d at 338. However, the Legislature proved that theory wrong by revising the statute itself, but still not including full duplication. *Cf.* Ala. Code 1975, § 13A-5-40, with Ala. Code 1975, § 13A-5-49.

What rational explanation, for example, could be given to justify murder for pecuniary gain, *see* §§ 13A-5-40(a)(7) and 13A-5-49(6), being treated as a more death-worthy offense than murder of a law enforcement officer?

[130] 399 So. 2d at 337-38.

[131] *See, e.g., Ex parte McNabb*, 887 So. 2d 998, 1005 (Ala. 2004) ("McNabb contends – correctly – that, despite his conviction for capital murder, he could not have been sentenced to death unless at least one of the aggravating circumstances set forth in § 13A-5-49 was found by the jury to exist beyond a reasonable doubt.").

is eligible for a death sentence before further findings are made.[132] In Alabama, as in Florida, these further findings are made by the trial court independently of the jury. This is unacceptable under *Hurst*.[133]

Florida's system operates in the same fashion with respect to duplication. Some of the aggravating factors listed in Florida Statute, § 782.04(a) (2010) (defining capital murder where any one of 18 aggravating factors exist), are duplicated as aggravating circumstances in § 921.141(1) (listing 17 aggravating circumstances). Nonetheless, the U.S. Supreme Court did not hold in *Hurst* that Florida's system is unconstitutional sometimes. It held that the system is unconstitutional, period: "Florida's sentencing *scheme*, which required the judge alone to find the existence of

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[132] Holding otherwise would render the system violative of Equal Protection because some defendants would be treated differently from others. Those who had a duplicative aggravator found in the innocence/guilt phase would be at a disadvantage compared to those who did not if the aggravation does not have to be found separately in the penalty phase. This is so because the former class would not have the opportunity to address the aggravation as an element of punishment during the innocence/guilt phase, meaning their juries would be permitted to make a critical finding without being instructed about its purport. Such a system would run afoul of the U.S. Supreme Court's insistence as a "premise [of] its capital punishment decisions . . . that a capital sentencing jury recognizes the gravity of its task and proceeds with the *appropriate awareness* of its 'truly awesome responsibility.'" *Caldwell v. Mississippi*, 472 U.S. 320, 341 (1985) (emphasis added).

[133] 136 S. Ct. at 622.

an aggravating circumstance, is therefore unconstitutional."[134]

That a jury's finding of a duplicate aggravator in the guilt phase is not sufficient to save death penalty statutes such as Florida's and Alabama's is also evident from the U.S. Supreme Court's reversal and remand of *Wimbley v. Alabama* for reconsideration in light of *Hurst*.[135] While the jury's guilt verdict in Hurst's case did not include a duplicate aggravator,[136] Wimbley's did.[137]

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[134] *Id.* at 624.

[135] 136 S. Ct. 2387 (2016).

[136] *Hurst*, 136 S. Ct. at 619-20 (jury convicted of first-degree murder, but did not specify whether verdict rested on a finding of premeditation or a finding of murder during a robbery) and *id.* at 620 (two aggravating circumstances submitted to the jury: murder during a robbery and "heinous, atrocious, or cruel," and verdict did not specify which it found).

[137] *Wimbley v. State*, 191 So. 3d 176, 192 (Ala. Crim. App. 2014) ("Corey Allen Wimbley was indicted for one count of murder made capital pursuant to § 13A-5-40(a)(2), Ala. Code 1975, for killing Connie Ray Wheat during the course of a robbery and one count of murder made capital pursuant to § 13A-5-40(a)(9), Ala. Code 1975, for killing Wheat during the course of an arson. At the conclusion of the guilt phase of the trial, the jury unanimously found Wimbley guilty of both counts, and, following the presentation of evidence during the penalty phase of the trial, it recommended by a vote of 11-1 that he be sentenced to death for count one and by a vote of 10-2 that he be sentenced to death for count two."). The CCA recently denied relief to Wimbley on remand, based on *Ex parte Bohannon*, which, in turn, depends wholly on *Ex parte Waldrop*. *See Wimbley v. State*, No. CR-11-0076, 2016 WL 7322334 (Ala. Crim. App. Dec. 16, 2016). The *Bohannon* case is pending before the U.S. Supreme Court on a petition for writ of certiorari. *Bohannon v. Alabama*, U.S.

In its consideration of the application of *Ring* in Alabama, the ASC has made the same distinctions as those made by the State of Florida and rejected in *Hurst*. So, for example, in *Ex parte Waldrop*, the Court found *Ring* distinguishable because Waldrop's jury had found an aggravating factor in the guilt phase which was "duplicated" by an aggravating circumstance presented in the penalty phase.[138] But, as just explained, Florida's system operates in exactly the same way.[139] Yet, the *Hurst* Court found the Florida scheme unconstitutional, not just as applied to Hurst,

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Supreme Court No. 16-6746 (filed Nov. 2, 2016) (petition for writ of certiorari).

[138] 859 So. 2d at 1187-88.

[139] Under Alabama's statute, the trial court does not adopt the jury's guilt verdict in order to find an aggravating circumstance exists: "Based upon *the evidence presented at trial* [not the jury's verdict], the evidence presented during the sentence hearing, and the presentence investigation report and any evidence submitted in connection with it, the trial court shall enter specific written findings concerning the existence or nonexistence of each aggravating circumstance . . ." Ala. Code 1975, § 13A-5-47(d) (emphasis added). In other words, the court must make its own finding respecting the existence of each aggravating circumstance, independent of the jury's, even though its findings may agree with the jury's.

Section 13A-5-47(c), Ala. Code 1975, laying out the procedures for the sentencing hearing before the judge, also provides: "Before imposing sentence the trial court shall permit the parties to present arguments concerning the existence of aggravating and mitigating circumstances and the proper sentence to be imposed in the case." If the existence of aggravating circumstances has already been determined by the jury, there would be no point in re-arguing non-existence at this stage.

but *in its entirety*.[140]

Similarly, in *Ex parte McNabb*, the ASC held that the fact that any jurors voted for death necessarily implied that the jury unanimously found the existence of at least one aggravating circumstance beyond a reasonable doubt, thereby satisfying *Ring*.[141] The *Hurst* decision shows that this analysis is likewise flawed: "The State cannot now treat the advisory recommendation by the jury as the necessary factual finding that *Ring* requires."[142]

Thus, a death sentence violates the Sixth and Fourteenth Amendments where the judge, rather than the jury, finds the fact, necessary to impose the death penalty, that an aggravating circumstance exists. And because Alabama's capital sentencing scheme requires a judge

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[140] 136 S. Ct. at 624.

[141] 887 So. 2d at 1005-6. *See also Bryant v. State*, 951 So. 2d 732, 751 (Ala. Crim. App. 2003) ("[I]n *Ex parte McNabb*, 887 So. 2d 998 (Ala. 2004), the Supreme Court held that even a nonunanimous recommendation of death by the jury proved that the jury, including the jurors who voted against the recommendation of death, had unanimously found the existence of a proffered aggravating circumstance, even though the circumstance was not included within the definition of the particular capital-murder offense charged in the indictment, because the trial court had specifically instructed the jury that it could not proceed to a vote on whether to impose the death penalty unless it had already unanimously agreed that the aggravating circumstance existed.").

[142] 136 S. Ct. at 622.

to make this finding, which is necessary to sentence a defendant to death, the scheme itself is unconstitutional.

Just as Florida's capital sentencing scheme is unconstitutional because it "required the judge alone to find the existence of an aggravating circumstance,"[143] so too is Alabama's scheme, which is identical to Florida's in this regard. Therefore, Mr. Burton's death sentence was imposed in violation of his right to trial by jury under the Sixth and Fourteenth Amendments and must be vacated in favor of a sentence of life without parole.

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 finding that aggravating circumstances outweigh mitigating.

Under *Apprendi* and its progeny, "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?"[144]

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[143] *Id.* at 624.

[144] 530 U.S. at 494. *See also Hurst*, 136 S. Ct. at 621.

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 usual definition of an 'element' of the offense."[145] All such factors must be found by the jury[146] beyond a reasonable doubt[147] and *must be binding* on the court.[148] A court's parallel decision, based on its own findings and a lesser standard of proof, is not sufficient.[149]

Under Alabama law, as under Florida law, a finding that an aggravating circumstance exists is not the only finding necessary to impose a death sentence. No matter how many aggravating circumstances

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[145] *Apprendi v. New Jersey*, 530 U.S. 466, 494 n.19 (2000) (citation omitted).

[146] *Hurst*, 136 U.S. at 622. Alabama's system does not prohibit the trial judge from finding additional aggravating circumstances for which there is no proof that the jury also found them. *See, e.g., Ex parte Waldrop*, 859 So. 2d at 1190. 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.

[147] *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)).

[148] *Id.* at 622.

[149] *Id.*

may be found,[150] a defendant cannot receive a death sentence unless the further finding is made that whatever mitigating circumstances exist do not outweigh the aggravation.[151] 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 . . . ."[152]

For this reason, even a finding by the jury that an aggravating circumstance exists, whether made at the innocence/guilt phase or the

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[150] Alabama's system allows a judge to find more aggravators than the jury. *Ex parte Waldrop*, 859 So. 2d at 1190. But this procedure must also be unconstitutional, since elements, which 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). *See also United States v. Gaudin*, 515 U.S. 506, 511-13 (1995) (rejecting the Government's argument that "'requiring the jury to decide "all the elements of a criminal offense,"'" meant "'*only the factual components* of the essential elements.'") (quoting Brief for the United States) (emphasis in original). Death sentences which include consideration of improper aggravators are also subject to reversal under *Espinosa v. Florida*, 505 U.S. 1079, 1082 (1992) ("[I]f a weighing State decides to place capital sentencing authority in two actors rather than one, neither actor must be permitted to weigh invalid aggravating circumstances."). A judge of the Court of Criminal Appeals has recognized this pitfall and cautioned trial judges to rely only on aggravating circumstances found by the jury. *Ex parte State (In re State v. Billups)*, 2016 WL 3364689, at *13 (Ala. Crim. App. 2016) (Joiner, J., concurring in part and concurring in the result).

[151] Ala. Code 1975, § 13A-5-46(e).

[152] Ala. Code 1975, § 13A-5-48.

penalty phase, cannot support 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."[153] And Mr. Burton's jury had been alleviated of the weight of having the ultimate burden of knowing its decision was binding, rather than only a recommendation. Thus, 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.'"[154] Indeed, not only had the jury been alleviated of the "appropriate awareness" of its responsibility, but it also had not been instructed that it must find that the aggravating factors outweigh the mitigating factors beyond a reasonable doubt.[155]

The ASC has held that all that is required for the imposition of a death sentence is the existence of one aggravating factor:

> Because the jury convicted Waldrop of two counts of murder during a robbery in the first degree, a violation of Ala. Code 1975, § 13A-5-40(a)(2), the statutory aggravating circumstance of committing a capital offense while engaged in the commission of a robbery, Ala. Code 1975, § 13A-5-49(4), was

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[153] *Id.* (emphasis added).

[154] *Caldwell*, 472 U.S. at 341 (emphasis added).

[155] Vol. 8 at 1129 (informing the jury that the "beyond a reasonable doubt" standard applied only to the existence of aggravating circumstances).

> "proven beyond a reasonable doubt." Ala. Code 1975, § 13A-5-45(e); Ala. Code 1975, § 13A-5-50. Only one aggravating circumstance must exist in order to impose a sentence of death. Ala. Code 1975, § 13A-5-45(f). Thus, in Waldrop's case, the jury, and not the trial judge, determined the existence of the "aggravating circumstance necessary for imposition of the death penalty." *Ring*, 536 U.S. at 609, 122 S. Ct. at 2443. Therefore, the findings reflected in the jury's verdict alone exposed Waldrop to a range of punishment that had as its maximum the death penalty. This is all *Ring* and *Apprendi* require.[156]

This holding is directly contradicted by *Hurst*, on the basis of the non-binding jury finding alone. But, in addition, Section 13A-5-45(f) 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," – but not a *sufficient* condition, in light of Section 13A-5-47(e) – "In deciding upon the sentence, the trial court shall determine whether the aggravating circumstances it finds to exist outweigh the mitigating circumstances it finds to exist . . ."

The distinction between necessary and sufficient conditions was clearly made by Justice See in a special concurrence in *Holcomb v. Carraway*:

> The term "only if," on the other hand, is a term, not of sufficiency, but of necessity. For example, the shipment will be accepted "only if" it has a moisture content of less than 4%;

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[156] *Ex parte Waldrop*, 859 So. 2d at 1188.

the team will clinch the pennant "only if" it wins this game. This describes a condition of necessity, not one of sufficiency. Thus, there may be other conditions on the acceptance of the shipment, but even if all of those other conditions are met, and more, the shipment will be accepted "only if" the moisture content is less than 4%. There may be other games that the team must win, but even if it wins all those other games, the team will clinch the pennant "only if" it wins this game. The fulfillment of condition A is necessary to produce consequence B, although it alone may not be sufficient – there may be other, additional conditions that also must be met.[15]

> FN 15. For example, one can buy milk from the corner grocery today "only if" one gets there by 9:00 p.m. It is a necessary condition that one get to the store by 9:00 p.m.; however, in addition to getting there by 9, the grocery must have received its shipment and not sold out of the milk, and the purchaser must also pay the price of the milk.
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> A condition may be both necessary and sufficient. That is, there may be one and only one way to produce a particular result. In that case, the language used is "if and only if." It is the seventh game of the World Series and the team will be world champions if and only if it wins this game.[157]

Thus, a death sentence can be imposed in Alabama only if an

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[157] 945 So. 2d 1009, 1023 (Ala. 2006) (See, J., joined by Nabers, C.J., and Smith and Bolin, JJ., concurring specially) (some footnotes omitted). *See also Moran v. Burbine*, 475 U.S. 412, 452-53 (1986) ("Indeed, as *Miranda* itself makes clear, proof that the required warnings have been given is a necessary, but by no means sufficient, condition for establishing a valid waiver. As the Court plainly stated in *Miranda*, 'any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege. The requirement of warnings and waiver of rights is a fundamental with respect to the Fifth Amendment privilege and not simply a preliminary ritual to existing methods of interrogation.'").

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."[158] Because this is so, under *Hurst*, that finding must be made by the jury. The U.S. Supreme 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.'"[159] Hurst thus makes clear that a court's finding that the aggravating circumstances *outweigh* the mitigating is constitutionally impermissible.

Alabama's system, like Florida's, improperly places the 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.[160] Compounding the unconstitutionality,

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[158] *Apprendi*, 530 U.S. at 494.

[159] 136 S. Ct. at 622.

[160] Ala. Code 1975, § 13A-5-47(d) and (e).

there is no stated standard of proof 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,[161] with no requirement that they do so beyond a reasonable doubt.[162] Alabama has, in fact, rejected the contention that any particular standard applies to the judicial findings on these points.[163]

Thus, a death sentence violates the Sixth, Eighth and Fourteenth Amendments where the judge, rather than the jury, makes the ultimate finding that the aggravating circumstances outweigh the mitigating. And because Alabama's capital sentencing scheme requires a judge to make

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[161] *Id.*

[162] *Cf. Powell v. Delaware*, No. 310, 2016, 2016 WL 7243546, at *3-4 (Del. Dec. 15, 2016).

[163] Respecting the court's authorization to find aggravators not found by the jury, *see Ex parte 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 id.* at 1189 (citing *Ford v. Strickland*, 696 F.2d 804, 818 (11th Cir. 1983) (en banc)); *Whisenhant v. State*, 482 So. 2d 1225, 1234 (Ala. Crim. App. 1982) (citing *Ford v. Strickland*, 676 F.2d 434, 442 (11th Cir.1982) (panel decision)). Both *Ford* opinions also held that "[t]he aggravating and mitigating circumstances are not facts or elements of the crime." *See* 696 F.2d at 818 and 676 F.2d at 441. It is evident that both have been overruled by *Apprendi*.

this finding, which is required in order to sentence a defendant to death, the scheme itself is unconstitutional.

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,'"[164] so too is Alabama's scheme, which is identical to Florida's in this regard. Therefore, Mr. Burton's death sentence was imposed in violation of his right to trial by jury under the Sixth and Fourteenth Amendments and must be vacated in favor of a sentence of life without parole.

Given the remarkable similarities between the judge-based death penalty schemes of Florida and Alabama, it is clear that Alabama's judge-based scheme violates the Sixth Amendment[165] and, unless the Alabama

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[164] 136 S. Ct. at 622.

[165] *See Brooks v. Alabama*, 136 S. Ct. 708 (2016) (mem.) (Sotomayor, J., concurring in denial of cert.) ("This Court's opinion upholding Alabama's capital sentencing scheme was based on *Hildwin v. Florida*, 490 U.S. 638 (1989) (per curiam), and *Spaziano*[], two decisions we recently overruled in *Hurst*[]"); *Kirksey v. Alabama*, No. 15-7912, 2016 WL 378578 (U.S. June 6, 2016) (mem.), *Wimbley v. Alabama*, No. 15-7939, 2016 WL 410937 (U.S. May 31, 2016) (mem.), and *Johnson v. Alabama*, 136 S. Ct. 1837 (2016) (mem.).

Supreme Court is able to reinterpret in such a way as to render it constitutional, no sentence of death may be imposed in this State.[166]

Furthermore, Alabama's capital punishment scheme expressly provides for retroactive relief to those sentenced to death under a statute later found to be unconstitutional. Alabama Code § 13A-5-59, in relevant part, provides,

> It is the intent of the Legislature that if the death penalty provisions of this article are declared unconstitutional and if the offensive provision or provisions cannot be reinterpreted so as to provide a constitutional death penalty . . . that the defendants *who have been sentenced to death* under this article shall be re-sentenced to life imprisonment without parole.[167]

Because Alabama law expressly provides that any determination that Alabama's death penalty scheme is unconstitutional must be applied retroactively to those who have been sentenced to death, any time or subject matter limitation contained in the Alabama Rules of Criminal Procedure cannot bar relief under Alabama Code § 13A-5-59.

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[166] *See* Ala. Code § 13A-5-58 ("[t]his article shall be interpreted, and if necessary reinterpreted, to be constitutional.").

[167] Ala. Code § 13A-5-59 (emphasis added); *see also Ex parte Henderson*, 144 So.3d 1262, 1281 (Ala. 2013) ("[s]ections 13A-5-58 and -59 evidence the intent of the legislature that Alabama have a valid capital-murder statutory-sentencing scheme as it applies to adults and to juveniles tried as adults.").

In *Thigpen v. Thigpen*, 541 So.2d 465 (Ala. 1989), the Alabama Supreme Court answered a certified question from a federal district court asking whether, in light of the Supreme Court's decision in *Sumner v. Shuman*, 483 U.S. 66 (1987),[168] Mr. Thigpen could "be resentenced capitally or should simply have his existing death sentence reduced to life imprisonment."[169] Citing Article I, § 7, of the Alabama Constitution,[170] the Court held that "[b]ecause § 319 is unconstitutional, it cannot be 'legally applied' to impose the death penalty on Thigpen.'"[171] In the final sentence

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[168] In *Sumner*, the Supreme Court invalidated a Nevada statute that provided for an automatic death sentence for anyone who committed a murder while serving a life sentence. *Sumner*, 483 U.S. at 67 n.1. Alabama's similar statute (section 319) was never explicitly found unconstitutional in the wake of *Furman v. Georgia*, 408 U.S. 238 (1972), and was, at the time of the murder, "the only statute under which Thigpen could have been sentenced to death." *See Thigpen*, 541 So.2d at 467 (citing *Hubbard v. State*, 274 So.2d 298, 300 (Ala. 1973)).

[169] *Thigpen*, 541 So.2d at 466.

[170] "[N]o person shall be punished but by virtue of a law established and promulgated prior to the offense and legally applied." Ala Const., art. I, § 7.

[171] *Thigpen*, 541 So.2d at 467 (citing Ala. Const., art. I, § 7). Recognizing that it could attempt to reinterpret the statute in a way that would render it constitutional, the Court declined, reasoning, "The wholesale revision that would be necessary to apply § 319 so as to impose a death sentence on Thigpen works far too much of a change to be allowed as a merely procedural revision." *Id.*

of its opinion, the Court held, "[U]nder the clear, absolute mandate of the Alabama constitution, Thigpen cannot be resentenced to death."[172]

Like *Hurst*, *Sumner* did not directly address an Alabama statute,[173] but did not stop the Alabama Supreme Court from holding, "Of course, *Sumner* invalidated the death sentence Thigpen was given under § 319."[174]

Further supporting retroactive application of a finding of unconstitutionality as to an Alabama death penalty statute is the fact that Mr. Thigpen, convicted and sentenced in 1976, had exhausted all state post-conviction remedies in 1979, nearly a decade before *Sumner* was decided[175] and a full ten years before the Court addressed his claim, yet still received relief.

Even in the absence of Alabama Code § 13A-5-59's provision for retroactivity and Alabama Supreme Court precedent, because Alabama's death penalty sentencing scheme is unconstitutional, his judge-imposed

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[172] *Id.*

[173] *Sumner*, 483 U.S. at 83-85.

[174] *Thigpen*, 541 So.2d at 467.

[175] *See Thigpen v. Thigpen*, 926 F.2d 1003, 1005 n.2 (11th Cir. 1991) (citing, *inter alia*, *Thigpen v. State*, 374 So.2d 401 (Ala. Crim. App. 1979)).

sentence is illegal[176] and was, therefore, entered outside the trial court's jurisdiction.[177]

A judge sentenced Mr. Burton to death by following an advisory jury verdict. At a later proceeding, the trial court decided what aggravating and mitigating circumstances existed and did not exist based, in part, on evidence not presented to a jury (the presentence investigation report, which including evidence of a juvenile offense not presented to the jury).[178] Furthermore, in order to impose a death sentence, the trial court was

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[176] *See Rogers v. State*, 728 So.2d 690, 691 (Ala. Crim. App. 1998) ("an allegedly illegal sentence may be challenged at any time, because if the sentence is illegal, the sentence exceeds the jurisdiction of the trial court and is void") (citation omitted); *see also Hollis v. State*, 845 So.2d 5, 6 (Ala. Crim. App. 2002) ("as an issue concerning subject-matter jurisdiction, [a]n illegal sentence may be challenged at any time") (brackets in original) (citations and quotation marks omitted); *see also J.B. v. A.B.*, 888 So.2d 528, 532 (Ala. Civ. App. 2004) ("[a]n order entered by a trial court without jurisdiction is a nullity") (citations omitted).

[177] *See* Ala. R. Crim. P. 32.2(b) ("[a] successive petition on different grounds shall be denied *unless* . . . the petitioner is entitled to relief on the ground that the court was without jurisdiction to render a judgment or to impose sentence") (emphasis added); *see also* Ala. R. Crim. P. 32.2(c) (providing no time limitation with respect to claims based on either lack of jurisdiction or alleging an illegal sentence); *see also Henderson v. State*, 895 So.2d 364, 365 (Ala. Crim. App. 2004) ("[c]ontrary to the State's assertions below and on appeal, this claim – that Henderson's sentence is illegal – is not subject to procedural bars").

[178] (Vol. 1, p. 64-71, 103).

required to "determine" that the aggravating circumstances *it found* outweighed the mitigating circumstances *it found*.[179]

As with Florida's unconstitutional statute, in the absence of the trial court's fact finding, including *weighing the aggravating circumstances it found against any mitigating circumstances it found*, Mr. Burton could not have been sentenced to death.[180] The Supreme Court's classification of the process of weighing aggravating against mitigating circumstances as a "fact[]" that must be found before a death sentence may be imposed indicates that, regardless of whether an aggravating circumstance is also an element of the capital murder charge in the guilt phase, the Sixth

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[179] The Florida Supreme Court, citing *Hurst*, *Apprendi*, and *Ring*, recently concluded, "[T]he Sixth Amendment right to a trial by jury mandates that under Florida's capital sentencing scheme, the jury – not the judge – must be the finder of every fact, and thus every element, necessary for the imposition of the death penalty," including "that the aggravating factors outweigh the mitigating circumstances." *Hurst v. State*, No. SC12-1947, slip op. at 21-22 (Fla. Oct. 14, 2016); *see also Rauf v. State*, __ A.3d __, 2016 WL 4224252, at *2 (Del. Aug. 2, 2016) (finding Delaware's capital punishment statute unconstitutional under the Sixth Amendment because it does not require that a jury find that the aggravating circumstances outweigh the mitigating circumstances). Alabama is now the only state that does not require a jury to make all findings necessary to impose a death sentence.

[180] *See Hurst*, 136 S. Ct. at 622 ("[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.' '[T]he jury's function under the Florida death penalty statute is advisory only.'") (emphases added).

Amendment requires something more of statutes like Florida's and Alabama's.[181]

The necessary role that weighing plays in Alabama's death penalty sentencing scheme is obvious from the language employed in the jury advisory statute[182] and the judge-based sentencing statute.[183] Providing further support is Alabama Code § 13A-5-48, which defines weighing as, "a process by which circumstances relevant to sentence are marshalled and considered in an organized fashion for the purpose of determining whether the proper sentence in view of all the relevant circumstances in an individual case is life imprisonment without parole or death."[184]

Furthermore, *Ring* expressly disapproved of attempts to classify those determinations that are necessary to increase a sentence beyond

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[181] *Contra Ex parte Waldrop*, 859 So. 2d 1181, 1189 (Ala. 2002) ("the weighing process is not a factual determination") (citing, *inter alia*, *Harris v. Alabama*, 513 U.S. at 512).

[182] Ala. Code § 13A-5-46(e)(3) (requiring a "determin[ation] that one or more aggravating circumstances as defined in Section 13A-5-49 exist *and* that they outweigh the mitigating circumstances, if any" before a jury may return an advisory verdict of death) (emphasis added).

[183] Ala. Code § 13A-5-47(d) and (e).

[184] Ala. Code § 13A-5-48. The fact that the CCA is required to "determine" "[w]hether an independent weighing of the aggravating and mitigating circumstances . . . indicates that death was the proper sentence" implies that there is some objective method by which such weighing can be conducted. Ala. Code § 13A-5-53(b)(2).

that authorized by a jury's verdict as "sentencing factor[s]" or anything else.[185] Under Alabama law, Mr. Burton was not eligible for a sentence of death until and unless *the trial court* found the existence of one or more aggravating circumstances *and* that such circumstance or circumstances outweighed any and all mitigating circumstances. Had the trial court attempted to impose a death sentence without having found at least one aggravating circumstance *and* that the aggravating circumstance(s) outweighed any mitigating circumstance(s), the sentence would have been unlawful.[186]

If a finding that any aggravating circumstance(s) outweighed all mitigating circumstance(s) wasn't necessary to impose death under

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[185] *Ring*, 536 U.S. at 604-05 (citing *Apprendi*, 530 U.S. 466); *see also id.* at 610 (Scalia, J., concurring) ("the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives – whether the statute calls them elements of the offense, sentencing factors, or Mary Jane – must be found by the jury beyond a reasonable doubt").

[186] *See Hadley v. State*, 575 So. 2d 145, 160 (Ala. Crim. App. 1990) (remanding for reweighing after finding error in trial court's findings as to one aggravating circumstance and one mitigating circumstance); *see also Yeomans v. State*, 898 So. 2d 878, 904 (Ala. Crim. App. 2004) (rejecting an argument that, to satisfy the Sixth Amendment, the jury "is required to conduct the final weighing of the aggravating circumstances and mitigating circumstances," but remanding for a new sentencing order in part because "it appears that the court weighed each factor individually against a single aggravating factor" in violation of Alabama Code § 13A-5-47(e), a "procedure [that] would not have been in compliance with the statute").

Alabama law, then why, after finding error as to aggravating and mitigating circumstances, would the ACCA repeatedly remand cases for reweighing?[187]

Mr. Burton's sentence, imposed only after the trial judge made the factual findings necessary by statute to impose the death penalty, including that the aggravating circumstances outweighed the mitigating circumstances, is unconstitutional under the Sixth Amendment, illegal, and was, therefore, entered without jurisdiction.[188] This Court should

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[187] *See Hurst*, 136 S. Ct. at 622 (noting that, under Florida law, a person may not be sentenced to death until the trial court has made findings, and that "[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'") (second and third brackets, emphasis, and ellipsis in original).

[188] Alabama Rule 32.2(b)(2) allows this court to hear a successive petition if "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." These factors are both met. On January 12, 2016 the United States Supreme Court issued its decision in *Hurst*, 136 S.Ct. 616. Because *Hurst* was decided in 2016 these arguments could not have been raised when Mr. Burton's first Rule 32 petition was heard, or any time during his initial round of appeals. Failure to entertain this petition will result in a miscarriage of justice. A violation of the right to trial by jury unquestionably undermines the fundamental fairness of the proceeding. Rule 32.2(b)(1) also authorizes this court to hear this petition. Rule 32.2(b)(1) allows this court to hear a successive petition if "the petitioner is entitled to relief on the ground that the court was without jurisdiction to render a judgment or to impose sentence." "Whether a sentence is excessive ... is a jurisdictional issue, which is not precluded by the limitations period or by the rule against successive petitions. If a sentence imposed by the trial court exceeds that

therefore order that Mr. Burton be resentenced to life in prison without the possibility of parole. Alternatively, this Court should vacate the sentence of death, formulate an interpretation of the statute that renders it constitutional, and order that Mr. Burton receive a new penalty phase hearing before a jury that is empowered to issue a binding verdict as to the sentence to be imposed. Or, at a minimum, given the unsettled state of the law, this Court should hold any ruling on this claim in abeyance. Three Alabama cases raising *Hurst* issues are currently pending before the United States Supreme Court.[189] One of these is the *Bohannon* case, which the U.S. Supreme Court previously remanded to the ASC for reconsideration in light of *Hurst*.[190] The ASC denied relief; however, in

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allowed by law, then this issue may be raised in a Rule 32 petition." *Jones v. State*, 724 So. 2d 75, 76 (Ala. Crim. App. 1998).

[189] *Shaw v. Alabama*, U.S. Supreme Court No. 16-5726 (filed Aug. 22, 2016) (petition for writ of certiorari); *Bohannon v. Alabama*, U.S. Supreme Court No. 16-6746 (filed Nov. 2, 2016) (petition for writ of certiorari); and *Arthur v. Alabama*, U.S. Supreme Court No. 16-595 (filed Nov. 3, 2016) (petition for writ of certiorari).

[190] In addition to *Bohannon*, the U.S. Supreme Court has remanded four Alabama cases for reconsideration in light of *Hurst*:

(1) *Johnson v. State*, No. CR-10-1606, 2014 WL 2061147, at *61 (Ala. Crim. App. May 20, 2014), *on return to remand, cert. denied*, 136 S. Ct. 857, 193 L. Ed. 2d 755 (2016), *order vacated on reh'g*, 136 S. Ct. 1837, 194 L. Ed. 2d 828 (2016), *and cert. granted, judgment vacated*, 136 S. Ct. 1837, 194 L. Ed. 2d 828 (2016);

doing so, it merely reiterated its holding in *Ex parte Waldrop.*[191] Mr. Bohannon has filed a new petition for writ of certiorari challenging this remand decision.[192]

Both the Florida Supreme Court and the Delaware Supreme Court have held that, in light of *Hurst*, the finding that the aggravators outweigh the mitigators must be found by a jury.[193] Either they are wrong or the

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(2) *Wimbley v. State*, 191 So. 3d 176, 192 (Ala. Crim. App. 2014) (per curiam), *reh'g denied* (Mar. 6, 2015), *cert. denied* (Sept. 25, 2015), *cert. granted, judgment vacated*, 136 S. Ct. 2387, 195 L. Ed. 2d 760 (2016);

(3) *Kirksey v. State*, 191 So. 3d 810, 877-78 (Ala. Crim. App. 2014), *reh'g denied* (Apr. 10, 2015), *cert. denied* (Sept. 18, 2015), *cert. granted, judgment vacated*, 136 S. Ct. 2409, 195 L. Ed. 2d 777 (2016); and

(4) *Russell v. State*, No. CR-10-1910, 2015 WL 3448853, at *1 (Ala. Crim. App. May 29, 2015), *cert. granted, judgment vacated*, 137 S. Ct. 158 (Oct. 3, 2016).

The Court of Criminal Appeals has denied relief in three of these case purely on the basis of the ASC's holding in *Bohannon*. *Wimbley v. State*, No. CR-11-0076, 2016 WL 7322334 (Ala. Crim. App. Dec. 16, 2016); *Kirksey v. State*, No. CR-09-1091, 2016 WL 7322330 (Ala. Crim. App. Dec. 16, 2016); *Russell v. State*, No. CR-10-1910, 2016 WL 7322331 (Ala. Crim. App. Dec. 16, 2016). Should the U.S. Supreme Court decide to review *Bohannon*, then, all of the denials may be subject to reversal.

[191] *Ex parte Bohannon*, 2016 WL 5817692, at *2-4 (quoting from *Ex parte Waldrop in extenso*).

[192] *Bohannon v. Alabama*, U.S. Supreme Court No. 16-6746 (filed Nov. 2, 2016) (petition for writ of certiorari).

[193] *Hurst v. State*, No. SC12-1947, 2016 WL 6036978, at *2 (Fla. Oct. 14, 2016) ("[W]e hold that the Supreme Court's decision in *Hurst v. Florida* requires that all the critical findings necessary before the trial court may

Alabama Supreme Court is wrong. The matter is ripe for consideration by the U.S. Supreme Court, and its holding in the matter will be binding on this Court. For this reason, this Court should, at a minimum, withhold ruling until the matter is settled.

Prayer for Relief

30. For the foregoing reasons, Mr. Burton's sentence was unconstitutional, illegal, and entered without jurisdiction. As such, and in light of Alabama Code § 13A-5-59, Mr. Burton respectfully requests that this Court grant him the following relief:

a. Vacate the sentence of death, and resentence Mr. Burton to life without the possibility of parole;

b. In the alternative regarding the *Hurst* claim, vacate the sentence of death, formulate an interpretation of the statute that renders it constitutional, and order that Mr. Burton receive a new penalty phase

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consider imposing a sentence of death must be found unanimously by the jury. . . . In capital cases in Florida, these specific findings required to be made by the jury include . . . the finding that the aggravating factors outweigh the mitigating circumstances."); *Rauf v. State*, No. 39, 2016, 2016 WL 4224252, at *2 (Del. Aug. 2, 2016) ("Does the Sixth Amendment to the United States Constitution require a jury, not a sentencing judge, to find that the aggravating circumstances found to exist outweigh the mitigating circumstances found to exist . . . ? Yes.").

hearing before a jury that is empowered to issue a binding, unanimous verdict as to the sentence to be imposed; and

c. Grant Mr. Burton an evidentiary hearing as necessary to resolve any disputed issues of fact raised herein, and grant Mr. Burton any such additional relief as is just, equitable, and proper under federal and state law.

Respectfully submitted,

Dustin J. Fowler, Esq.
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Counsel for Petitioner

ATTORNEY'S VERIFICATION UNDER OATH
SUBJECT TO PENALTY FOR PERJURY

I swear or affirm under penalty of perjury that, upon information and belief, the foregoing is true and correct. Executed this 11th day of January, 2017.

Dustin J. Fowler, Esq.
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Counsel for Petitioner

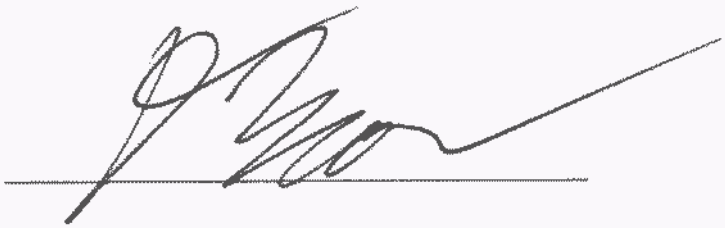
SWORN TO AND SUBSCRIBED before me this 11th day of January, 2017.

NOTARY PUBLIC
My certificate expires: 9/17/17

CERTIFICATE OF SERVICE

I Dustin J. Fowler, hereby certify that on the 11th day of January, 2017, a copy of the foregoing was served by placing a copy of thereof in the United States Mail, postage prepaid and properly addressed as follows:

The Honorable Luther Strange
Attorney General, State of Alabama
Alabama State House
11 South Union Street
Montgomery, AL 36130.



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Counsel for Petitioner

Attachment A

Affidavit of Juror James Cottongim

Affidavit of James Cottingim

Before me, the undersigned authority, a Notary Public in and for said County and State, personally appeared before me, James Cottingim, who is known to me or who was duly identified by me, and being first duly sworn, on oath, deposes and says as follows:

I, James Cottingim, of Talladega County, Alabama, do hereby state the following of my own knowledge and under penalty of perjury:

I was a juror in the death penalty case of Charles Burton. I have been informed by an investigator and a social work intern representing Mr. Burton that Mr. Burton's co-defendant, Mr. Daniel DeBruce, is no longer on Death Row, but has had his sentence reduced to life in prison without the possibility of parole. Because of that, I think it is only fair that Mr. Burton's sentence be reduced to life without the possibility of parole. So I am asking the Governor to consider commuting Mr. Burton's sentence.

I hereby declare, under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

pg. 2 of 2 JC

Signature: James Cothran Date: 3/24/16

Before me, the undersigned authority, a Notary Public, in and for the State of Alabama at Large, did personally appear James Cothran, who being known to me, or who was properly identified to me, and being first duly sworn, deposed and said that he has read the foregoing affidavit understands its contents and has signed the same voluntarily.

Sworn to and subscribed before me this 24th day of March 2016

Notary Public: Janice Romano
My commission expires: 3/2/2020

Attachment B

Affidavit of Juror Ola Marie Williams

Affidavit of OLA MARIE WILLIAMS

Before me, the undersigned authority, a Notary Public in and for said County and State, personally appeared before me, OLA MARIE WILLIAMS, who is known to me or who was duly identified by me, and being first duly sworn, on oath, deposes and says as follows:

I, Ola Marie Williams, of Talladega County, Alabama, do hereby state the following of my own knowledge and under penalty of perjury:

I was a juror in the death penalty case of Charles Burton. This was the case involving the death of a man who was shot during a robbery of an AutoZone store in Talladega.

I have been informed by an attorney and investigator representing Mr. Burton that Mr. Burton's co-defendant, Mr. Derrick DeBruce is no longer on Death Row, but has had his sentence reduced to life in prison without the possibility of parole. I understand that Mr. Burton's attorney is going to be asking the Governor to commute Mr. Burton's sentence from a death sentence to a sentence of life without the possibility of parole. I think this is reasonable. Because Mr. DeBruce was convicted as the actual shooter, it makes sense that if he is not going to be put to death, that

reducing Mr. Burton's sentence to life without parole seems appropriate, and I would have no objection to the Governor commuting his sentence, as that seems the only fair thing to do.

I hereby declare, under penalty of perjury that the foregoing is true and correct to the best of my knowledge and beliefs

signature: Ola Williams date: 3-16-16

Before me, the undersigned authority, a Notary Public, in and for the State of Alabama at Large, did personally appear Ola Marie Williams, who being known to me, or who was properly identified to me, and being first duly sworn, deposed and said that she has read the foregoing Affidavit, understands its contents and has signed the same voluntarily.

SWORN TO AND SUBSCRIBED BEFORE ME this 16th day of March 2016.

Notary Public Ola E Roman

My Commission Expires 3/2/2020

Attachment C

Affidavit of Juror William Gooch

Affidavit of William Gooch

Before me, the undersigned authority, a Notary Public in and for said County and State, personally appeared before me, William Gooch, who is known to me or who was duly identified by me, and being first duly sworn, on oath, deposes and says as follows:

I, William Gooch, of Talladega County, Alabama, do hereby state the following of my own knowledge and under penalty of perjury:

I was a juror in the death penalty case of Charles Burton. I have been informed by an attorney and investigator representing Mr. Burton that Mr. Burton's co-defendant, Mr. Derrick DeBruce, is no longer on Death Row, but has had his sentence reduced to life in prison without the possibility of parole. I understand that Mr. Burton's attorney is going to be asking the Governor to commute Mr. Burton's sentence from a death sentence to a sentence of life without the possibility of parole. I also understand that a similar situation happened in Texas, where a shooter was going to not get the death penalty, while the non-Shooter was still going to be executed, and Governor Perry commuted the non-Shooters sentence to life without parole. I think this is reasonable, and I would not oppose the Governor doing the

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same thing in Mr. Burton's case.

I hereby declare, under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

signature: William K. Gooch date: 3/17/16

Before me, the undersigned authority, a Notary Public, in and for the State of Alabama at Large, did personally appear William Gooch, who being known to me, or who was properly identified to me, and being first duly sworn, deposed and said that he has read the foregoing affidavit, understands its content and has signed the same voluntarily.

SWORN TO AND SUBSCRIBED BEFORE ME THIS 17TH day of March 2016.

Notary Public: Jan E Rowe

My commission expires: 3/2/2020

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Attachment D

Letter from Mr. Burton to Mr. Battle's family apologizing for his role in the robbery

To the Battle family,

To begin with my name is Charles Lee Burton, Jr. I'm one of the men convicted in the case of your father, husband, brother, and Uncle.

For the last 25 years my involvement had weighted on me for years, and I wanted to reach out to the family and apologized for my participation in the robbery which was a terrible decision on my part. Something I have to live with for the rest of my life. I never expected it (robbery) would end in Doug Battle losing his life in Murder. And was terribly horrified when I learn that it did.

It been a very long time but I have come to the point I know I must apologize now. These years have prepared me the stamina to admit my role in the robbery. It have also allowed me to see the pain it have caused your family to lose a love one to violent -- especially one not of their making.

I Sincerely apologize for taking so long to say this. I have struggle with this for years.

I Sincerly apologize for participating in the robbery that led to Mr. Battle

murder. I wish there was more that I could do, but I do hope you can maybe find some comfort in this apology.

I want to thank you for taking time out to read this apology letter.

Respectful yours,
Charles Lee Burton, Jr.

PET. APP. E

Mr. Burton's brief on appeal to the Alabama Court of Criminal Appeals

No. CR-16-0812

IN THE COURT OF CRIMINAL APPEALS
STATE OF ALABAMA

CHARLES LEE BURTON, Appellant, v. STATE OF ALABAMA, Respondent-Appellee.	Appeal from Talladega County Circuit Court No. CC 1991-341.61

BRIEF OF THE APPELLANT

s/ Dustin J. Fowler
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Counsel for Mr. Burton

- - Oral Argument Requested - -

Statement regarding oral argument

This capital case involves complex claims including a fact-specific Eighth Amendment issue arising from the unique circumstances surrounding Mr. Burton's case, in which Mr. Burton, a non-shooter who did not witness the murder, remains under a sentence of death while the shooter has been resentenced to life without the possibility of parole. This case also raises arguments relating to Alabama's judge-based capital sentencing which this Court has not previously addressed.

Because this is a death penalty case and raises complex legal issues, oral argument would assist the Court. Mr. Burton thus requests an opportunity to be heard through oral argument in addition to the briefing.

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Statement of the case/Procedural history[1]

Mr. Burton was convicted of capital murder in the Talladega County Circuit Court on April 16, 1992.[2] The jury recommended a death sentence[3] and the Court sentenced Mr. Burton to death on May 8, 1992.[4]

An appeal was timely filed and the Alabama Court of Criminal Appeals affirmed on December 30, 1993.[5] The Alabama Supreme Court affirmed on September 16, 1994.[6] On May 15, 1995, the U.S. Supreme Court denied Mr. Burton's Petition for a Writ of Certiorari.[7]

Mr. Burton filed a petition for post-conviction relief in State court, pursuant to Rule 32 of the Alabama Rule of Criminal Procedure, on December 4, 1996.[8] The circuit court dismissed/denied Mr. Burton's Petition, as Amended on July

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[1] References to the clerk's record from the original trial or Mr. Burton's original Rule 32 proceedings are denoted by (C. __), with the case number provided; references to the Reporter's Transcripts of the original trial record, CC-1991-341, are denoted by (Vol. __, TR. __); and references to the Record on Appeal are denoted by (ROA, __).
[2] (Vol. 1, TR. 62, 65; Vol. 7, TR. 914).
[3] (Vol. 1, TR. 63).
[4] (Vol. 1, TR. 74-75).
[5] *Burton v. State*, 651 So. 2d 641 (Ala. Crim. App. 1993).
[6] *Ex parte Burton*, 651 So. 2d 659 (Ala. 1994)(rehearing denied December 9, 1994).
[7] *Burton v. Alabama*, 514 U.S. 1115 (1995).
[8] (Vol. 1, C. 9) (Case No. CC-1991-341.60).

17, 2001.[9] Mr. Burton appealed to the Alabama Court of Criminal Appeals, which affirmed the decision,[10] and denied rehearing on April 23, 2004.[11] The Alabama Supreme Court denied relief without opinion on September 24, 2004.[12]

Mr. Burton filed a petition for a writ of habeas corpus in the Northern District of Alabama on February 8, 2005.[13] The district court denied this petition on March 27, 2009.[14]

Mr. Burton appealed to the Eleventh Circuit, which denied the appeal on November 7, 2012, and on February 8, 2013, denied Mr. Burton's timely petition for rehearing and rehearing *en banc*.[15] Mr. Burton appealed to the United States Supreme Court, which denied his appeal on October 7, 2013.[16] On January 11, 2017, Mr. Burton filed a Rule 32 Petition setting forth the claims he now raises on appeal.[17] On February 10, 2017, the State filed a motion to dismiss the Petition, and a proposed order, which substantially reiterated the

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[9] (Vol. 1, C. 8) (Case No. CC-1991-341.60).
[10] *Burton v. State*, 910 So. 2d 831 (Ala. Crim. App. 2004).
[11] *Burton v. State*, 919 So. 2d 1235 (Ala. Crim. App. 2004).
[12] *Ex parte Burton*, 920 So. 2d 1139 (Ala. 2004).
[13] *Burton v. Comm'r*, No. 4:05-cv-00308-CLS-PWG (N.D. Ala.) (Doc. #1).
[14] *Id.* (Doc. #33).
[15] *Burton v. Thomas*, 700 F.3d 1266 (11th Cir. 2012).
[16] *Burton v. Thomas*, 134 S. Ct. 249 (2013).
[17] ROA, 5.

arguments made in the motion to dismiss.[18] Mr. Burton filed a reply to the State's motion to dismiss on February 24, 2017, noting errors in both the State's motion and proposed order.[19] On March 31, 2017, the circuit court, adopting the State's proposed order and failing to address the arguments Mr. Burton had set forth in his Reply, denied Mr. Burton's petition.[20]

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[18] ROA, 84, 132.

[19] ROA, 150.

[20] ROA, 176. In *Ex Parte Scott*, No. 1091275, 2011 WL 925761, at *8 (Ala. Mar. 18, 2011), the Alabama Supreme Court reversed the circuit court's adoption of the State's answer to Scott's petition, reasoning that "an answer, by its very nature, is adversarial and sets forth one party's position in the litigation." The Court reasoned that an answer "makes no claim of being an impartial consideration of the facts and law; rather, it is a work of advocacy that exhorts one party's perception of the law as it pertains to the relevant facts." In so doing, the ASC compared a case, *Ex parte Ingram*, 51 So.3d 1119 (Ala. 2010), where the circuit court judge, Judge Hollingsworth, had signed a proposed order offered by the State which included information that the judge could not have known, thus indicating that the proposed order was not the independent judgment of the court. *Ex parte Scott*, 2011 WL 925761, at *2-3. Judge Hollingsworth is also the judge who denied Mr. Burton relief by adopting the State's proposed order. Mr. Burton recognizes that, here, the circuit court did not technically adopt the State's answer, but rather the proposed order. Additionally, Mr. Burton recognizes that the circuit court added in a notation that the order represented the circuit court's "independent Judgment, finding of fact and conclusions of law." (ROA, 2) (apart from this, and some other language surrounding this notation, the adopted order is identical to the proposed order, with page numbers removed due to the addition and subsequent change to the page numbering). However, the State's proposed order, although slightly different in

Mr. Burton filed a motion to reconsider on April 27, 2017,[21] and filed his notice of appeal on May 11, 2017.[22]

Mr. Burton is party to a federal case challenging the State of Alabama's method of execution,[23] and no execution date has been set.

Statement of the issues

1. Under evolving standards of decency, do the Eighth Amendment to the United States Constitution and Article I, Section 15 of the Alabama Constitution permit the execution of a non-shooter who even did not witness the shooting, when the person who pulled the trigger and killed the victim has had his capital sentence reduced to life without the possibility of parole?

2. Was Mr. Burton's judge-imposed capital sentence constitutionally imposed, where the judge made the ultimate finding of fact weighing the aggravating factors against the mitigating factors, and the jury was alieved of the ultimate weight of the decision by being informed that its vote regarding life or death was a mere "recommendation?"

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form, is identical to its answer in substance, containing the same arguments, mostly verbatim, put forth in the answer. Additionally, the proposed order contains numerous misstatements of law and fact, which Mr. Burton countered in his reply. Because the proposed order was filed before Mr. Burton's reply, the proposed, and then adopted, order did not address the arguments Mr. Burton submitted countering those laid out in the proposed order.

[21] ROA, 195.

[22] ROA, 219.

[23] *West, et al. v. Comm'r*, No. 17-11536 (11th Cir. Notice of Appeal filed April 6, 2017).

Statement of the facts

On August 16, 1991, six men, Derrick DeBruce, LuJuan McCants, Deon Long, Willie Brantley, Andre Jones and the appellant, Mr. Charles Burton, went to an AutoZone store in Talladega, Alabama, with the intent to rob the store.[24] At the conclusion of the robbery, with Mr. Burton already out of the store, Derrick DeBruce shot and killed the victim in this case, Mr. Doug Battle, a customer who had entered the store during the robbery.[25] DeBruce and Mr. Burton were prosecuted and convicted separately on capital murder charges, while the other co-defendants were tried on non-capital murder charges.

During the robbery, the men entered the store at different intervals and went to different parts of the store.[26] Mr. Burton went to pay for something at the cash register, announced it was a stick-up, and he and others then instructed customers and employees to get onto the floor.[27]

Mr. Burton then took a store employee to the back of the store where the safe was, and announced that he wasn’t going to hurt anybody.[28] Meanwhile, the other co-defendants had

[24] (Vol. 4, TR. 341-43, 351).
[25] (Vol. 4, TR. 359-60).
[26] (Vol. 4, TR. 354).
[27] (Vol. 4, TR. 355).
[28] (Vol. 4, TR. 355-56).

also pulled their guns and were telling customers and employees to get down on the floor.[29] Derrick DeBruce began cracking jokes and kicking some of the people on the floor.[30]

As the men were taking money from some of the people on the floor, Mr. Battle, a customer, entered the store. LuJuan McCants instructed Mr. Battle to get on the floor, and Mr. Battle threw his wallet down at McCants.[31] McCants again instructed Mr. Battle to get on the floor, but Mr. Battle stood motionless.[32] Derrick DeBruce then came toward Mr. Battle, instructed him to get on the floor and, when he again did not comply, DeBruce hit him on the back of his head with a pistol.[33] Mr. Battle then lay face down on the floor, and called Derrick DeBruce a "punk."[34] The two then started cursing at each other.[35]

At this point, Mr. Burton and Deon Long were leaving out of the front of the store.[36] McCants and Brantley followed after them.[37] At Mr. Burton's trial, McCants testified that,

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[29] (Vol. 4, TR. 355).
[30] (Vol. 4, TR. 355-36).
[31] (Vol. 4, TR. 355).
[32] (Vol. 4, TR. 357-58).
[33] (Vol. 4, TR. 358-59).
[34] (Vol. 4, TR. 359).
[35] (*Id.*).
[36] (*Id.*).
[37] (Vol. 4, TR. 360).

after all the co-defendants but DeBruce had left the store, McCants heard a gunshot go off, and Derrick DeBruce then ran from the store.[38]

As the men drove away from the scene of the crime, Mr. Burton asked DeBruce why he shot a man, and DeBruce claimed he shot Mr. Battle because he had a gun, and DeBruce was trying to protect McCants.[39] McCants testified that Mr. Burton then shook his head, and said, "let's get out of here," while everyone else looked at DeBruce.[40] The men then went back to a house, and split up the money from the robbery.[41]

During both the opening and closing arguments in Mr. Burton's trial, the State conceded that Mr. Burton was not the triggerman who killed the victim, Doug Battle, in this case.[42] In fact, not only did Mr. Burton not kill Mr. Battle, but he did not even witness the shooting and he had already left the store when the shooting occurred.[43] Still, Mr. Burton was convicted of capital murder.[44]

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[38] (*Id.*).
[39] (*Id.*).
[40] (Vol. 4, TR. 361).
[41] (Vol. 4, TR. 365) (Willie Brantley's father, who was identified as "Sportio" (Sportio was also Derrick DeBruce's brother), helped to split up the money.) *Id*.
[42] (Vol. 4, TR. 299; Vol. 7, TR. 883).
[43] (Vol. 4, TR. 359-60).
[44] (Vol. 1, C. 62 (Clerk's Record); Vol. 7, TR. 914).

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.[45] As accomplices to a robbery where deadly weapons were employed, any of the men could be held responsible for the death.[46]

However, in order to apply the death penalty to a specific defendant, Alabama law requires the State to prove that the specific defendant harbored a "particularized intent to kill."[47]

In Mr. Burton's case, the State conceded that Mr. Burton neither shot Mr. Battle, nor was even present in the building when the shooting occurred. To show intent to kill, the State relied upon three main theories. First, the State contended that Mr. Burton was the leader of the group, because Mr. Burton was the oldest member of the group, and had been the one to decide whether or not the robbery would go forward.[48]

Second, through the testimony of co-defendant LuJuan McCants, the State contended that Mr. Burton allegedly

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[45] *See* Ala. Code § 13A-2-23 (1975).
[46] *Id.*
[47] *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).
[48] (Vol. 6, TR. 831, 835, 839).

foresaw the possibility that someone may 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 inappropriately bolster it.[49]

The State's third theory was that Mr. Burton was automatically liable for the intent of the shooter, because Mr. Burton was an accomplice in the underlying robbery.[50] This contention was legally incorrect. Although an accomplice can be held liable for murder even if he himself did not intend that a person be killed, the accomplice would

[49] LuJuan McCants, a sixteen year-old accomplice in the robbery, was given a deal to testify against Mr. Burton. (Vol. 4, TR. 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 improperly overruled, the cooperating teenage witness then testified, almost word-for-word as fed to him. However, in a videotaped 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. 16, State Court - Collateral Appeal (Supplement, Clerk's Record, p. 56 - Exhibit 10b of the Supplemental Index submitted by the Respondent)).

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

not be liable for capital murder unless he had a particularized intent to kill.[51]

The State's third theory was buttressed when the trial court gave an erroneous 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*.[52]

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

[52] The trial court's flawed 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* *or* that the Defendant intentionally aided or abetted the other person or persons in the commission of *the murder*.

(Vol. 7, TR. 900-901) (emphasis added). Because the reference to "the murder" came second, the instruction encouraged a misapplication of the proper standard. The evidence at trial overwhelmingly went toward establishing the plan to commit the robbery. Thus, a reasonable juror would have considered "the crime" to be referencing "the robbery," given the way the instruction read.

Although Mr. Burton's trial counsel argued to the jury that Mr. Burton was not present at the crime scene, this argument was refuted by the eyewitness identification of Mr. Burton from the manager of the AutoZone store, fingerprint evidence demonstrating Mr. Burton's presence in the AutoZone store, and McCants' testimony that Mr. Burton was a participant. At the conclusion of the guilt phase of trial, Mr. Burton was found guilty of capital murder.[53]

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,"[54] and that Mr. Burton was relinquished to the custody of his abusive father at a young age.[55] Mr. Burton's wife, Hattie Pearl Burton, testified that Mr. Burton acted as a father to at least five of her children, even though the children were not his.[56] 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.[57] Mrs. Ellison further testified that Mr.

[53] (Vol. 7, TR. 914).
[54] (Vol. 7, Tab #R-19, TR. 1024-25).
[55] (Vol. 7, Tab # R-19, TR. 1025).
[56] (Vol. 7, TR. 1028).
[57] (Vol. 7, TR. 1031).

Burton went to live with his biological father when he was seven years old and did not have the protective influence of a mother after that time.[58] Mr. Burton himself testified, and the State did not rebut his testimony on this point, that he obtained a GED while in prison.[59]

Unfortunately, against the wishes of Mr. Burton's trial counsel, the trial court forced counsel to call two witnesses that Mr. Burton had indicated he wanted to call.[60] The trial court did not inquire as to the reasons Mr. Burton wanted to call the witnesses, and did not explore why trial counsel did not want to call them. Rather, the Court simply mandated that trial counsel call them.[61] The two witnesses were two of Mr. Burton's co-defendants, Andre Jones and Willie Brantley.[62] Both men took the stand and testified that they did not know Mr. Burton.[63] It immediately became obvious why trial counsel had not wanted to call them. The calling of these two witnesses opened the door for the prosecutor to introduce damaging evidence against Mr. Burton, and the prosecutor

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[58] (Vol. 8, Tab #R-19, TR. 1032-33).
[59] (Vol. 7, Tab #R-19, TR.1006).
[60] (Vol. 7, TR. 920; Vol. 7, TR. 991-992).
[61] (*Id.*).
[62] (*Id.*).
[63] (Vol. 7, TR. 996-997, 1001-1003).

capitalized on this evidence in his closing arguments as he asked for the death penalty. After both co-defendants testified that they did not even know Mr. Burton, the prosecutor was able to introduce a videotape showing Mr. Burton and the other co-defendants, including Jones and Brantley, together entering a bank in Sylacauga, Alabama.[64] Additionally, the State recalled two eyewitnesses from the AutoZone robbery, both of whom provided in-court identifications of Jones and Brantley.[65]

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, his influence on the co-defendants, and to Mr. Burton's criminal history.[66] 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.[67]

The jury was informed repeatedly that, under the law, its vote recommending either life without the possibility of

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[64] (Vol. 8, TR. 1067-71).
[65] (Vol. 8, TR. 1042-1047).
[66] (Vol. 7, Tab #R-18, TR. 930-80; Vol. 7, Tab #R-19, TR. 995-99, TR. 1001-3, and TR. 1008-16; Vol. 8, Tab #R-20, TR. 1042-80).
[67] (Vol. 8, 1184-86).

parole, or death, was merely a "recommendation."[68] Although Mr. Burton was not the triggerman, and even though the evidence that Mr. Burton had any intent that anyone be killed was weak, the jury recommended death.[69] The jury did not state whether it specifically found one or both offered aggravators.[70]

The judge then independently found and weighed the aggravating and mitigating circumstances, determined that there were no mitigating circumstances, statutory or non-statutory,[71] and sentenced Mr. Burton to death.[72] In so doing, the judge considered additional aggravating and mitigating circumstances not presented to the jury, but presented to the court via a presentence report, including a juvenile offense involving the stabbing of another boy.[73]

Although the vastly more culpable co-defendant, DeBruce, was also convicted of capital murder and sentenced to death, his death sentence was overturned by the Eleventh Circuit Court of Appeals.[74] The State of Alabama eventually dropped

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[68] (Vol. 8, TR. 1130-36).
[69] (Vol. 1, C. 63).
[70] (*Id.*).
[71] (Vol. 1, C. 105).
[72] (Vol. 1, C. 106).
[73] (Vol. 1, C. 64-71, 103).
[74] *DeBruce v. Comm'r*, 758 F.3d 1263 (11th Cir. 2015).

any attempt to appeal that reversal, and the district court unconditionally granted his petition, and ordered that he be resentenced to life without the possibility of parole.[75] 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, remains on death row.

Statement of the standards of review

"[I]n [an underlying] Rule 32, Ala. R. Crim. P., proceeding, the burden of proof is upon the petitioner seeking post-conviction relief to establish his grounds for relief by a preponderance of the evidence."[76]

On appeal, "When the facts are undisputed and an appellate court is presented with pure questions of law, that court's review in a Rule 32 proceeding is *de novo.*"[77]

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[75] *DeBruce v. Dunn*, No. 1:04-cv-02669 (N.D. Ala.), Doc. 55. (Public records available via Alacourt do not show that DeBruce yet has been resentenced. However, an inmate search via the Alabama Department of Corrections website no longer lists him as being housed on death row).

[76] *Wilson v. State*, 644 So. 2d 1326, 1328 (Ala. Crim. App. 1994).

[77] *Boyd v. State*, 913 So. 2d 1113, 1122 (Ala. Crim. App. 2003) (citing *Ex parte White*, 792 So. 2d 1097, 1098 (Ala. 2001) (internal alterations omitted)).

Summary of the argument

Mr. Burton has never killed anyone. The State of Alabama admitted at his trial that Mr. Burton was not the triggerman. The evidence conclusively demonstrated that Mr. Burton did not witness the shooting, and was not in the building when it took place. The shooter, Derrick DeBruce, was convicted of capital murder and sentenced to death. Mr. Burton, although vastly less culpable, also received a death sentence. However, DeBruce had his capital sentence reversed by the Eleventh Circuit Court of Appeals, and remanded with orders that he be granted a new sentencing hearing or be resentenced to life without parole. The State has agreed that it will not proceed with another sentencing hearing in DeBruce's case, and has agreed to have DeBruce resentenced to life without the possibility of parole.

The State has admitted that this creates an "arguably unjust"[78] situation. Indeed, evolving standards of decency dictate that it would be cruel and unusual, and manifestly unjust, to execute a non-shooter who even did not witness or order the shooting, while the shooter who intentionally

[78] State of Alabama's Petition for Certiorari, *Dunn. v. DeBruce*, 125 S. Ct. 2854, U.S. Supreme Court No. 14-807 (2015), p. 24.

pulled the trigger is no longer subject to a death sentence. Governors of other states have commuted sentences of non-shooters in similar circumstances, even though in those cases, the non-shooters were much more participatory and culpable than was Mr. Burton. At least three jurors who voted to recommend a death sentence for Mr. Burton have either asked that his sentenced be reduced, or agreed that they would not object to such a reduction, and that it would be just under the circumstances. This Court should recognize the injustice of this unique situation, and order that Mr. Burton be re-sentenced to life without the possibility of parole.

Additionally, Mr. Burton's jury had been alleviated of the awesome burden of deciding on his life or death, by knowing that the judge would be the ultimate decider, and that their vote was merely a recommendation. Thus, the ultimate fact-finding regarding whether the aggravating circumstances outweighed the mitigating circumstances was made by the judge, and not the jury. Pursuant to the Sixth Amendment to the United States Constitution, Mr. Burton had a right to have the jury alone, and not the judge, make this determination. This Court should recognize the error in

continuing to uphold capital sentences imposed using such a methodology.

Argument

I. Because Mr. Burton's co-defendant, who was vastly more culpable in the crime than Mr. Burton, has had his death sentence overturned, Mr. Burton's death sentence is arbitrary, capricious, and disproportionate, in violation of Mr. Burton's rights under Article I, Sections VI and XV of the Alabama Constitution, and the Fifth, Sixth, Fourteenth and Eighth Amendments to the United States Constitution.

In *State v. Gamble*[79] this Court addressed the issue of whether a less-culpable co-defendant could constitutionally be executed, when his more-culpable co-defendant was relieved of the death penalty and re-sentenced to life without the possibility of parole.

The circuit court granted Gamble relief on this claim under the Eighth and Fourteenth Amendments, finding:

> This Court finds that although Gamble and [his 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.[80]

[79] 63 So.3d 707 (Ala. Crim. App. 2010).
[80] *Gamble*, 63 So.3d at 724 (quoting circuit court opinion).

Although this Court reversed, it simultaneously affirmed the circuit court's decision granting Gamble a new sentencing due to ineffective assistance of counsel at the penalty phase.[81] Neither party appealed to the Alabama Supreme Court. Thus, the Alabama Supreme Court has never had the opportunity to resolve this issue. And, Mr. Burton's case is far more compelling. Under evolving standards of decency, Mr. Burton's death sentence is unconstitutional as applied to the unique facts of Mr. Burton's situation.

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.[82] Presley had been the one to fire the shots that killed the victims, while Gamble only watched and otherwise participated in the underlying robbery.[83] Gamble was outside of the pawnshop where the robbery transpired when Presley fired his first shot.[84] After Presley's gun jammed, Gamble walked back

[81] *Id.* at 721-22, 729.
[82] *Id.* at 709-10.
[83] *Id.* at 710.
[84] *Id.*

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 Presley's gun.[85] Presley then fired a final shot at the victims, and Gamble leaned over the counter and looked at them.[86]

In Mr. Burton's case, similar circumstances exist, with Mr. Burton even having *less* participation than did Gamble with the shooting itself. Unlike Gamble, Mr. Burton was *not* present when the shooting occurred and did not witness it.[87] 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.[88]

Thus, as in *Gamble*, the evidence against Mr. Burton at trial demonstrated that, although culpable in the underlying crime of armed robbery, he was *significantly* less culpable than his co-defendant DeBruce.

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

[85] *Id.*
[86] *Id.*
[87] (Vol. 4, TR. 359-60).
[88] *Id.*

> 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)).[89]

The principle of *Enmund* also weighs heavily in favor of relief in Mr. Burton's case. In *Enmund*, the Court held that the death penalty is unconstitutional for one who "does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed."[90] Although the State twisted some testimony to make it appear that Mr. Burton had contemplated that a murder could take place, the weight of the evidence did not support that conclusion.

A. This claim was not, and could not have been, raised on direct appeal, and is cognizable pursuant to Ala. R. Crim. P. 32.2(b)(2).

In adopting the State's proposed order and denying Mr. Burton relief on this claim, the circuit court erred in finding that Mr. Burton "raised this claim on direct appeal."[91] This is impossible. A distinctly different claim

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[89] *Gamble*, 63 So.3d at 723 (quoting the circuit court opinion granting Gamble relief on this issue).
[90] 458 U.S. at 797.
[91] ROA, 180, 183 (Doc. 15 at 5, 8).

was raised at that time: that Mr. Burton's sentence of death was disproportionate pursuant to *Enmund* and *Tison* simply because Mr. Burton was a non-shooter. The claim raised in this proceeding 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 raised on direct appeal, because the more culpable defendant was not off of death row at that time.[92]

As detailed in Mr. Burton's Petition,[93] even if Mr. Burton's case is viewed as initially comporting with *Tison v. Arizona*,[94] which Mr. Burton does not concede, under current evolving standards of decency, putting Mr. Burton to death while the shooter is no longer subject to a death sentence is

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[92] The circuit court further erred when stating that Mr. Burton "cite[ed] no relevant authority" for this claim. ROA, 176 (Doc. 15 at 1), ignoring Mr. Burton's reliance on the well-established principle of "evolving standards of decency," his reliance on the Eighth and Fourteenth Amendments to the United States Constitution, and his arguments, laid out in the Petition and again noted herein, that based upon evolving standards of decency, Mr. Burton now represents a class of individuals, such as in *Roper v. Simmons*, 543 U.S. 551, 568-69 (2005) and *Atkins v. Virginia*, 536 U.S. 304, 321 (2002), categorically ineligible for the death penalty. ROA, 19-25, n. 85 (Doc. 1, at 15-21 & n. 85).

[93] ROA, 22-24 (Doc. 1 at 18-20).

[94] 481 U.S. 137, 154 (1987).

arbitrary and unreasonable. Such persons are categorically ineligible for the death penalty under evolving standards of decency, and Alabama's capital murder scheme is unconstitutional as applied to Mr. Burton, in that it does not properly narrow the class of persons eligible for the death penalty to the "worst of the worst," as required for the death penalty to be properly applied.[95]

Thus, Mr. Burton's first claim falls squarely within the exception of Ala. R. Crim. P. 32.2(b)(2). Derrick DeBruce's removal from death row after the State agreed to have him resentenced to life without the possibility of parole represents "good cause . . . why the new ground [was] not known or could not have been ascertained through reasonable diligence when the first petition was heard."[96] Additionally, failure to entertain this claim "will result in a miscarriage of justice."[97]

That standards of decency have evolved in this manner is patent, as Mr. Burton also described in his Petition.[98] In a similar situation in Texas, then-Governor Rick Perry commuted

[95] *See Simmons*, 543 U.S. at 568-69; *Atkins*, 536 U.S. at 319.
[96] Ala. R. Crim. P. 32.2(b)(2).
[97] *Id.*
[98] ROA, 19-25 (Doc. 1 at 15-21).

the sentence of death-row inmate Kenneth Foster, a non-shooter, even though the gunman, Mauriceo Brown, *had* been executed.[99] The pro-death penalty governor of a pro-death penalty state understood the injustice of executing the non-shooter, even where the shooter had been executed. Mr. Burton's situation is far more equitably unjust in light of the newly available development of the shooter's death sentence being vacated.

Indeed, standards of decency continue to evolve concerning disproportionality in death penalty cases. Even after the circuit court adopted the State's proposed order and denied 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 the more culpable defendant, who actually committed the killing, was sentenced to life without the possibility of parole, while Mr. Teleguz received a death sentence.[100] And, in that case, Teleguz was

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[99] *See* Ralph Blumenthal, Governor Commutes Sentence in Texas, New York Times, August 31, 2007, at A14. http://www.nytimes.com/2007/08/31/us/31execute.html

[100] Press Release, "Governor McAuliffe Commutes Sentence of Ivan Teleguz to Life Imprisonment," Office of the Governor, April 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

still vastly more culpable in the crime than was Mr. Burton, in that Teleguz *hired* the more culpable defendant to kill the victim,[101] whereas Mr. Burton did not direct DeBruce to commit the murder, did not participate in it, and even did not witness it, as he was out of the building when the shooting took place.

Moreover, in its *Amicus* brief to the United States Supreme Court in the *Simmons* case, 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[]."[102]

Additionally, at least three of the jurors who voted for death in Mr. Burton's case, now knowing that the shooter is

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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.").

[101] *See id.*

[102] 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 (April 20, 2004) ("an 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.").

off of death row, have stated that they are either hopeful that Mr. Burton's sentence will be commuted, or believe it would 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.[103]

The State itself 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."[104] This new development, by the State's own admission, creates a *new*, "arguably unjust" situation. Therefore, this claim falls squarely within the Rule 32.2(b)(2) exception, and the

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[103] ROA, 66-77 (attachments A, B, C and D to the R. 32 Petition (Doc. 1) – affidavits from three jurors in Mr. Burton's case, and a letter from Mr. Burton apologizing to Mr. Battle's family). For the convenience of the Court, these affidavits and letter are also attached to this brief, again as attachments A, B, C and D).

[104] State of Alabama's Petition for Certiorari at 24, *Dunn. v. DeBruce*, 125 S. Ct. 2854 (2015) (No. 14-807) (emphasis added). Indeed, the injustice of such disparities has been recognized by other courts. *See People v. Henne*, 10 Ill. App. 3d 179, 180, 293 N.E.2d 172, 174 (1973) ("Fundamental fairness and respect for the law dictate that similarly situated defendants may not receive grossly disparate sentences." (citation omitted)); *State v. Buck*, 10 W. Va 505, 508, 361 S.E.2d 470, 474 (1987) ("If codefendants are similarly situated, some courts will reverse on disparity of sentence alone." (citation omitted)).

circuit court's finding that this claim was raised on direct appeal is in error.

B. This claim also represents a jurisdictional issue, which is not precluded by the limitations period or by the rule against successive petitions.

The circuit court further erred in holding that this claim is not jurisdictional.[105] The circuit court found that Mr. Burton's sentence was not facially illegal because "as an adult convicted of capital murder, Burton could receive the death penalty."[106] This failed to address Mr. Burton's argument that individuals who are less culpable than the major actor in a murder, and the major actor is no longer subject to the death penalty, are categorically ineligible for execution pursuant to evolving standards of decency and fundamental fairness, even if they are adults who would otherwise be eligible for a death sentence.[107] This argument 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."[108]

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[105] ROA, 179 (Doc. 15 at 4).
[106] *Id.*
[107] ROA, 22-25 (Doc. 1 at 18-21).
[108] *See Ex parte Wood*, 498 S.W. 3d 926, 928-29 (Tex. Crim. App. 2016) (Alcala, J., concurring).

"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."[109] Thus, as is evident in the *Atkins* context, simply because a person is "an adult convicted of capital murder,"[110] does not automatically mean that a death sentence for that person is excessive and unconstitutional.

As this Court has made clear, "Whether a sentence is excessive . . . *is a jurisdictional issue*, which is not precluded by the limitations period or by the rule against successive petitions. If a sentence imposed by the trial court exceeds that allowed by law, then this issue may be raised in a Rule 32 petition."[111] Thus, although the court generally had jurisdiction to try the case and sentence Mr. Burton in the first instance, evolving standards of decency, as in *Atkins*, render Mr. Burton's death sentence categorically unconstitutional as excessive and, therefore,

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[109] *Id.*
[110] ROA, 179 (Doc. 15 at 4).
[111] *Jones v. State*, 724 So. 2d 75, 76 (Ala. Crim. App. 1998) (emphasis added).

retroactively undermines the court's jurisdiction to have imposed such a sentence.

Thus, this case falls squarely within the Rule 32.2(b)(2) exception and this Court erred in finding that it does not. The State's own publicly stated position recognizes that the changed circumstance of Derrick DeBruce being removed from death row creates a *new*, "arguably unjust" situation. Thus, the circuit court incorrectly found that this claim is the same as what was raised on direct appeal, or could have been raised in Mr. Burton's initial Rule 32 petition.[112] This claim is cognizable pursuant to both Rule 32.2(b)(1) and (2), and this Court erred in holding otherwise.

Mr. Burton thus asks this Court to consider the same concern articulated by the prosecutor in the *Gamble* case, 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."[113]

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[112] ROA, 180 (Doc. 15 at 5).

[113] *See* Brenda Goodman, Prosecutor Who Opposed a Death Sentence is Rebuked, New York Times, September 15, 2007, at A9. http://www.nytimes.com/2007/09/15/us/15penalty.html.

The prosecutor in Gamble's case, Shelby County District Attorney Robert Owens, sought to have Gamble's sentence reduced, even in the face of retribution from Alabama's Attorney General, but was supported by his fellow district attorneys. *See id.*

Under Article I, Sections VI and XV of the Alabama Constitution, and the Eighth and Fourteenth Amendments to the United States Constitution, Mr. Burton's death sentence is arbitrary, capricious and disproportionate. This Court should reverse the circuit court's order denying Mr. Burton's claim, and order that Mr. Burton be resentenced to life in prison without the possibility of parole.

II. Alabama's Death Penalty System Violates the Right to Trial by Jury under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

On January 12, 2016, the United States Supreme Court issued a ruling in *Hurst v. Florida*, holding unconstitutional Florida's death penalty statute, which vests the trial court with sole authority to sentence a defendant to death.[114] Prior to *Hurst*, the Florida Supreme Court ("FSC") had repeatedly held that *Ring v. Arizona*[115] did not have any effect in its jurisdiction, because Florida's system included a jury verdict on punishment,[116] albeit non-binding on the sentencing

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[114] No. 14-7505, 136 S. Ct. 616 (2016).
[115] 536 U.S. 584 (2002).
[116] *See*, *e.g.*, *Kormondy v. State*, 845 So. 2d 41, 54 (Fla. 2003) ("[T]he Supreme Court [in *Ring*] found unconstitutional a death penalty scheme where the jury did not participate in the penalty phase of a capital trial. That, of course, is not

court,[117] and because the U.S. Supreme Court had upheld the Florida system prior to *Ring* and had not explicitly overruled those prior cases in *Ring*.[118]

The Alabama Supreme Court ("ASC") has similarly held that *Ring* does not impact Alabama's death penalty system, because of jury participation in finding an aggravating circumstance[119] and because the U.S. Supreme Court upheld Alabama's system in *Harris v. Alabama*,[120] a pre-*Ring* decision which it had not yet explicitly overruled.[121]

The U.S. Supreme Court's ruling in *Hurst* now demonstrates

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the situation in Florida where the trial court and the jury are cosentencers under our capital scheme.") (citation omitted).

[117] *Hurst*, 136 S. Ct. at 622 ("'It is true that in Florida the jury recommends a sentence, but . . . its recommendation is not binding on the trial judge.'") (quoting *Walton v. Arizona*, 497 U.S. 639, 648 (1990)).

[118] *See, e.g., Bottoson v. Moore*, 833 So. 2d 693, 695 (Fla. 2002) ("Significantly, the United States Supreme Court repeatedly has reviewed and upheld Florida's capital sentencing statute over the past quarter of a century, and although Bottoson contends that there now are areas of 'irreconcilable conflict' in that precedent, the Court in *Ring* did not address this issue.") (footnote omitted); *King v. Moore*, 831 So. 2d 143, 144 (Fla. 2002) (same).

[119] *Ex parte Waldrop*, 859 So. 2d 1181, 1188 (Ala. 2002); *Ex parte Bohannon*, — So. 3d —, No. 1150640, 2016 WL 5817692, at *4-5 (Ala. Sept. 30, 2016).

[120] 513 U.S. 504 (1995).

[121] *Ex parte Waldrop*, 859 So. 2d at 1189; *Ex parte Bohannon*, 2016 WL 5817692, at *3 (quoting *Ex parte Waldrop*, 859 So. 2d at 1189).

that the ASC's decision upholding Alabama's system even after *Ring*, like the FSC's similar decision, was in error. Therefore, Alabama must acknowledge and correct the unconstitutionality of its own system and resentence Mr. Burton to life without parole.

A. *Hurst* applies with equal force to Alabama's system, which parallel's Florida's in all the relevant respects.

In its 1995 decision in *Harris v. Alabama*, the U.S. Supreme Court described Alabama's death penalty system as equivalent to Florida's in all relevant respects, even noting that the only main difference revolved around the fact that, in Florida, the judge at least was required to give "great weight" to the jury's recommendation, while in Alabama, the judge must only "consider" it:

> Alabama's capital sentencing scheme is much like that of Florida. . . . Both require jury participation in the sentencing process but give ultimate sentencing authority to the trial judge . . . .
>
> The two States differ in one important respect. The Florida Supreme Court has opined that the trial judge must give "great weight" to the jury's recommendation and may not override the advisory verdict of life unless "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ." . . . The Alabama capital sentencing statute, by contrast, requires only that the judge "consider" the jury's

> recommendation, and Alabama courts have refused to read the *Tedder*[122] standard into the statute.[123]

The Court based this comparison on this Court's description of Alabama's system as derived from Florida's.[124] This Court had held in the underlying case, *Harris v. State*, that "the constitutionality of Alabama's statutory sentencing scheme was approved by the U.S. Supreme Court in *Proffitt v. Florida*, 428 U.S. 242, 252 . . . (1976), and the jury verdict override provisions were specifically found constitutional in *Spaziano v. Florida,* 468 U.S. 447, 457–67 . . . (1984)."[125] Neither of these cases had Alabama's system under review,[126] yet this Court recognized the equivalence between Alabama's system and Florida's.

The ASC has agreed with this comparison: "Alabama's

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[122] *Tedder v. State*, 322 So. 2d 908 (Fla. 1975).
[123] *Harris*, 513 U.S. at 508-9 (citations omitted).
[124] *Id.* at 508 (citing *Harris v. State*, 632 So. 2d 503, 538 (1992)).
[125] 632 So. 2d at 538.
[126] *Proffitt* did not mention Alabama at all, much less the constitutionality of its death sentencing provisions. *Spaziano* referenced Alabama only in its discussion of the applicability of the holding in *Beck v. Alabama*, 447 U.S. 625 (1980), that capital juries must be permitted to consider lesser included offenses, where the facts would support them. 468 U.S. at 454-57. As to the death penalty scheme, the *Spaziano* opinion references Alabama's system anonymously as one of the three allowing override, *id.* at 463-64, but does not otherwise discuss that feature.

procedure permitting judicial override is almost identical to the scheme used in Florida."[127] The State of Alabama has also equated the two systems. In *Harris*, the State argued that "the Alabama statute is essentially the same as Florida's capital sentencing statute which has been found by this Court to be constitutional."[128] More recently, the State has reiterated this position: "States like Florida and Alabama responded to *Furman*[129] by creating hybrid systems under which the jury recommends an advisory sentence, but the judge makes the final sentencing decision."[130]

The United States Supreme Court's description of the Florida system in *Hurst* shows that these comparisons are valid and render Alabama's system equally unconstitutional.

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[127] *Ex parte Harrell*, 470 So. 2d 1309, 1317 (Ala. 1985).
[128] Br. of Resp't, 1994 WL 514669, at *13 n.5, *Harris v. Alabama*, 513 U.S. 504 (1995) (No. 93-7659).
[129] *Furman v. Georgia*, 408 U.S. 238 (1972).
[130] Brief of *Amici Curiae* Alabama and Montana in Support of Respondent at 4, *Hurst v. Florida*, No. 14-7505, 136 S. Ct. 616 (2016), 2015 WL 4747983. *See also id.* at 7 ("Three states – Delaware, Florida, and Alabama – allow a judge to impose a sentence regardless of a jury's recommendation. *See* Ala. Code § 13A-5-47; Fla. Stat. § 921.141; Del. Code tit. 11, § 4209(d).").

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.

In *Hurst*, the State of Florida argued that Florida's death sentencing procedures are distinguishable from Arizona's and, therefore, not rendered unconstitutional under *Ring*.[131] In rejecting that distinction the U.S. Supreme Court described the relevant components of Florida's system, which are comparable to the unconstitutional elements of Arizona's:

> The analysis the *Ring* Court applied to Arizona's sentencing scheme applies equally to Florida's. Like Arizona at the time of *Ring,* Florida does not require the jury to make the critical findings necessary to impose the death penalty. Rather, Florida requires a judge to find these facts. Fla. Stat. § 921.141(3). Although Florida incorporates an advisory jury verdict that Arizona lacked, we have previously made clear that this distinction is immaterial: "It is true that in Florida the jury recommends a sentence, but it does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation is not binding on the trial judge. A Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona." . . .
>
> As with Timothy Ring, the maximum punishment Timothy Hurst could have received without any judge-

[131] *See*, *e.g.*, 136 S. Ct. at 622.

> made findings was life in prison without parole. As with Ring, a judge increased Hurst's authorized punishment based on her own factfinding.[132]

Comparing these components side-by-side to provisions in Alabama's death penalty statute shows that the same infirmities plague Alabama's system:

1) "Florida does not require the jury to make the critical findings necessary to impose the death penalty" – neither does Alabama, *see* Ala. Code 1975, § 13A-5-47(d);[133]
2) "Florida requires a judge to find these facts" ("the critical findings necessary to impose the death penalty") – so does Alabama, *see* Ala. Code 1975, § 13A-5-46(e)[134] and § 13A-5-47(3);[135]
3) "Florida incorporates an advisory jury verdict" – as does Alabama, *see* Ala. Code 1975, § 13A-5-47(d);[136]
4) "in Florida the jury . . . does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances" – nor do Alabama juries, *cf.* Ala. Code 1975, § 13A-5-46(e) (requiring a jury verdict only), *with* § 13A-5-47(d) (requiring

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[132] 136 S. Ct. at 621-22.

[133] "After deliberation, the jury shall return an *advisory* verdict . . . ." (Emphasis added.)

[134] "Based upon the evidence presented at trial, the evidence presented during the sentence hearing, and the presentence investigation report and any evidence submitted in connection with it, *the trial court shall enter specific written findings* concerning the existence or nonexistence of each aggravating circumstance enumerated in Section 13A-5-49, each mitigating circumstance enumerated in Section 13A-5-51, and any additional mitigating circumstances offered pursuant to Section 13A-5-52." (Emphasis added.)

[135] "[T]he trial court shall consider the recommendation of the jury contained in its advisory verdict . . . ."

[136] "After deliberation, the jury shall return an advisory verdict . . . ."

"specific written findings" by the court); and

5) "its [the jury's] recommendation is not binding on the trial judge" – nor is it in Alabama, *see* Ala. Code 1975, § 13A-5-47(e).[137]

Because of these provisions, the U.S. Supreme Court has concluded (1) that "'[a] Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona,'"[138] (2) that "the maximum punishment [a capitally convicted defendant in Florida] could have received without any judge-made findings was life in prison without parole,"[139] and (3) that Florida "judge[s imposing a death sentence] increase[a defendant's] authorized punishment based on [their] own factfinding."[140] This judicial fact-finding violates the right to trial by jury.[141]

Because Alabama's death penalty system operates in the

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[137] "While the jury's recommendation concerning sentence shall be given consideration, it is not binding upon the court."

[138] 136 S. Ct. at 622 (quoting *Walton v. Arizona,* 497 U.S. at 648).

[139] *Id.*

[140] *Id.*

[141] *Id.* ("As with Timothy Ring, the maximum punishment Timothy Hurst could have received without any judge-made findings was life in prison without parole. As with Ring, a judge increased Hurst's authorized punishment based on her own factfinding. In light of *Ring,* we hold that Hurst's sentence violates the Sixth Amendment.")

same way as Florida's in all respects relevant to an analysis under *Hurst*, its system is equally unconstitutional. Therefore, Mr. Burton's death sentence was imposed in violation of his right to trial by jury under the Sixth and Fourteenth Amendments and must be vacated in favor of a sentence of life without parole.

The circuit court's adopted order concluded that Alabama's judicial sentencing scheme remains constitutional under *Hurst*, because, unlike Florida's unconstitutional scheme, in Alabama, the jury has, in the State's view, automatically found an aggravating factor beyond a reasonable doubt in order to have found the defendant guilty of a capital crime in the first place.[142] This conclusion is incorrect for two reasons. First, Alabama's sentencing scheme does not actually work as the adopted order suggests. As is evident from the fact that numerous aggravating factors do **not** overlap with an aggravating circumstance, under Alabama's scheme, without further proceedings, a defendant found guilty of a capital crime is **not** automatically eligible for a death sentence.[143] Second, the judicial weighing of the aggravating

[142] ROA, 184-88 (Doc. 15 at 9-13).
[143] *Id.*

and mitigating circumstances represents the ultimate fact-finding which exposes defendants to the death penalty. Pursuant to *Hurst*, that fact-finding must be made by the jury, not by a judge.

> **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 aggravation the basis of its death sentences.**

Florida raised a number of points of purported distinction between its system and Arizona's, all of which the U.S. Supreme Court rejected. In the most relevant point addressed to the system itself:

> Florida argue[s] that when Hurst's sentencing jury recommended a death sentence, it "necessarily included a finding of an aggravating circumstance."[144] . . . The State contends that this

[144] Because the Court rejects this "implicit finding" argument, the holding by the United States Court of Appeals for the Eleventh Circuit in *Lee v. Commissioner, Alabama Department of Corrections*, based on the same argument is undercut. In *Lee*, the Eleventh Circuit stated:

> Nothing in *Ring* – or any other Supreme Court decision – forbids the use of an aggravating circumstance implicit in a jury's verdict. Indeed, *Ring* itself specifically left open and did not decide the question of whether the aggravator used to impose a death sentence could be implicit in the jury's verdict. *See Ring,* 536 U.S. at 609 n.7, 122 S. Ct. at 2443 n.7 ("We do not reach the State's assertion

> finding qualified Hurst for the death penalty under Florida law, thus satisfying *Ring*. "[T]he additional requirement that a judge *also* find an aggravator," Florida concludes, "only provides the defendant additional protection."[145]

The Supreme Court explained why this duplication was inadequate:

> The State fails to appreciate the central and singular role the judge plays under Florida law . . . the Florida sentencing statute does not make a defendant eligible for death until "findings *by the court* that such person shall be punished by death." The 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." "[T]he jury's function under the Florida death penalty statute is advisory only." The State cannot now treat the advisory recommendation by the jury as the necessary factual finding that *Ring* requires.[146]

Any fact that "expose[s] the defendant to a greater punishment than that authorized by the jury's guilt verdict"[147] is an

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> that any error was harmless because a pecuniary gain finding was implicit in the jury's guilty verdict.").

726 F.3d 1172, 1198 (11th Cir. 2013). As is evident from the quotation from *Ring*, such an implicit finding would be relevant only to harmless error analysis (in circumstances where such analysis is permissibly employed), not constitutionality analysis.

[145] *Id.*

[146] *Id.* (internal citations omitted) (emphases and brackets in original).

[147] *Apprendi*, 530 U.S. at 494. *See also Hurst*, 136 S. Ct. at 621.

"element"[148] that must be proved beyond a reasonable doubt and found by a jury.[149] Elements of an offense cannot be left to the fact-finding of a judge. This must be all the more true where a judge's fact-finding is not bound to any particular standard of proof, as in Alabama.[150] Florida's argument (and Alabama's) would be equivalent to a system in which juries rendered only partial verdicts, "leaving it to the judge to apply the law to th[e] facts and render the ultimate verdict of 'guilty' or 'not guilty.'"[151]

That a defendant found guilty of a capital crime under Alabama's death penalty statute is **not** thereby eligible for a death sentence, without further proceedings, is evident from the fact that numerous aggravating factors do **not** overlap with an aggravating circumstance. These include:

> 13A-5-40(a)(5) (murder of a law enforcement officer);
> 13A-5-40(a)(8) (murder during sexual abuse);
> 13A-5-40(a)(9) (murder during arson or by means of

[148] *Apprendi*, 530 U.S. at 494 n.19 (citation omitted).
[149] *Id.* at 490 and 494.
[150] Section 13A-5-47(d), Ala. Code 1975, describes what findings the court must make, but does not give any guidance as to the proof required to make those findings.
[151] *United States v. Gaudin*, 515 U.S. 506, 512-13 (1995). In *Gaudin*, the government argued that the right to trial by jury applies to finding "*only the factual components* of the essential elements." *Id.* at 511 (quoting Brief for the United States) (emphasis in original). The U.S. Supreme Court rejected such a system as unconstitutional.

> explosives);
> 13A-5-40(a)(11) (murder of a state or federal official);
> 13A-5-40(a)(12) (murder during aircraft hijacking);
> 13A-5-40(a)(14) (murder of a witness);
> 13A-5-40(a)(15) (murder of a victim less than fourteen);
> 13A-5-40(a)(16) (murder by firing into a dwelling);
> 13A-5-40(a)(17) (murder by firing into an occupied vehicle);
> 13A-5-40(a)(18) (murder by firing from a vehicle); and
> 13A-5-40(a)(19) (murder of a victim under a protective order).

The ASC acknowledged as much in *Ex parte Stephens*,[152] in revisiting its earlier opinion in *Ex parte Kyzer*:[153]

> In *Kyzer,* the Court noted that "[a] literal and technical reading of the statute" would preclude the consideration of an aggravating circumstance other than those identified by statute. 399 So. 2d at 337. This would mean that some defendants, such as Kyzer, could be convicted of capital murder without being eligible for a death sentence. This Court rejected that conclusion as "completely illogical." *Id.* It is, however, the Court's responsibility to give effect to the plain meaning of a statute, not to substitute its own judgment as to what is logical or illogical. *Munnerlyn v. Alabama Dep't of Corr.,* 946 So. 2d 436, 438 (Ala. 2006).[154]

But a system cannot, consistent with due process and equal protection under the law, operate one way for half of those

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[152] 982 So. 2d 1148 (Ala. 2006).
[153] 399 So. 2d 330 (Ala. 1981).
[154] 982 So. 2d at 1153 n.6. Thus, for some defendants, Alabama's capital sentencing scheme patently does not require a jury finding of aggravation or a jury recommendation of death at any stage in order for the judge to impose death.

charged under it and another way for the other half, without some rational basis for distinguishing between the two categories.[155] No rational explanation has ever been given that would allow some capital defendants to be treated differently from others, depending on the aggravating factors charged against them.[156] So, either a defendant is eligible for a death sentence following the innocence/guilt phase, or not. The *Kyzer* Court, acknowledging this inconsistency, thought it illogical to conclude that all capital defendants found guilty as charged are not thereby eligible for the death penalty at the conclusion of the first phase of trial.[157]

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[155] *Clark v. Jeter*, 486 U.S. 456, 461 (1988) ("In considering whether state legislation violates the Equal Protection Clause of the Fourteenth Amendment, U.S. Const., Amdt. 14, § 1, we apply different levels of scrutiny to different types of classifications. At a minimum, a statutory classification must be rationally related to a legitimate governmental purpose. . . . [C]lassifications affecting fundamental rights . . . are given the most exacting scrutiny") (citations omitted).

[156] In fact, the ASC in *Ex parte Kyzer*, postulated that the failure to duplicate some aggravating factors must have been an oversight by the Legislature. 399 So. 2d at 338. However, the Legislature proved that theory wrong by revising the statute itself, but still not including full duplication. *Cf.* Ala. Code 1975, § 13A-5-40, with Ala. Code 1975, § 13A-5-49.

What rational explanation, for example, could be given to justify murder for pecuniary gain, *see* §§ 13A-5-40(a)(7) and 13A-5-49(6), being treated as a more death-worthy offense than murder of a law enforcement officer?

[157] 399 So. 2d at 337-38.

But since, as is evident from the above and from the Court's later clarification in *Ex parte Stephens*, many capitally-charged defendants *would not* be death-eligible based on the jury's finding of an aggravating factor during the innocence/guilt phase,[158] it must be that *no* defendant is eligible for a death sentence before further findings are made.[159] In Alabama, as in Florida, these further findings are made by the trial court independently of the jury. This is unacceptable under *Hurst*.[160]

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[158] *See*, *e.g.*, *Ex parte McNabb*, 887 So. 2d 998, 1005 (Ala. 2004) ("McNabb contends – correctly – that, despite his conviction for capital murder, he could not have been sentenced to death unless at least one of the aggravating circumstances set forth in § 13A-5-49 was found by the jury to exist beyond a reasonable doubt.").

[159] Holding otherwise would render the system violative of Equal Protection because some defendants would be treated differently from others. Those who had a duplicative aggravator found in the innocence/guilt phase would be at a disadvantage compared to those who did not if the aggravation does not have to be found separately in the penalty phase. This is so because the former class would not have the opportunity to address the aggravation as an element of punishment during the innocence/guilt phase, meaning their juries would be permitted to make a critical finding without being instructed about its purport. Such a system would run afoul of the U.S. Supreme Court's insistence as a "premise [of] its capital punishment decisions . . . that a capital sentencing jury recognizes the gravity of its task and proceeds with the *appropriate awareness* of its 'truly awesome responsibility.'" *Caldwell v. Mississippi*, 472 U.S. 320, 341 (1985) (emphasis added).

[160] 136 S. Ct. at 622.

Florida's system operates in the same fashion with respect to duplication. Some of the aggravating factors listed in Florida Statute, § 782.04(a) (2010) (defining capital murder where any one of 18 aggravating factors exist), are duplicated as aggravating circumstances in § 921.141(1) (listing 17 aggravating circumstances). Nonetheless, the U.S. Supreme Court did not hold in *Hurst* that Florida's system is unconstitutional sometimes. It held that the system is unconstitutional, period: "Florida's sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, is therefore unconstitutional."[161]

That a jury's finding of a duplicate aggravator in the guilt phase is not sufficient to save death penalty statutes such as Florida's and Alabama's is also evident from the U.S. Supreme Court's reversal and remand of *Wimbley v. Alabama* for reconsideration in light of *Hurst*.[162] While the jury's guilt verdict in Hurst's case did not include a duplicate

[161] *Id.* at 624.
[162] 136 S. Ct. 2387 (2016).

aggravator,[163] Wimbley's did.[164]

In its consideration of the application of *Ring* in Alabama, the ASC has made the same distinctions as those made by Florida and rejected in *Hurst*. So, for example, in *Ex parte Waldrop*, the ASC found *Ring* distinguishable because Waldrop's jury had found an aggravating factor in the guilt phase which was "duplicated" by an aggravating circumstance presented in the penalty phase.[165] But, as just explained, Florida's system

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[163] *Hurst*, 136 S. Ct. at 619-20 (jury convicted of first-degree murder, but did not specify whether verdict rested on a finding of premeditation or a finding of murder during a robbery) and *id.* at 620 (two aggravating circumstances submitted to the jury: murder during a robbery and "heinous, atrocious, or cruel," and verdict did not specify which it found).

[164] *Wimbley v. State*, 191 So. 3d 176, 192 (Ala. Crim. App. 2014) ("Corey Allen Wimbley was indicted for one count of murder made capital pursuant to § 13A-5-40(a)(2), Ala. Code 1975, for killing Connie Ray Wheat during the course of a robbery and one count of murder made capital pursuant to § 13A-5-40(a)(9), Ala. Code 1975, for killing Wheat during the course of an arson. At the conclusion of the guilt phase of the trial, the jury unanimously found Wimbley guilty of both counts, and, following the presentation of evidence during the penalty phase of the trial, it recommended by a vote of 11-1 that he be sentenced to death for count one and by a vote of 10-2 that he be sentenced to death for count two."). This Court recently denied relief to Wimbley on remand, based on *Ex parte Bohannon*, which, in turn, depends wholly on *Ex parte Waldrop*. *See Wimbley v. State*, No. CR-11-0076, 2016 WL 7322334 (Ala. Crim. App. Dec. 16, 2016).

[165] 859 So. 2d at 1187-88.

operates in exactly the same way.[166] Yet, the *Hurst* Court found the Florida scheme unconstitutional, not just as applied to Hurst, but *in its entirety*.[167]

Similarly, in *Ex parte McNabb*, the ASC held that the fact that any jurors voted for death necessarily implied that the jury unanimously found the existence of at least one aggravating circumstance beyond a reasonable doubt, thereby satisfying *Ring*.[168] The *Hurst* decision shows that this analysis is likewise flawed: "The State cannot now treat the advisory

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[166] Under Alabama's statute, the trial court does not adopt the jury's guilt verdict in order to find an aggravating circumstance exists: "Based upon *the evidence presented at trial* [not the jury's verdict], the evidence presented during the sentence hearing, and the presentence investigation report and any evidence submitted in connection with it, the trial court shall enter specific written findings concerning the existence or nonexistence of each aggravating circumstance . . ." Ala. Code 1975, § 13A-5-47(d) (emphasis added). In other words, the court must make its own finding respecting the existence of each aggravating circumstance, independent of the jury's, even though its findings may agree with the jury's.

Section 13A-5-47(c), Ala. Code 1975, laying out the procedures for the sentencing hearing before the judge, also provides: "Before imposing sentence the trial court shall permit the parties to present arguments concerning the existence of aggravating and mitigating circumstances and the proper sentence to be imposed in the case." If the existence of aggravating circumstances has already been determined by the jury, there would be no point in re-arguing non-existence at this stage.

[167] 136 S. Ct. at 624.

[168] 887 So. 2d at 1005-6. *See also Bryant v. State*, 951 So. 2d 732, 751 (Ala. Crim. App. 2003).

recommendation by the jury as the necessary factual finding that *Ring* requires."[169]

Thus, a death sentence violates the Sixth and Fourteenth Amendments where the judge, rather than the jury, finds the fact, necessary to impose the death penalty, that an aggravating circumstance exists. And because Alabama's capital sentencing scheme requires a judge to make this finding, which is necessary to sentence a defendant to death, the scheme itself is unconstitutional.

Just as Florida's capital sentencing scheme is unconstitutional because it "required the judge alone to find the existence of an aggravating circumstance,"[170] so too is Alabama's scheme, which is identical to Florida's in this regard. Therefore, Mr. Burton's death sentence was imposed in violation of his right to trial by jury under the Sixth and Fourteenth Amendments and must be vacated in favor of a sentence of life without parole.

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[169] 136 S. Ct. at 622.
[170] *Id.* at 624.

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 finding that aggravating circumstances outweigh mitigating.

Under *Apprendi* and its progeny, "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?"[171] 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 usual definition of an 'element' of the offense."[172] All such factors must be found by the jury[173] beyond a

[171] 530 U.S. at 494. *See also Hurst*, 136 S. Ct. at 621.
[172] *Apprendi v. New Jersey*, 530 U.S. 466, 494 n.19 (2000) (citation omitted).
[173] *Hurst*, 136 U.S. at 622. Alabama's system does not prohibit the trial judge from finding additional aggravating circumstances for which there is no proof that the jury also found them. *See, e.g., Ex parte Waldrop*, 859 So. 2d at 1190. 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

reasonable doubt[174] and *must be* ***binding*** on the court.[175] A court's parallel decision, based on its own findings and a lesser standard of proof, is not sufficient.[176]

Under Alabama law, as under Florida law, a finding that an aggravating circumstance exists is not the only finding necessary to impose a death sentence. No matter how many aggravating circumstances may be found,[177] a defendant cannot receive a death sentence unless the further finding is made that whatever mitigating circumstances exist do not outweigh the aggravation.[178] In the exact words of the statute, this assessment is not "a mere tallying of aggravating and mitigating circumstances for the purpose of numerical

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by a jury verdict.

[174] *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)).

[175] *Id.* at 622.

[176] *Id.*

[177] Alabama's system allows a judge to find more aggravators than the jury. *Ex parte Waldrop*, 859 So. 2d at 1190. But this procedure must also be unconstitutional, since elements, which 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).

[178] Ala. Code 1975, § 13A-5-46(e).

comparison . . . ."[179]

For this reason, even a finding by the jury that an aggravating circumstance exists, whether made at the innocence/guilt phase or the penalty phase, cannot support 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."[180] Moreover, Mr. Burton's jury had been alleviated of the weight of having the ultimate burden of knowing its decision was binding, rather than only a recommendation. Thus, 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.'"[181] Indeed, not only had the jury been alleviated of the "appropriate awareness" of its responsibility, but it also had not been instructed that it must find that the aggravating factors outweigh the mitigating factors beyond a reasonable doubt.[182]

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[179] Ala. Code 1975, § 13A-5-48.
[180] *Id.* (emphasis added).
[181] *Caldwell*, 472 U.S. at 341 (emphasis added).
[182] Vol. 8 at 1129 (informing the jury that the "beyond a reasonable doubt" standard applied only to the existence of aggravating circumstances).

The ASC has held that all that is required for the imposition of a death sentence is the existence of one aggravating factor:

> Because the jury convicted Waldrop of two counts of murder during a robbery in the first degree, a violation of Ala. Code 1975, § 13A-5-40(a)(2), the statutory aggravating circumstance of committing a capital offense while engaged in the commission of a robbery, Ala. Code 1975, § 13A-5-49(4), was "proven beyond a reasonable doubt." Ala. Code 1975, § 13A-5-45(e); Ala. Code 1975, § 13A-5-50. Only one aggravating circumstance must exist in order to impose a sentence of death. Ala. Code 1975, § 13A-5-45(f). Thus, in Waldrop's case, the jury, and not the trial judge, determined the existence of the "aggravating circumstance necessary for imposition of the death penalty." *Ring*, 536 U.S. at 609, 122 S. Ct. at 2443. Therefore, the findings reflected in the jury's verdict alone exposed Waldrop to a range of punishment that had as its maximum the death penalty. This is all *Ring* and *Apprendi* require.[183]

This holding is directly contradicted by *Hurst*, on the basis of the non-binding jury finding alone. In addition, Section 13A-5-45(f) 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," – but not a *sufficient* condition, in light of Section 13A-5-47(e)

[183] *Ex parte Waldrop*, 859 So. 2d at 1188.

– "In deciding upon the sentence, the trial court shall determine whether the aggravating circumstances it finds to exist outweigh the mitigating circumstances it finds to exist . . ."

The distinction between necessary and sufficient conditions was clearly made by Justice See in a special concurrence in *Holcomb v. Carraway*:

> The term "only if," on the other hand, is a term, not of sufficiency, but of necessity. For example, the shipment will be accepted "only if" it has a moisture content of less than 4%; the team will clinch the pennant "only if" it wins this game. This describes a condition of necessity, not one of sufficiency. Thus, there may be other conditions on the acceptance of the shipment, but even if all of those other conditions are met, and more, the shipment will be accepted "only if" the moisture content is less than 4%. There may be other games that the team must win, but even if it wins all those other games, the team will clinch the pennant "only if" it wins this game. The fulfillment of condition A is necessary to produce consequence B, although it alone may not be sufficient – there may be other, additional conditions that also must be met. [184]

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

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[184] 945 So. 2d 1009, 1023 (Ala. 2006) (See, J., joined by Nabers, C.J., and Smith and Bolin, JJ., concurring specially) (footnotes omitted).

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."[185] Because this is so, under *Hurst*, that finding must be made by the jury. The U.S. Supreme 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.'"[186] Hurst thus makes clear that a court's finding that the aggravating circumstances *outweigh* the mitigating is constitutionally impermissible.

Alabama's system, like Florida's, improperly places the 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.[187] Compounding the unconstitutionality, there is no stated standard of proof for the existence of the

[185] *Apprendi*, 530 U.S. at 494.
[186] 136 S. Ct. at 622.
[187] Ala. Code 1975, § 13A-5-47(d) and (e).

aggravators found by the court and the ultimate burden of proof is simply that the aggravating factors "outweigh" the mitigating,[188] with no requirement that they do so beyond a reasonable doubt.[189] Alabama has, in fact, rejected the contention that any particular standard applies to the judicial findings on these points.[190]

Thus, a death sentence violates the Sixth, Eighth and Fourteenth Amendments where the judge, rather than the jury, makes the ultimate finding that the aggravating circumstances outweigh the mitigating. And because Alabama's capital sentencing scheme requires a judge to make this finding, which is required in order to sentence a defendant to death, the scheme itself is unconstitutional.

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[188] *Id.*

[189] *Cf. Powell v. Delaware*, No. 310, 2016, 2016 WL 7243546, at *3-4 (Del. Dec. 15, 2016).

[190] Respecting the court's authorization to find aggravators not found by the jury, *see Ex parte 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 id.* at 1189 (citing *Ford v. Strickland*, 696 F.2d 804, 818 (11th Cir. 1983) (en banc)). Both *Ford* opinions also held that "[t]he aggravating and mitigating circumstances are not facts or elements of the crime." *See* 696 F.2d at 818 and 676 F.2d at 441. It is evident that both have been overruled by *Apprendi*.

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,'"[191] so too is Alabama's scheme, which is identical to Florida's in this regard. Therefore, Mr. Burton's death sentence was imposed in violation of his right to trial by jury under the Sixth and Fourteenth Amendments and must be vacated in favor of a sentence of life without parole.

4. The circuit court failed to address Mr. Burton's State-law based retroactivity argument.

The circuit court erroneously adopted the State's proposed order, holding that "[b]ecause the Court of Criminal Appeals has held that Hurst is not applicable due to non-retroactivity, [Mr.] Burton's Hurst claim is untimely pursuant to Rule 32.2(c)."[192] For support, the circuit court

[191] 136 S. Ct. at 622.
[192] ROA, 182-83 (Doc. 15 at 7-8).

relied[193] on decisions apparently issued in *Madison v. State*,[194] and *Reeves v. State*.[195]

But both the language quoted as appearing in *Madison* and the language of *Reeves* only held that *Hurst* was not retroactive pursuant to *federal* law.[196] Even assuming that *Hurst* does not apply retroactively under federal law,[197] Alabama law "expressly provides for retroactive relief to

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[193] *Id.*, 182 (Doc. 15 at 7).

[194] In the adopted order, the case is cited as "*Madison v. State*, CR-15-0931 (Dec. 9, 2016)[.]" (ROA, 182, (Doc. 15 at 7)). A search of Westlaw and this Court's website reveal no such opinion. Further, this Court's website for criminal opinions contains no opinions released on December 9, 2016. (http://judicial.alabama.gov/criminal_opinions.cfm (last accessed: July 10, 2017) (providing a list of decisions released on December 16, 2016, and listing no opinions released on any other date in December 2016)). The order further states that *Madison* was "quoting *Reeves*." (ROA, 182, (Doc. 15 at 7)). However, a Westlaw search lists only one case that has relied upon *Reeves*, and does not list *Madison v. State*. Additionally, the Alabama judiciary's ACIS Online case information sheet for *Madison* contains no entry of an order, although it does contain an entry for a petition for rehearing and subsequent proceedings. The ACIS case information sheet does provide a link to a docket sheet which shows an opinion filed in the case on December 9, 2016. However, the docket sheet does not provide a link to the document. Thus, absent the circuit court having taken steps to obtain a physical copy from this Court, it could not have independently reviewed the case.

[195] CR-13-1504, 2016 WL 3247447 (Ala. Crim. App. June 10, 2016).

[196] *See* the purported *Madison* language, ROA, 181-82 (Doc. 15 at 6-7); *see also Reeves*, 2016 WL 3247447 at *37.

[197] Mr. Burton does not concede this issue.

those sentenced to death under a statute later found to be unconstitutional."[198] Thus, regardless of the claims raised by Messrs. Madison and Reeves and this Court's decisions on those claims, Mr. Burton's *state-law based* argument has *not* been addressed by this Court.

Alabama's capital punishment scheme expressly provides for retroactive relief to those sentenced to death under a statute later found to be unconstitutional. Alabama Code § 13A-5-59, in relevant part, provides,

> It is the intent of the Legislature that if the death penalty provisions of this article are declared unconstitutional and if the offensive provision or provisions cannot be reinterpreted so as to provide a constitutional death penalty . . . that the defendants *who have been sentenced to death* under this article shall be re-sentenced to life imprisonment without parole.[199]

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[198] ROA, 52 (Doc. 1 at 48) (citing Ala. Code § 13A-5-59 and *Ex parte Henderson*, 144 So. 3d 1262, 1281 (Ala. 2013) ("[s]ections 13A-5-58 and -59 evidence the intent of the legislature that Alabama have a valid capital-murder statutory-sentencing scheme as it applies to adults and to juveniles tried as adults.")); *see also* Ala. Const., art. I, § 7 ("[N]o person shall be punished but by virtue of a law established and promulgated prior to the offense *and legally applied*") (emphasis added); *see also Thigpen v. Thigpen*, 541 So. 2d 465, 467 (Ala. 1989) ("Because § 319 is unconstitutional, it cannot be 'legally applied' to impose the death penalty on Thigpen") (citing Ala. Const., art. I, § 7).

[199] Ala. Code § 13A-5-59 (emphasis added); *see also Ex parte Henderson*, 144 So.3d 1262, 1281 (Ala. 2013) ("[s]ections 13A-5-58 and -59 evidence the intent of the legislature that Alabama have a valid capital-murder statutory-

Because Alabama law expressly provides that any determination that Alabama's death penalty scheme is unconstitutional must be applied retroactively to those who have been sentenced to death, any time or subject matter limitation contained in the Alabama Rules of Criminal Procedure cannot bar relief under Alabama Code § 13A-5-59.

In *Thigpen v. Thigpen*, 541 So.2d 465 (Ala. 1989), the Alabama Supreme Court answered a certified question from a federal district court asking whether, in light of the Supreme Court's decision in *Sumner v. Shuman*, 483 U.S. 66 (1987),[200] Mr. Thigpen could "be resentenced capitally or should simply have his existing death sentence reduced to life imprisonment."[201] Citing Article I, § 7, of the Alabama

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sentencing scheme as it applies to adults and to juveniles tried as adults.").

[200] In *Sumner*, the Supreme Court invalidated a Nevada statute that provided for an automatic death sentence for anyone who committed a murder while serving a life sentence. *Sumner*, 483 U.S. at 67 n.1. Alabama's similar statute (section 319) was never explicitly found unconstitutional in the wake of *Furman v. Georgia*, 408 U.S. 238 (1972), and was, at the time of the murder, "the only statute under which Thigpen could have been sentenced to death." *See Thigpen*, 541 So.2d at 467 (citing *Hubbard v. State*, 274 So.2d 298, 300 (Ala. 1973)).

[201] *Thigpen*, 541 So.2d at 466.

Constitution,[202] the Court held that "[b]ecause § 319 is unconstitutional, it cannot be 'legally applied' to impose the death penalty on Thigpen.'"[203] In the final sentence of its opinion, the Court held, "[U]nder the clear, absolute mandate of the Alabama constitution, Thigpen cannot be resentenced to death."[204]

Like *Hurst*, *Sumner* did not directly address an Alabama statute,[205] but did not stop the Alabama Supreme Court from holding, "Of course, *Sumner* invalidated the death sentence Thigpen was given under § 319."[206]

Further supporting retroactive application of a finding of unconstitutionality as to an Alabama death penalty statute is the fact that Mr. Thigpen, convicted and sentenced in 1976, had exhausted all state post-conviction remedies in 1979,

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[202] "[N]o person shall be punished but by virtue of a law established and promulgated prior to the offense and legally applied." Ala Const., art. I, § 7.
[203] *Thigpen*, 541 So.2d at 467 (citing Ala. Const., art. I, § 7). Recognizing that it could attempt to reinterpret the statute in a way that would render it constitutional, the Court declined, reasoning, "The wholesale revision that would be necessary to apply § 319 so as to impose a death sentence on Thigpen works far too much of a change to be allowed as a merely procedural revision." *Id.*
[204] *Id.*
[205] *Sumner*, 483 U.S. at 83-85.
[206] *Thigpen*, 541 So.2d at 467.

nearly a decade before *Sumner* was decided[207] and a full ten years before the Court addressed his claim, yet still received relief.

5. The judicially imposed death sentence was illegal and, therefore, the sentencing court was without jurisdiction to impose the sentence.

Even in the absence of Alabama Code § 13A-5-59's provision for retroactivity and Alabama Supreme Court precedent, because Alabama's death penalty sentencing scheme is unconstitutional, his judge-imposed sentence is illegal[208] and was, therefore, entered outside the trial court's jurisdiction.[209]

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[207] *See Thigpen v. Thigpen*, 926 F.2d 1003, 1005 n.2 (11th Cir. 1991) (citing, *inter alia*, *Thigpen v. State*, 374 So.2d 401 (Ala. Crim. App. 1979)).

[208] *See Rogers v. State*, 728 So.2d 690, 691 (Ala. Crim. App. 1998) ("an allegedly illegal sentence may be challenged at any time, because if the sentence is illegal, the sentence exceeds the jurisdiction of the trial court and is void") (citation omitted).

[209] *See* Ala. R. Crim. P. 32.2(b) ("[a] successive petition on different grounds shall be denied *unless* . . . the petitioner is entitled to relief on the ground that the court was without jurisdiction to render a judgment or to impose sentence") (emphasis added); *see also* Ala. R. Crim. P. 32.2(c) (providing no time limitation with respect to claims based on either lack of jurisdiction or alleging an illegal sentence); *see also Henderson v. State*, 895 So.2d 364, 365 (Ala. Crim. App. 2004) ("[c]ontrary to the State's assertions below and on appeal, this claim – that

A judge sentenced Mr. Burton to death by following an advisory jury verdict. At a later proceeding, the trial court decided what aggravating and mitigating circumstances existed and did not exist based, in part, on evidence not presented to a jury (the presentence investigation report, which including evidence of a juvenile offense not presented to the jury).[210] Furthermore, in order to impose a death sentence, the trial court was required to "determine" that the aggravating circumstances *it found* outweighed the mitigating circumstances *it found*.[211]

As with Florida's unconstitutional statute, in the absence of the trial court's fact finding, including *weighing*

Henderson's sentence is illegal – is not subject to procedural bars").

[210] (Vol. 1, p. 64-71, 103).

[211] The Florida Supreme Court, citing *Hurst*, *Apprendi*, and *Ring*, recently concluded, "[T]he Sixth Amendment right to a trial by jury mandates that under Florida's capital sentencing scheme, the jury – not the judge – must be the finder of every fact, and thus every element, necessary for the imposition of the death penalty," including "that the aggravating factors outweigh the mitigating circumstances." *Hurst v. State*, No. SC12-1947, slip op. at 21-22 (Fla. Oct. 14, 2016); *see also Rauf v. State*, __ A.3d __, 2016 WL 4224252, at *2 (Del. Aug. 2, 2016) (finding Delaware's capital punishment statute unconstitutional under the Sixth Amendment because it does not require that a jury find that the aggravating circumstances outweigh the mitigating circumstances). Alabama is now the only state that does not require a jury to make all findings necessary to impose a death sentence.

the aggravating circumstances it found against any mitigating circumstances it found, Mr. Burton could not have been sentenced to death.[212] The Supreme Court's classification of the process of weighing aggravating against mitigating circumstances as a "fact[]" that must be found before a death sentence may be imposed indicates that, regardless of whether an aggravating circumstance is also an element of the capital murder charge in the guilt phase, the Sixth Amendment requires something more of statutes like Florida's and Alabama's.[213]

The necessary role that weighing plays in Alabama's death penalty sentencing scheme is obvious from the language employed in the jury advisory statute[214] and the judge-based sentencing statute.[215] Providing further support is Alabama Code § 13A-5-48, which defines weighing as, "a process by

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[212] *See Hurst*, 136 S. Ct. at 622 ("[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.' '[T]he jury's function under the Florida death penalty statute is advisory only.'") (emphases added).
[213] *Contra Ex parte Waldrop*, 859 So. 2d 1181, 1189 (Ala. 2002) ("the weighing process is not a factual determination") (citing, *inter alia*, *Harris v. Alabama*, 513 U.S. at 512).
[214] Ala. Code § 13A-5-46(e)(3) (requiring a "determin[ation] that one or more aggravating circumstances as defined in Section 13A-5-49 exist *and* that they outweigh the mitigating circumstances, if any" before a jury may return an advisory verdict of death) (emphasis added).
[215] Ala. Code § 13A-5-47(d) and (e).

which circumstances relevant to sentence are marshalled and considered in an organized fashion for the purpose of determining whether the proper sentence in view of all the relevant circumstances in an individual case is life imprisonment without parole or death."[216]

Furthermore, *Ring* expressly disapproved of attempts to classify those determinations that are necessary to increase a sentence beyond that authorized by a jury's verdict as "sentencing factor[s]" or anything else.[217] Under Alabama law, Mr. Burton was not eligible for a sentence of death until and unless *the trial court* found the existence of one or more aggravating circumstances *and* that such circumstance or circumstances outweighed any and all mitigating circumstances. Had the trial court attempted to impose a death

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[216] Ala. Code § 13A-5-48. The fact that the CCA is required to "determine" "[w]hether an independent weighing of the aggravating and mitigating circumstances . . . indicates that death was the proper sentence" implies that there is some objective method by which such weighing can be conducted. Ala. Code § 13A-5-53(b)(2).

[217] *Ring*, 536 U.S. at 604-05 (citing *Apprendi*, 530 U.S. 466); *see also id.* at 610 (Scalia, J., concurring) ("the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives – whether the statute calls them elements of the offense, sentencing factors, or Mary Jane – must be found by the jury beyond a reasonable doubt").

sentence without having found at least one aggravating circumstance *and* that the aggravating circumstance(s) outweighed any mitigating circumstance(s), the sentence would have been unlawful.[218]

If a finding that any aggravating circumstance(s) outweighed all mitigating circumstance(s) wasn't necessary to impose death under Alabama law, then why, after finding error as to aggravating and mitigating circumstances, would this Court repeatedly remand cases for reweighing?[219]

Mr. Burton's sentence, imposed only after the trial judge made the factual findings necessary by statute to impose the

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[218] *See Hadley v. State*, 575 So. 2d 145, 160 (Ala. Crim. App. 1990) (remanding for reweighing after finding error in trial court's findings as to one aggravating circumstance and one mitigating circumstance); *see also Yeomans v. State*, 898 So. 2d 878, 904 (Ala. Crim. App. 2004) (rejecting an argument that, to satisfy the Sixth Amendment, the jury "is required to conduct the final weighing of the aggravating circumstances and mitigating circumstances," but remanding for a new sentencing order in part because "it appears that the court weighed each factor individually against a single aggravating factor" in violation of Alabama Code § 13A-5-47(e), a "procedure [that] would not have been in compliance with the statute").

[219] *See Hurst*, 136 S. Ct. at 622 (noting that, under Florida law, a person may not be sentenced to death until the trial court has made findings, and that "[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'") (second and third brackets, emphasis, and ellipsis in original).

death penalty, including that the aggravating circumstances outweighed the mitigating circumstances, is unconstitutional under the Sixth Amendment, illegal, and was, therefore, entered without jurisdiction.[220] The circuit court incorrectly adopted the State's reasoning that, "Because [Mr. Burton's] petition arises under Rule 32.1(a), [Mr.] Burton had to bring this claim 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)."[221]

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[220] Alabama Rule 32.2(b)(2) allows a court to hear a successive petition if "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." These factors are both met. On January 12, 2016 the United States Supreme Court issued its decision in *Hurst*, 136 S. Ct. 616. Because *Hurst* was decided in 2016 these arguments could not have been raised when Mr. Burton's first Rule 32 petition was heard, or any time during his initial round of appeals. Failure to grant this petition will result in a miscarriage of justice. A violation of the right to trial by jury unquestionably undermines the fundamental fairness of the proceeding. Rule 32.2(b)(1) also authorizes this court to hear this petition. Rule 32.2(b)(1) allows this court to hear a successive petition if "the petitioner is entitled to relief on the ground that the court was without jurisdiction to render a judgment or to impose sentence." "Whether a sentence is excessive . . . is a jurisdictional issue, which is 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).

[221] ROA, 181 (Doc. 15 at 6).

The circuit court further adopted the position that Mr. "Burton's Rule 32 petition ignores the statute of limitations time bar." This is patently incorrect. As Mr. Burton noted in the Petition,[222] the statute of limitations does not apply to claims that challenge the jurisdiction of the court.[223]

6. This claim could not have been raised at trial or on direct appeal.

The circuit court further erred in adopting the State's proposed order and finding that Mr. Burton's *Hurst*-based claim could have been raised at trial or on direct appeal.[224] To support this conclusion, the circuit court adopted the State's contention that *Hurst* represents nothing more than an application of *Ring* and *Apprendi*.[225] However, as noted in his Petition, Mr. Burton's direct appeal became final on May 15, 1995 when the United States Supreme Court denied certiorari.[226] As such, Mr. Burton could not have relied upon *Ring*, which

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[222] ROA, 59 & n. 188 (Doc. 1 at 55).
[223] *Jones*, 724 So. 2d at 76 ("Whether a sentence is excessive . . . is a jurisdictional issue, which is not precluded by the limitations period or by the rule against successive petitions.").
[224] ROA, 180-81 (Doc. 15 at 5-6).
[225] *Id.*
[226] ROA, 18 (Doc. 1 at 14) (citing *Burton v. Alabama,* 514 U.S. 1115 (1995)).

was not issued until 2002,[227] at trial or on direct appeal. Mr. Burton could not have relied on *Apprendi* either, as it was not issued until 2000,[228] long after Mr. Burton's trial and the conclusion of his direct appeal. Additionally, Rule 32.2(a) expressly permits bringing a claim on the ground that the trial court lacked jurisdiction even if it "could have been but was not raised at trial . . . [or] on appeal[.]"[229]

Conclusion

This Court should order that Mr. Burton be resentenced to life in prison without the possibility of parole. Alternatively, this Court should vacate the sentence of death, formulate an interpretation of the statute that renders it constitutional, and order that Mr. Burton receive a new penalty phase hearing before a jury that is empowered to issue a binding verdict as to the sentence to be imposed.

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[227] *See Ring*, 536 U.S. 584 (issued in 2002).
[228] *See Apprendi*, 530 U.S. 466 (issued in 2000).
[229] Ala. R. Crim. P. 32.2(a) ("A petitioner will not be given relief under this rule upon any ground . . . (3) Which could have been but was not raised at trial, *unless the ground for relief arises under Rule 32.1(b)* . . . [or] (5) Which could have been but was not raised on appeal, *unless the ground for relief arises under Rule 32.1(b)*") (emphases added).

Both the Florida Supreme Court and the Delaware Supreme Court have held that, in light of *Hurst*, the finding that the aggravators outweigh the mitigators must be found by a jury.[230] Either they are wrong or the Alabama Supreme Court is wrong. Respectfully, for the reasons set forth herein, the ASC's reasoning is incorrect, and cannot stand. The ASC has repeatedly upheld Alabama's judge-based capital sentencing scheme. However, in light of *Hurst*, the Alabama courts must, in good conscience, admit their prior error, and allow Mr. Burton to be resentenced by a jury properly informed that its decision, and its decision alone, will determine whether Mr. Burton should be sentenced to death. For, as Justice Gorsuch recently articulated in the context of sentencing error: "[W]ho wouldn't hold a rightly diminished view of our courts

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[230] *Hurst v. State*, No. SC12-1947, 2016 WL 6036978, at *2 (Fla. Oct. 14, 2016) ("[W]e hold that the Supreme Court's decision in *Hurst v. Florida* requires that all the critical findings necessary before the trial court may consider imposing a sentence of death must be found unanimously by the jury. . . . In capital cases in Florida, these specific findings required to be made by the jury include . . . the finding that the aggravating factors outweigh the mitigating circumstances."); *Rauf v. State*, No. 39, 2016, 2016 WL 4224252, at *2 (Del. Aug. 2, 2016) ("Does the Sixth Amendment to the United States Constitution require a jury, not a sentencing judge, to find that the aggravating circumstances found to exist outweigh the mitigating circumstances found to exist . . . ? Yes.").

if we allowed individuals to [face harsher penalties] than the law requires only because we were unwilling to correct our own obvious mistakes?"[231]

Respectfully submitted this 14th day of July, 2017.

s/ Dustin J. Fowler

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[231] *Hicks v. United States*, — S. Ct. —, No. 16–7806, 2017 WL 2722869, at *1 (U.S. June 26, 2017) (Gorsuch, J. concurring).

CERTIFICATE OF SERVICE

I certify that on July 14, 2017, I electronically filed the foregoing motion via the ACIS System, and will also mail the original and 4 hard copies (total of 5 hard copies) to the clerk as required by Rule 31(b)(2). I have also sent, via first class U.S. mail, a copy to counsel for the Respondent:

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Attachment A

Affidavit of Juror James Cottongim

Affidavit of James Cottingim

Before me, the undersigned authority, a Notary Public in and for said County and State, personally appeared before me, James Cottingim, who is known to me or who was duly identified by me, and being first duly sworn, on oath, deposes and says as follows:

I, James Cottingim, of Talladega County, Alabama, do hereby state the following of my own knowledge and under penalty of perjury:

I was a juror in the death penalty case of Charles Burton. I have been informed by an investigator and a social work intern representing Mr. Burton that Mr. Burton's co-defendant, Mr. Daniel DeBruce, is no longer on Death Row, but has had his sentence reduced to life in prison without the possibility of parole. Because of that, I think it is only fair that Mr. Burton's sentence be reduced to life without the possibility of parole. So I am asking the Governor to consider commuting Mr. Burton's sentence.

I hereby declare, under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

signature: James Cothran date: 3/24/16

Before me, the undersigned authority, a Notary Public, in and for the State of Alabama at Large, did personally appear James Cothran, who being known to me, or who was properly identified to me, and being first duly sworn, deposed and said that he has read the foregoing affidavit, understand its contents and has signed the same voluntarily.

Sworn to and subscribed before me this 24th day of March 2016

Notary Public: Janice Romano

My commission expires: 3/2/2020

Attachment B

Affidavit of Juror Ola Marie Williams

Affidavit of OLA MARIE WILLIAMS

Before me, the undersigned authority, a Notary Public in and for said County and State, personally appeared before me, OLA MARIE WILLIAMS, who is known to me or who was duly identified by me, and being first duly sworn, on oath, deposes and says as follows:

I, Ola Marie Williams, of Talladega County, Alabama, do hereby state the following of ~~any~~ own knowledge and under penalty of perjury:

I was a juror in the death penalty case of Charles Burton. This was the case involving the death of a man who was shot during a robbery of an AutoZone store in Talladega.

I have been informed by an attorney and investigator representing Mr. Burton that Mr. Burton's co-defendant, Mr. Derrick DeBruce, is no longer on Death Row, but has had his sentence reduced to life in prison without the possibility of parole. I understand that Mr. Burton's attorney is going to be asking the Governor to commute Mr. Burton's sentence from a death sentence to a sentence of life without the possibility of parole. I think this is reasonable. Because Mr. DeBruce was convicted as the actual shooter, it makes sense that if he is not going to be put to death, that

reducing Mr. Burton's sentence to life without parole seems appropriate, and I would have no objection to the Governor commuting his sentence, as that seems the only fair thing to do.

I hereby declare, under penalty of perjury that the foregoing is true and correct to the best of my knowledge and beliefs

signature: Ola Williams date: 3-16-16

Before Me, the undersigned authority, a Notary Public, in and for the State of Alabama at Large, did personally appear Ola Marie Williams, who being known to me, or who was properly identified to me, and being first duly sworn, deposed and said that she has read the foregoing Affidavit, understands its contents and has signed the same voluntarily.

SWORN TO AND SUBSCRIBED BEFORE ME this 16th day of March 2016.

Notary Public [signature]

My Commission Expires 3/2/2020

Attachment C

Affidavit of Juror William Gooch

Affidevit of William Gooch

Before me, the undersigned authority a Notary Public in and for said County and State, personally appeared before me, William Gooch, who is known to me or who was duly identified by me, and being first duly sworn, on oath, deposes and says as follows.

I, William Gooch, of Talledega County, Alabama, do hereby state the following of my own knowledge and under penalty of perjury:

I was a juror in the death penalty case of Charles Burton. I have been informed by an attorney and investigator representing Mr. Burton that Mr. Burton's co-defendant, Mr. Derrick DeBruce, is no longer on Death Row, but has had his sentence reduced to life in prison without the possibility of parole. I understand that Mr. Burton's attorney is going to be asking the Governor to commute Mr. Burton's sentence from a death sentence to a sentence of life without the possibility of parole. I also understand that a similar situation happened in Texas, where a shooter was going to not get the death penalty, while the non-shooter was still going to be executed, and Governor Perry commuted the non-shooters sentence to life without parole. I think this is reasonable, and I would not oppose the Governor doing the

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same thing in Mr. Burton's case.

I hereby declare, under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

signature: William K. Gooch date: 3/17/16

Before me, the undersigned authority, a Notary Public, in and for the State of Alabama at Large, did personally appear William Gooch, who being known to me, or who was properly identified to me, and being first duly sworn, deposed and said that he has read the foregoing affidavit, understands its contents and has signed the same voluntarily.

SWORN TO AND SUBSCRIBED BEFORE ME THIS 17TH day of March 2016.

Notary Public: Jan E Rowe

My commission expires: 3/2/2020

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Attachment D

Letter from Mr. Burton to Mr. Battle's family apologizing for his role in the robbery

To the Battle family,

To begin with my name is Charles Lee Burton, Jr. I'm one of the men convicted in the case of your father, husband, brother, and Uncle.

For the last 25 years my involvement had weighted on me for years, and I wanted to reach out to the family and apologized for my participation in the robbery which was a terrible decision on my part. Something I have to live with for the rest of my life. I never expected it (robbery) would end in Doug Battle losing his life in Murder. And was terribly horrified when I learn that it did.

It been a very long time but I have come to the point I know I must apologize now. These years have prepared me the stamina to admit my role in the robbery. It have also allowed me to see the pain it have caused your family to lose a love one to violent - especially one not of their making.

I Sincerely apologize for taking so long to say this. I have struggle with this for years.

I Sincerly apologize for participating in the robbery that led to Mr. Battle

murder. I wish there was more that I could do, but I do hope you can maybe find some comfort in this apology.

I want to thank you for taking time out to read this apology letter.

Respectful yours,
Charles Lee Burton, Jr.