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 II

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CHARLES LEE BURTON, Appellant, v. STATE OF ALABAMA, Respondent-Appellee.	Appeal from Talladega County Circuit Court No. CC 1991-341.61 On Writ of Certiorari to the Court of Criminal Appeals No. CR-16-0812

PETITION FOR WRIT OF CERTIORARI
TO THE ALABAMA COURT OF CRIMINAL APPEALS

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PETITION FOR WRIT OF CERTIORARI
TO THE ALABAMA COURT OF CRIMINAL APPEALS

Mr. Charles Lee Burton, by and through undersigned counsel, respectfully petitions this Court under Rule 39 of the Alabama Rules of Appellate Procedure for a writ of certiorari to review the judgment of the Alabama Court of Criminal Appeals (CCA) in the above-styled case. On February 2, 2018, the CCA denied Mr. Burton's appeal of the Talladega County Circuit Court's denial of his Rule 32 petition.[1] A copy of the CCA's opinion is attached to this petition as Exhibit F. Mr. Burton timely filed an application for rehearing with the CCA, which was denied on March 9, 2018. A

[1] *Burton v. Alabama*, No. CR-16-0812, slip op. (Ala. Crim. App. Feb. 2, 2018) (attached as Ex. F).

copy of the CCA's order denying the application for rehearing is attached as Exhibit G.

Statement of facts[2]

Pursuant to Ala. R. App. P 39(d)(5)(A)(ii), Mr. Burton verifies that the following statement of facts is identical to that presented to the CCA in his application for rehearing:

On August 16, 1991, six men, Derrick DeBruce, LuJuan McCants, Deon Long, Willie Brantley, Andre Jones and the appellant, Charles Burton, went to an AutoZone store in Talladega, Alabama, with the intent to rob the store.[3] 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.[4] DeBruce and Mr. Burton were prosecuted

[2] References to the clerk's record from the original trial are denoted by (C. ___). Reference to the clerk's record of Mr. Burton's original Rule 32 proceedings are denoted by (R. 32 C. __). References to the Reporter's Transcripts of the original trial record, CC-1991-341, are denoted by (Vol. __, R. __). References to the Reporter's Transcripts of the original Rule 32 proceedings are denoted by R. 32, Vol. __, R. __). References to the record on appeal in this proceeding are denoted by (ROA, ___).

[3] (Vol. 4, R. 341-43, 351).

[4] (Vol. 4, R. 359-60).

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.[5] 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.[6]

Mr. Burton then took an employee to the back of the store where the safe was, and announced that he was not going to hurt anybody.[7] Meanwhile, his co-defendants had also pulled their guns and were ordering people to get down.[8] Derrick DeBruce began cracking jokes and kicking people.[9]

As the co-defendants 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.[10] McCants again instructed Mr. Battle to get on the floor, but

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[5] (Vol. 4, R. 354).

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

[7] (Vol. 4, R. 355-56).

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

[9] (Vol. 4, R. 355-36).

[10] (Vol. 4, R. 355).

Mr. Battle stood motionless.[11] Derrick DeBruce then came toward Mr. Battle, instructed him to get on the floor and, when he again did not comply, hit him on the back of his head with a pistol.[12] Mr. Battle then lay face down on the floor and called DeBruce a "punk."[13] The two then started cursing at each other.[14]

At this point, Mr. Burton and Deon Long left through the front door.[15] McCants and Brantley followed after them.[16] At Mr. Burton's trial, McCants testified that, after all the co-defendants but DeBruce had left the store, McCants heard a gunshot and saw DeBruce run from the store.[17]

As the men drove away from the scene, Mr. Burton asked DeBruce why he shot a man. DeBruce claimed he shot Mr. Battle because he had a gun, and DeBruce was trying to protect McCants.[18] McCants testified that Mr. Burton then shook his

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[11] (Vol. 4, R. 357-58).

[12] (Vol. 4, R. 358-59).

[13] (Vol. 4, R. 359).

[14] (*Id.*).

[15] (*Id.*).

[16] (Vol. 4, R. 360).

[17] (*Id.*).

[18] (*Id.*).

head and said, “let’s get out of here,” while everyone else looked at DeBruce.[19] The men then went back to a house and split up the money from the robbery.[20]

During both the opening and closing arguments in his trial, the State conceded that Mr. Burton was not the triggerman who killed the victim, Doug Battle.[21] In fact, not only did Mr. Burton not kill Mr. Battle, but he did not even witness the shooting, since he had already left the store when the shooting occurred.[22] Still, Mr. Burton was convicted of capital murder.[23]

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.[24] As accomplices to a robbery where deadly weapons were employed, any of the men could be held responsible for the death.[25]

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[19] (Vol. 4, R. 361).

[20] (Vol. 4, R. 365).

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

[22] (Vol. 4, R. 359-60).

[23] (C. 62; Vol. 7, R. 914).

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

[25] *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."[26]

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.[27]

Second, through the testimony of co-defendant LuJuan McCants, the State contended that Mr. Burton allegedly foresaw the possibility that someone might need to be hurt, and intended to be the one to do it. However, this testimony was suspect, and the prosecutor did his best to inappropriately bolster it.[28]

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[26] *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).

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

[28] LuJuan McCants, a sixteen year-old accomplice in the robbery, was given a deal to testify against Mr. Burton. (Vol. 4, R. 341, 370). In Mr. Burton's trial, the prosecutor asked him, "Now, what would happen if somebody caused any trouble?"

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.[29] 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.[30]

This 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

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McCants answered, "[Mr. Burton] said let him *take care of it*." *Id.* (emphasis added). On redirect examination, the prosecutor went beyond the scope of redirect, assumed facts not in evidence, and injected his own testimony into the case via the leading question: "[Y]ou said that back up at the car wash that [Mr. Burton] said y'all will hit Auto Zone. If anyone had to *get hurt*, let him do it." *Id.* at 382 (emphasis added). Despite an immediate objection, which the trial judge overruled, the cooperating teenage witness then testified, almost word-for-word as fed to him. However, in a videotaped statement to police, when McCants was asked if Mr. Burton had instructed him or anyone else to shoot anyone if they were uncooperative, McCants answered "No, sir." (Vol. 1, R. 32, R. 56).

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

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

of the shooter, so long as Mr. Burton merely intentionally participated in the underlying *robbery*.[31]

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

[31] 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, R. 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 a plan to commit the robbery. Thus, a reasonable juror would have considered "the crime" to be referencing "the robbery," given the way the instruction was read.

participant. At the conclusion of the guilt phase of trial, Mr. Burton was found guilty of capital murder.[32]

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,"[33] and that Mr. Burton was relinquished to the custody of his abusive father at a young age.[34] 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.[35] 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.[36] 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.[37] Mr. Burton himself testified, and

[32] (Vol. 7, R. 914).
[33] (Vol. 7, R. 1024-25).
[34] (Vol. 7, R. 1025).
[35] (Vol. 7, R. 1028).
[36] (Vol. 7, R. 1031).
[37] (Vol. 8, R. 1032-33).

the State did not rebut his testimony on this point, that he obtained a GED while in prison.[38]

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.[39] 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.[40] The two witnesses were two of Mr. Burton's co-defendants, Andre Jones and Willie Brantley.[41] Both men took the stand and testified that they did not know Mr. Burton.[42] 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

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[38] (Vol. 7, R. 1006).

[39] (Vol. 7, R. 920; Vol. 7, R. 991-992).

[40] (*Id.*).

[41] (*Id.*).

[42] (Vol. 7, R. 996-997, 1001-1003).

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.[43] Additionally, the State recalled two eyewitnesses from the AutoZone robbery, both of whom provided in-court identifications of Jones and Brantley.[44]

The State's rebuttal of Mr. Burton's mitigation thus went to Mr. Burton's identity as one of the robbers at the Auto Zone, to his influence on the co-defendants, and to his criminal history.[45] 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.[46]

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."[47] Although Mr. Burton was not the triggerman, and even though the evidence

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[43] (Vol. 8, R. 1067-71).

[44] (Vol. 8, R. 1042-1047).

[45] (Vol. 7, R. 930-80; Vol. 7, R. 995-99, R. 1001-3, and R. 1008-16; Vol. 8, R. 1042-80).

[46] (Vol. 8, R. 1184-86).

[47] (Vol. 8, R. 1130-36).

that Mr. Burton had any intent that anyone be killed was weak, the jury recommended death.[48] The jury did not state whether it specifically found one or both offered aggravators.[49]

The judge then independently found and weighed the aggravating and mitigating circumstances, determined that there were no mitigating circumstances, statutory or non-statutory,[50] and sentenced Mr. Burton to death.[51] In so doing, the judge considered additional aggravating and mitigating circumstances not presented to the jury, but provided to the court via a presentence report, including a juvenile offense of which the jury had not been informed.[52]

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.[53] The State of Alabama chose not to pursue an appeal, so the district court unconditionally granted the petition and ordered that DeBruce be resentenced to life

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[48] (C. 63).

[49] (*Id.*).

[50] (C. 105).

[51] (C. 106).

[52] (C. 64-71, 103).

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

without the possibility of parole.[54] 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.

II. Grounds for issuance of the writ.

The following issues were raised on appeal to the CCA:

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 did not even 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 findings of fact weighing the aggravating factors against the mitigating factors, and the jury was relieved of the ultimate weight of the decision by being informed that its vote regarding life or death was a mere "recommendation"?[55]

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[54] *DeBruce v. Dunn*, No. 1:04-cv-02669 (N.D. Ala. Sept. 22, 2015), Doc. 55. (Public records available via Alacourt do not show that DeBruce yet has been officially resentenced. However, an inmate search via the Alabama Department of Corrections website no longer lists him as being housed on death row).

[55] *See* Initial Br. of Appellant to CCA at 4.

As to the first issue, this Court should issue a writ pursuant to Rules 39(a)(1)(C) and (D) of the Alabama Rules of Criminal Procedure. Because this issue regards evolving standards of decency, which have continued to evolve even during the course of this appeal, it represents a case of first impression for this Court. Additionally, the CCA's opinion conflicts with prior decisions of the United States Supreme Court interpreting the Eighth Amendment to the United States Constitution. Because no portion of the CCA's opinion demonstrates the conflict succinctly, Mr. Burton will, pursuant to Ala. R. Crim. P. 39(a)(1)(D)(2), state below, with particularity, how the CCA's order conflicts with Supreme Court precedent.

As to the second issue, this Court should issue a writ pursuant to both Rules 39(a)(1)(D) and (E) of the Alabama Rules of Criminal Procedure. In denying Mr. Burton's challenge to the constitutionality of Alabama's judge-based sentencing scheme, the CCA relied, in part, on this Court's controlling decision in *Ex parte Bohannon*.[56] Thus, this petition seeks to have this Court reconsider and overrule its

[56] *Ex parte Bohannon*, 222 So. 3d 525 (Ala. 2016).

decision in that case. Additionally, the CCA's opinion conflicts with United States Supreme Court precedent. Again, because no portion of the CCA's opinion demonstrates the conflict succinctly, Mr. Burton will, pursuant to Ala. R. Crim. P. 39(a)(1)(D)(2), state below, with particularity, how the CCA's order conflicts with Supreme Court precedent.

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, Eighth, and Fourteenth Amendments to the United States Constitution.

Since the time of Mr. Burton's original conviction, standards of decency regarding capital murder have evolved significantly. Under those standards, a less-culpable co-defendant cannot constitutionally be executed, when his more-culpable co-defendant is not subject to a death sentence. In Mr. Burton's case, he did not kill the victim, he did not tell his co-defendant Derrick DeBruce to kill the victim, and he even did not witness the shooting, having left the store prior to the murder taking place. Yet, Mr. Burton remains on death row, while the triggerman, DeBruce, has been relieved

of the death penalty and re-sentenced to life without the possibility of parole.

In denying Mr. Burton relief on this claim, the CCA failed to recognize the evolving nature of this claim, and its denial of relief contradicts United States Supreme Court precedent. The United States Supreme Court granted relief in *Atkins v. Virginia*[57] and *Roper v. Simmons*,[58] finding that evolving standards of decency forbade execution of those with mental retardation[59] and juveniles,[60] despite the fact that no prior precedents dictated the results of those cases. Courts may look to the full societal evolution of standards of decency in determining what falls outside such bounds.[61]

As Judge Alcala of the Texas Court of Criminal Appeals has articulated, this type of claim represents "the same type of categorical ban on the death penalty for certain individuals much in the same way as *Atkins* [*v. Virginia*] has for intellectually disabled offenders."[62] "Applying the same reasoning that applies in the *Atkins* context, applicant may

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[57] 536 U.S. 304 (2002).
[58] 543 U.S. 551 (2005).
[59] *Atkins*, 536 U.S. at 321.
[60] *Roper*, 543 U.S. at 568-69.
[61] *See Atkins*, 536 U.S. at 318-21.
[62] *See Ex parte Wood*, 498 S.W. 3d 926, 928-29 (Tex. Crim. App. 2016) (Alcala, J., concurring).

be *actually innocent* of the death penalty because he may be categorically ineligible for that punishment under the particular facts of this case."[63]

Standards of decency have evolved in non-shooter situations to such an extent that putting Mr. Burton to death, while his vastly more culpable co-defendant is no longer subject to a death sentence is unconscionable.

The United States Supreme Court has recognized that the Eighth Amendment only allows the most culpable offenders to be sentenced to death.[64] "[D]efendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers."[65]

Throughout the country, states are recognizing that evolving standards of decency forbid the execution of a non-shooter. 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

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[63] *Id.*
[64] *See Kennedy v. Louisiana*, 554 U.S. 407, 436-437 (2008).
[65] *Graham v. Florida*, 560 U.S. 48, 69 (2010).

Brown, *had* been executed.[66] 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.

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.[67] And, in that case, Teleguz was still vastly more culpable in the crime than was Mr. Burton, in that Teleguz *hired* the more culpable defendant

[66] *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

[67] 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 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.").

to kill the victim,[68] 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.

The evolution of standards in such situations is so rapid and pronounced that, even after the conclusion of briefing on this appeal, yet another governor, Arkansas Governor Asa Hutchinson, announced he would commute a death sentence in the case of Jason McGehee, where "equally culpable co-defendants are serving sentences less than death."[69] In so doing, the Governor stated that "the disparity in sentence given to Mr. McGehee compared to the sentences of his codefendants was a factor in my decision . . . ."[70] Once again, Mr. Burton's case is more compelling. His co-defendant is not "equally culpable," but vastly more so.

And, even between the CCA's denial of Mr. Burton's petition and the filing of this petition to this Court,

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[68] *See id.*

[69] *See* Jacob Kauffman, Arkansas Governor Grants Clemency To Death Row Inmate, Sets Execution For Another, National Public Radio, University of Arkansas – Little Rock, August 25, 2017. http://ualrpublicradio.org/post/arkansas-governor-grants-clemency-death-row-inmate-sets-execution-another.

[70] *Id.*

another sentence was commuted in Texas in similar circumstances. On February 22, 2018, Texas Governor Gregory Abbott commuted the death sentence of Thomas Whitaker to life without the possibility of parole.[71]

In the Whitaker case, Governor Abbott noted that a significant reason he granted the commutation was the fact that "Brashear [the co-defendant], who shot and killed the deceased, was sentenced to life, but [Whitaker], who conspired to kill his parents and brother, but did not actually shoot the gun that caused the murders, was sentenced to death."

As with the other commutations discussed above, Mr. Burton's situation is far more inequitable than Whitaker's in that Whitaker willfully conspired to kill his father, mother and brother, even arranging to have the codefendant shoot him (Whitaker) in order to cover up his participation,[72] whereas Mr. Burton did not direct DeBruce to commit the murder, did not participate in it, and even did not witness it.

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[71] *See*: "Proclamation by the Governor of the State of Texas," Feb. 22, 2018 (Attached as Ex. E for the Court's convenience).
[72] *See* Meagan Flynn, Texas governor spares inmate from execution after a father's pleas, Washington Post, February 23, 2018. https://www.washingtonpost.com/news/morning-mix/wp/2018/02/23/a-fathers-pleas-leads-texas-governor-to-spare-inmate-from-execution/?utm_term=.23083cdba114

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[]."[73]

Most compellingly, at least three of the jurors who voted for death in Mr. Burton's case, now knowing that the shooter is off of death row, have stated that they are either hopeful that Mr. Burton's sentence will be commuted, or believe it would 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.[74] Such juror concerns about the propriety of carrying out the sentences they, themselves, voted for

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[73] 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.").

[74] 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, as Exhibits A, B, C and D).

have given pause to government officials. Indeed, only last month, Ohio Governor John Kasich granted a temporary reprieve to a condemned inmate, based in large part on a letter from one of the inmate's original jurors, informing the governor that his decision would be different today, in light of new information.[75]

The State itself even has taken the position that Mr. Burton remaining on death row, when the triggerman, DeBruce, has had his death sentence overturned and is now off of death row "creates an unusual and arguably unjust situation."[76]

An Alabama prosecutor and circuit court judge have also recognized the unconscionable nature of putting someone to death under such circumstances. In *State v. Gamble*[77] the CCA

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

[76] 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)).

[77] 63 So. 3d 707 (Ala. Crim. App. 2010).

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 had 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.[78]

As in the other situations detailed herein, Mr. Burton's situation is far more compelling. In *Gamble*, the evidence at trial demonstrated that although Gamble was present at the crime scene and participated enough to invoke criminal liability for capital murder, he nonetheless was less culpable than his co-defendant, Presley, who actually killed two victims.[79] Presley had been the one to fire the shots that killed the victims, while Gamble only watched and

[78] *Gamble*, 63 So. 3d at 724 (quoting circuit court opinion).
[79] *Id.* at 709-10.

otherwise participated in the underlying robbery.[80] Gamble was outside of the pawnshop where the robbery transpired when Presley fired his first shot.[81] After Presley's gun jammed, Gamble walked back in, looked at the scene, and went back to the front door. Presley fired another shot, which again jammed, and Gamble re-entered the store, and picked up unspent bullets which had fallen from Presley's gun.[82] Presley then fired a final shot at the victims, and Gamble leaned over the counter and looked at them.[83]

Unlike Gamble, Mr. Burton was *not* present when the shooting occurred and did not witness it.[84] 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.[85]

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.

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[80] *Id.* at 710.
[81] *Id.*
[82] *Id.*
[83] *Id.*
[84] (Vol. 4, TR. 359-60).
[85] *Id.*

As the circuit court in *Gamble* articulated:

> It is the responsibility and duty of each court that sits in judgment of the constitutional validity of [a] death sentence to ensure that the imposition of the death penalty comports with the requirements of fundamental fairness while avoiding arbitrariness. Proportionality in sentencing between co-defendants is a major, independent element under the Eighth Amendment in assessing a death sentence. (citing *Enmund v. Florida*, 458 U.S. 782, 788 (1982)).[86]

Although the CCA reversed in *Gamble*, it simultaneously affirmed the circuit court's decision granting Gamble a new sentencing due to ineffective assistance of counsel at the penalty phase.[87] Neither party appealed to this Court. Thus, *this Court* has never had the opportunity to resolve this issue. And, Mr. Burton's case is far more compelling, particularly in light of the continually evolving standards of decency regarding such situations detailed herein. Under evolving standards of decency, Mr. Burton's death sentence is unconstitutional as applied to the unique facts of Mr. Burton's situation.

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[86] *Gamble*, 63 So. 3d at 723 (quoting the circuit court opinion granting Gamble relief on this issue).
[87] *Id.* at 721-22, 729.

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."[88] 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. Thus, Mr. Burton's death sentence is unconstitutional as applied to the rare facts of Mr. Burton's situation. The CCA's opinion failed to recognize the evolving nature of such circumstances, and the unconscionable nature of putting someone in Mr. Burton's situation to death. This Court should grant certiorari in order to vindicate not only the Eighth Amendment to the United States Constitution, but also Article I, Sections VI and XV of the Alabama Constitution.

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[88] *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.*

A. The CCA erred in holding that this claim does not represent a jurisdictional issue and is thus precluded by the limitations period and the rule against successive petitions.

The CCA erroneously held 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."[89] Thus, this Court also erred in finding that the claim did not meet the jurisdictional exception of Rule 32.2(b), which allows successive petition in cases involving jurisdiction.[90] In reaching this conclusion, this Court relied on the unpublished opinion of *Samra v. State*,[91] where the CCA upheld a circuit court's determination that a similar successive claim was not jurisdictional, and also denied the claim on the merits.[92] When subsequently raised in federal habeas proceedings, the Northern District of Alabama denied relief to Samra as well.[93]

However, the federal court was constrained by the Anti-terrorism and Effective Death Penalty Act's (AEDPA)

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[89] *Burton*, slip op. at 17.

[90] *Id.* at 18.

[91] 152 So. 3d 456 (Ala. Crim. App. 2012) (unpublished).

[92] *Burton*, slip op. at 14.

[93] *Samra v. Price*, No. 2:07-CV-1962, 2014 WL 4452676 at *43-44 (N.D. Ala. Sept. 5, 2014).

requirement that the state court's merits decision be contrary to clearly established United States Supreme Court precedent.[94] Thus, because the United States Supreme Court has previously declined to find an Eighth Amendment violation "by demonstrating that other defendants who may be similarly situated did not receive the death penalty," Samra could not overcome the hurdle of AEDPA. Additionally, the CCA relied on decisions, such as *United States v. Chauncey*,[95] in which the Eighth Circuit held that "a defendant's sentence is not disproportionate merely because it exceeds his co-defendant's sentence."[96]

These cases, however, do not mean that the CCA, and most certainly *this* Court, cannot grant Mr. Burton relief. This is true for three reasons. First, AEDPA, by its very nature, is backward looking. Because federal courts cannot grant relief unless the state court decision under review contradicts clearly established United States Supreme Court precedent, recognition of evolving standards of decency cannot occur

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[94] *Id.* at *12-13 (citing 18 U.S.C. § 2254(d)(1)).

[95] 420 F.3d 864, 876 (8th Cir. 2005).

[96] *Burton*, slip op. at 17 (citing *Chauncey*, 420 F.3d at 876) (additional citations omitted).

until the United States Supreme Court has the opportunity to address the matter unhampered by the constraints of AEDPA.

The CCA and this Court, however, are not bound by AEDPA. This Court does not have to show that a contrary finding directly contradicts clearly established United States Supreme Court precedent. Rather, this Court may grant Mr. Burton relief, thus vindicating evolving standards of decency and effectuating the Eighth Amendment to the United States Constitution.

Second, the Alabama courts not only have the primary responsibility to vindicate and protect the Eighth Amendment to the United States Constitution, but also have primary, indeed sole, responsibility to effectuate Article I, Sections VI and XV of the Alabama Constitution, which also protects against cruel or unusual punishment.

Third, Mr. Burton has not claimed that his sentence is unconstitutional, as the CCA claimed, "[m]erely because it exceeds his codefendant's sentence."[97] Mr. Burton did not claim that all co-defendants in capital cases must be sentenced proportionally. Thus, Mr. Burton did not raise a

[97] *See Chauncey*, 420 F.3d at 876 (emphasis added).

general "disproportionality" claim. Rather, it is an Eighth Amendment claim that, pursuant to evolving standards of decency, it is unconscionable, cruel and unusual to subject a specific class of persons -- individuals who did not kill anyone, where the actual killer is not subject to the death penalty -- to a capital sentence.

As discussed previously, this claim represents "the same type of categorical ban on the death penalty for certain individuals much in the same way as *Atkins* [*v. Virginia*] has for intellectually disabled offenders."[98] "Applying the same reasoning that applies in the *Atkins* context, [a successive petition] 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."[99]

"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

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[98] *See Ex parte Wood*, 498 S.W. 3d 926, 928-29 (Tex. Crim. App. 2016) (Alcala, J., concurring) (citing *Atkins v. Virginia*, 536 U.S. 304 (2002)).

[99] *Id.*

32 petition."[100] Thus, although the sentencing 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, retroactively undermines the court's jurisdiction to have imposed such a sentence.

Thus, this case falls squarely within the Rule 32.2(b)(1) jurisdictional exception and the CCA erred in holding that it does not.

B. The CCA failed to address the second exception to claims barred in successor Rule 32 petitions, that 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 denying Mr. Burton relief on this claim the CCA held that the claim was not jurisdictional in nature and, thus, that Mr. Burton "failed to satisfy the requirements of Rule 32.2(b)." However, even if this Court agrees that the claim is not jurisdictional, the CCA's conclusory holding failed to address Mr. Burton's argument that this claim also meets the requirements of Rule 32.2(b)(2).

[100] *Jones v. State*, 724 So. 2d 75, 76 (Ala. Crim. App. 1998) (emphasis added).

Rule 32.2(b) provides two exceptions to the ban on successive petitions:

> (1) The petitioner is entitled to relief on the ground that the court was without jurisdiction to render a judgment or to impose sentence or (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.

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 ascertained through reasonable diligence when the first petition was heard, because the more culpable co-defendant had not been resentenced to life without parole at that time.[101]

[101] The circuit court also 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).

As detailed in Mr. Burton's Petition,[102] even if Mr. Burton's case is viewed as initially comporting with *Tison v. Arizona*,[103] which Mr. Burton does not concede, under *evolving* standards of decency, putting Mr. Burton to death while the shooter is no longer subject to a death sentence is arbitrary and unreasonable. Such persons are categorically ineligible for the death penalty under *evolving* standards of decency.[104]

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."[105] Additionally, failure to entertain this claim "will result in a miscarriage of justice."[106]

The State itself has recognized that Mr. Burton remaining on death row, when the triggerman, DeBruce, has had his death

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

[103] 481 U.S. 137, 154 (1987).

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

[105] Ala. R. Crim. P. 32.2(b)(2).

[106] *Id.*

sentence overturned and is now off of death row "*creates* an unusual and arguably unjust situation."[107]

Therefore, this claim satisfies the Rule 32.2(b)(2) exception. 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."[108] Additionally, failure to entertain this claim "will result in a miscarriage of justice."[109] The CCA failed to address this alternative exception. This Court should grant certiorari, and order that Mr. Burton be resentenced to life without the possibility of parole.

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[107] State of Ala.'s Pet. for Cert. 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*, 180, 293 N.E.2d 172, 174 (Ill. 1973) ("Fundamental fairness and respect for the law dictate that similarly situated defendants may not receive grossly disparate sentences." (citation omitted)); *State v. Buck*, 361 S.E.2d 470, 474 (W. Va. 1987) ("If codefendants are similarly situated, some courts will reverse on disparity of sentence alone." (citation omitted)).

[108] Ala. R. Crim. P. 32.2(b)(2).

[109] *Id.*

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.

A. The CCA relied upon precedent incorrectly applying the United States Supreme Court's commands in *Hurst*.

In denying Mr. Burton relief on his Sixth Amendment right to a jury sentencing claim pursuant to *Hurst*, *Ring*, and *Apprendi*, the CCA relied upon this Court's decision in *Ex parte Bohannon*,[110] and held that, because one of the aggravating circumstances presented in the penalty phase (that the murder occurred during the course of a robbery) was necessarily found by the jury in the guilt phase of Mr. Burton's trial, "the holding in *Hurst* was fully complied with in this case."[111] In doing so, the CCA relied on *Bohannon*'s erroneous conclusion that "*Hurst* does not address the process of weighing the aggravating and mitigating circumstances or suggest that the jury must conduct the weighing process to satisfy the Sixth Amendment."[112]

Mr. Burton recognizes that the CCA is bound by the decisions of this Court. However, this Court has the power

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[110] *Ex parte Bohannon*, 222 So. 3d 525 (Ala. 2016).

[111] *Burton*, slip op. at 27.

[112] *Id.* at 24-25 (quoting *Bohannon*, 222 So. 3d at 532).

to reconsider and correct mistakes it has made in prior cases. With respect, *Bohannon* contradicts the United States Supreme Court's language and reasoning in *Hurst*, *Apprendi*, and *Ring*.

In *Hurst*, rejecting Florida's attempt to salvage its statute by relying on its advisory jury scheme, the United States Supreme Court held the statute unconstitutional because "[t]he trial court *alone* must find 'the facts … [t]hat sufficient aggravating circumstances exist' and '[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances.'"[113]

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?"[114] 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

[113] *Hurst*, 136 S. Ct. at 621-22. (emphasis, brackets, and ellipsis in original) (citations omitted).

[114] 530 U.S. at 494. *See also Hurst*, 136 S. Ct. at 621.

within the definition of an 'element' of the offense."[115]

All such factors must be found by the jury[116] beyond a reasonable doubt[117] and *must be* ***binding*** on the court.[118] A court's parallel decision, based on its own findings and a lesser standard of proof, is insufficient.[119]

The CCA failed to address Mr. Burton's argument[120] that, 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,[121] *a defendant cannot*

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

[116] *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 1181, 1190 (Ala. 2002). But this practice is comparable to allowing the trial judge to find a defendant guilty of additional counts of capital murder by finding additional aggravating factors unsupported by a jury verdict.

[117] *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)).

[118] *Id.* at 622.

[119] *Id.*

[120] Initial Br. of Appellant at 50.

[121] 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,

receive a death sentence unless the further finding is made that whatever mitigating circumstances exist do not outweigh the aggravation.[122] 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 . . . ."[123]

For this reason, even a jury's finding that an aggravating circumstance exists, whether made at the innocence/guilt phase or the penalty phase, cannot by itself 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."[124]

Moreover, Mr. Burton's jury was alleviated of the ultimate burden of knowing its decision was binding, rather

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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).

[122] Ala. Code 1975, § 13A-5-46(e).

[123] Ala. Code 1975, § 13A-5-48.

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

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.'"[125] Indeed, not only was the jury's responsibility improperly lessened, but it also had not been instructed that it must find that the aggravating factors outweigh the mitigating factors beyond a reasonable doubt.[126]

As explained in Mr. Burton's initial brief to the CCA,[127] 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

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[125] *Caldwell v. Mississippi*, 472 U.S. 320, 341 (1985) (emphasis added).

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

[127] Initial Br. of Appellant at 52-53.

exist outweigh the mitigating circumstances it finds to exist . . . .”

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

The *additional* finding that aggravating circumstances outweigh mitigating is equally critical to the finding of aggravation alone in order to “expose the defendant to a greater punishment than that authorized by the jury’s guilty verdict.”[128] 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.’”[129] *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

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

[129] 136 S. Ct. at 622.

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.[130] Compounding the unconstitutionality, there is no 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,[131] with no requirement that they do so beyond a reasonable doubt.[132] This Court has, in fact, rejected the contention that any particular standard applies to the judicial findings on these points.[133]

Thus, a death sentence violates the Sixth, Eighth and

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

[131] *Id.*

[132] *Cf. Powell v. Delaware*, 153 A.3d 69, 70 (Del. 2016).

[133] 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 *Ford v. Strickland*, 676 F.2d 434, 441 (11th Cir. 1982). It is evident that both have been overruled by *Apprendi*.

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.

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,'"[134] 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.

B. The CCA failed to address Mr. Burton's state-law based arguments relating to retroactivity.

Finally, the CCA relied upon *Lee v. State*[135] and *Reeves v.*

[134] 136 S. Ct. at 622.

[135] No. CR-15-1415, 2017 WL 543171 (Ala. Crim. App. Feb. 10, 2017).

State[136] for the proposition that *Hurst* is not retroactively applicable to Mr. Burton.[137] But *Reeves* only held that *Hurst* was not retroactive pursuant to *federal* law.[138] Even assuming that *Hurst* does not apply retroactively under federal law,[139] Alabama law "expressly provides for retroactive relief to those sentenced to death under a statute later found to be unconstitutional."[140] As the United States Supreme Court has made clear, federal law "does not in any way limit the authority of a state court, when reviewing its own state criminal convictions, to provide a remedy for a violation that is deemed "nonretroactive" under [federal law]."[141] Thus,

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[136] 226 So. 3d 711, 719 (Ala. Crim. App. 2016).

[137] Br. of State at 14, 19.

[138] *Reeves*, 226 So. 3d at 756-57.

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

[140] Ala. Code § 13A-5-59; *Ex parte Henderson*, 144 So. 3d 1262, 1281 (Ala. 2013) ("Sections 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); *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).

[141] *Danforth v. Minnesota*, 552 U.S. 264, 282 (2008) (citation omitted).

regardless of the claims raised in *Reeves* and the CCA's decisions on those claims, Mr. Burton's *state-law based* argument has *not* been addressed.

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.[142]

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.

[142] Ala. Code § 13A-5-59 (emphasis added). *See also Ex parte Henderson*, 144 So. 3d at 1281 ("Sections 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.").

The CCA failed to address Mr. Burton's state-law-based retroactivity arguments. Thus, this Court should grant a writ of certiorari, allow full briefing on this issue, and order that Mr. Burton be granted a new sentencing hearing before a jury that is empowered to issue a binding verdict as to the weighing of the aggravating and mitigating factors, and the sentence to be imposed.

Conclusion

For the foregoing reasons, this Court should grant certiorari on the two issues presented herein and, after briefing and oral argument, reverse the CCA's denial of relief and order that Mr. Burton be resentenced to life in prison without the possibility of parole. Alternatively, this Court should grant certiorari, reverse the CCA's order, vacate Mr. Burton's sentence of death, order a reformulation of Alabama's sentencing scheme that renders it constitutional, and order that Mr. Burton receive a new penalty phase hearing before a jury empowered to issue a binding verdict as to the sentence to be imposed.

Respectfully submitted this 22nd day of March, 2018.

s/ Dustin J. Fowler

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CERTIFICATE OF SERVICE

I certify that on March 22, 2018, I electronically filed the foregoing motion via the ACIS System, and will also provide 10 hard copies to the clerk as required by Rule 57(h)(2). I have also sent, via first class U.S. mail, a copy to counsel for the Respondent:

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Counsel for Mr. Burton

Exhibit 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

Exhibit 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

Exhibit 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

WKG

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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Exhibit 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.

Exhibit E

"Proclamation by the Governor of the State of Texas," Feb. 22, 2018 (commuting sentence of Thomas Whitaker).

PROCLAMATION

BY THE

Governor of the State of Texas

TO ALL TO WHOM THESE PRESENTS SHALL COME:

WHEREAS, the Board of Pardons and Paroles has unanimously recommended a commutation to a sentence less than death for THOMAS BARTLETT WHITAKER, TDCJ #999522; and

WHEREAS, the Board's decision is supported by the totality of circumstances in this case so long as THOMAS BARTLETT WHITAKER is never released from prison; and

WHEREAS, THOMAS BARTLETT WHITAKER has, through counsel, forever waived any and all claims to parole in exchange for a commutation of his sentence from death to life without the possibility of parole; and

WHEREAS, THOMAS BARTLETT WHITAKER's agreement to forever waive any and all claims to parole constitutes an essential and indispensable element of my decision; and

WHEREAS, the Governor has authority to commute THOMAS BARTLETT WHITAKER's death sentence to life without the possibility of parole even without the waiver submitted in this case; and

WHEREAS, THOMAS BARTLETT WHITAKER recruited others, including Chris Brashear, to kill THOMAS BARTLETT WHITAKER's mother, father, and brother; and

WHEREAS, Brashear killed THOMAS BARTLETT WHITAKER's mother and brother, and attempted but failed to kill THOMAS BARTLETT WHITAKER's father; and

WHEREAS, Brashear, who shot and killed the deceased, was sentenced to life, but THOMAS BARTLETT WHITAKER, who conspired to kill his parents and brother, but did not actually shoot the gun that caused the murders, was sentenced to death in Cause No. 42969 in the 400th Judicial District Court, Fort Bend County, Texas, on March 8, 2007; and

WHEREAS, THOMAS BARTLETT WHITAKER's father, whom Brashear and THOMAS BARTLETT WHITAKER attempted but failed to kill, passionately opposes the execution of his son;

NOW THEREFORE, I, GREG ABBOTT, Governor of the State of Texas, by virtue of the authority vested in me under the Constitution and laws of this State, and as a consequence of the circumstances stated above, and acting upon the recommendation of the Board of Pardons and Paroles, do hereby grant unto the said:

THOMAS BARTLETT WHITAKER

A COMMUTATION OF SENTENCE TO IMPRISONMENT FOR LIFE WITHOUT THE POSSIBILITY OF PAROLE FOR THE OFFENSE ABOVE SET OUT IN CAUSE NO. 42969, 400TH JUDICIAL DISTRICT COURT, FORT BEND COUNTY, TEXAS.

This commutation shall have no legal force or effect, and shall be void *ab initio*, if THOMAS BARTLETT WHITAKER ever withdraws his waiver of parole or if his sentence as commuted is ever challenged.

I HEREBY direct that a copy of this proclamation be filed in the office of the Secretary of State.

IN TESTIMONY WHEREOF, I have hereunto signed my name and have officially caused the Seal of State to be affixed hereon, this the 22nd day of February, 2018.

GREG ABBOTT
Governor

ATTESTED BY:

ROLANDO B. PABLOS
Secretary of State

FILED IN THE OFFICE OF THE
SECRETARY OF STATE
4:55 PM O'CLOCK

FEB 22 2018

Exhibit F

Burton v. Alabama, No. CR-16-0812, slip op. (Ala. Crim. App. Feb. 2, 2018)

Court of Criminal Appeals

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

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

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

MEMORANDUM

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

Charles Lee Burton v. State of Alabama

WELCH, Judge.

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

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

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

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

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

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

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

---

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

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

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

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

ensued between DeBruce and Battle. DeBruce hit Battle and he fell to the ground. DeBruce then shot Battle in the back while he was lying face-down on the floor. McCants testified that all of the robbers had either left the store or were about to leave when DeBruce shot Battle. He said that [Burton] was among those who had already left the store at the time of the shooting. After all six left the store, they jumped in their car, picked up the other car at the carwash where they had left it, went to Barbara Spencer's house and divided the money.

"....

"Barbara Spencer testified that before the robbery, the six men had been at her house discussing how to commit a robbery. She said that they left her house in separate cars and that the appellant and Derrick DeBruce were riding together. She testified that they returned to her house later and appeared to be upset. They had a large amount of money and the appellant was telling the others how to divide it. Spencer said that they gave her $100 but that she gave the money to McCants."

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.

Exhibit G

Court of Criminal Appeals order denying Mr. Burton's application for rehearing

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA

D. Scott Mitchell
Clerk
Gerri Robinson
Assistant Clerk

P. O. Box 301555
Montgomery, AL 36130-1555
(334) 229-0751
Fax (334) 229-0521

March 9, 2018

CR-16-0812 **Death Penalty**

Charles Lee Burton v. State of Alabama (Appeal from Talladega Circuit Court: CC91-341.61)

NOTICE

You are hereby notified that on March 9, 2018, the following action was taken in the above referenced cause by the Court of Criminal Appeals:

Application for Rehearing Overruled.

D. Scott Mitchell

D. Scott Mitchell, Clerk
Court of Criminal Appeals

cc: Hon. William E. Hollingsworth, III, Circuit Judge
Hon. Brian York, Circuit Clerk
Dustin Judd Fowler, Attorney
Lauren A. Simpson, Asst. Attorney General

PET. APP. G

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

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

WKG

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.