No. 18-5937
CAPITAL CASE

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 Court of Criminal Appeals

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED
(Restated)

1. Whether the Court should overrule *Harris v. Alabama*, 513 U.S. 504 (1995), which held Alabama's recently repealed capital sentencing statute to be constitutional even though it did not require jury sentencing in capital cases, because of the alleged interplay of *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Caldwell v. Mississippi*, 472 U.S. 320 (1985).

2. Whether *Hurst* is retroactively applicable to cases that became final before that decision was announced.

3. Whether the Eighth Amendment prohibits the execution of the leader and organizer of a multi-defendant robbery-murder where the triggerman was resentenced to life without parole.

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INTRODUCTION

In 1991, Charles Lee Burton and five accomplices piled into two cars, drove to Talladega, Alabama, and robbed an Auto Zone automotive store at gunpoint. Burton was the leader of the operation; he organized the robbery, gave the other men directions, and forced the manager to open the safe. During the course of the robbery, accomplice Derrick DeBruce fatally shot a customer. Both DeBruce and Burton were convicted of capital murder and sentenced to death. In fact, Burton's jury unanimously recommended the death penalty, and the trial court concurred with that recommendation. (Pet. App'x B at 1–2.)

More than two decades after the fact, the Eleventh Circuit Court of Appeals held that DeBruce had received ineffective assistance of counsel during the penalty phase of his trial and remanded the matter for a new sentencing proceeding. *DeBruce v. Comm'r, Ala. Dep't of Corrs.*, 758 F.3d 1263 (11th Cir. 2014). The State subsequently reached an agreement with DeBruce whereby he was resentenced to life without parole in 2015.

Burton now claims it is unconstitutional that he, the ringleader, should still be subject to a death sentence when DeBruce, the triggerman, was resentenced. In so doing, he makes an unsupported "evolving standards of decency" argument, including the incredible claim that his sentence puts him in a class of defendants like those protected by *Roper v. Simmons*, 543 U.S 551 (2005), and *Atkins v. Virginia*, 536 U.S 304 (2002). But as this Court recognized

in *Tison v. Arizona*, 481 U.S. 137 (1987), it is not unconstitutional for a major participant in a felony that results in murder, such as Burton, to be sentenced to death if he exhibits reckless indifference to human life, even if he was not the triggerman. Moreover, Burton fails to cite—and cannot cite—any decision of this Court holding that a defendant sentenced to death has a right to have his sentence vacated if a codefendant eventually receives a lesser sentence. Rather, this Court has held that defendants are entitled to individualized sentencing, *e.g.*, *Lockett v. Ohio*, 438 U.S. 586, 605 (1978); *Williams v. Illinois*, 399 U.S. 235, 243 (1970). Burton's jury and judge heard the evidence of his leadership of the robbery-murder and determined that death was appropriate, and a fault in **DeBruce**'s trial should not disturb that determination.

Burton's other claims are nothing novel. He contends that certiorari is warranted because Alabama's former capital sentencing scheme is in conflict with *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Caldwell v. Mississippi*, 472 U.S. 320 (1985)—and yet, somehow, he fails to even mention *Harris v. Alabama*, 513 U.S. 504 (1995), in which this Court held that Alabama's capital scheme was constitutional. This Court has consistently declined to overrule *Harris*, even post-*Hurst*, and it should not grant certiorari now.

Burton also claims that certiorari is warranted to resolve a split with Delaware and Florida as to whether *Hurst* is due to be applied retroactively. This claim is similarly not cert-worthy. Delaware applies *Hurst* retroactively

on state-law grounds, as does Florida, which limits its application to those cases decided between *Ring v. Arizona*, 536 U.S. 584, 613 (2002), and *Hurst*. That Florida should apply *Hurst* is unsurprising, as *Hurst* invalidated Florida's capital sentencing statutes; Delaware reviewed *Hurst* and determined that its own statutes had several flaws. *Hurst* did not invalidate **Alabama**'s capital statutes, however, and so the fact that Alabama declines to apply *Hurst* to Burton's case is not a matter worthy of certiorari. Moreover, Burton's case is a particularly poor vehicle for these *Hurst* claims, as the jury unanimously found an aggravating circumstance and decided that death was proper. Thus, this Court should deny review.

STATEMENT OF THE CASE

A. The murder of Doug Battle

On August 16, 1991,[1] six men gathered at the home of Barbara Spencer in Montgomery, Alabama, to plan a robbery. LuJuan McCants, one of the six, later testified that Charles Lee Burton organized the robbery and told the other five men what to do. After three men—Burton, Deon Long, and Derrick DeBruce—left the house to procure guns, the six reconvened at Burton's house.

1. A long-reprinted scrivener's error in the opinion on direct appeal states that the men gathered on April 16, not August 16. The correct date is shown on page 341 of the trial record. *See, e.g.*, Pet. App'x B at 3 (quoting *Burton v. State*, 651 So. 2d 641, 643–44 (Ala. Crim. App. 1993)).

They then drove in two cars to Talladega, where they went to a carwash and decided to rob an Auto Zone store. Leaving one car at the carwash, they proceeded to their target. (Pet. App'x B at 3.)

According to McCants, Burton directed him and Long to watch the door, telling them to forget the plans if he left the store. Burton also told McCants and Long that "if anyone caused any trouble in the store to let him handle the situation." (*Id.*) McCants stated that everyone who went into the store except Long was armed with a gun. (*Id.*)

Larry McCardle, the store manager, saw Burton enter the store, purchase items, and ask for the restroom. After Burton headed for the restroom, DeBruce pulled a gun and told everyone to get on the floor. Burton then grabbed McCardle and forced McCardle to take him to the safe at gunpoint. Shortly thereafter, McCardle heard yelling and gunshots from the store. (*Id.*)

Meanwhile, the other conspirators had put the customers on the floor and taken their valuables. While the robbery was in progress, another unsuspecting customer, Doug Battle, walked into the Auto Zone. McCants told him to get on the floor; he apparently had difficulty doing so, and he and DeBruce began to argue. According to McCants, DeBruce hit Battle, causing him to fall, then shot Battle in the back. At this point, all of the conspirators

were either leaving or had left the store, and McCants believed that Burton had already left. (*Id.* at 3–4.)

The men picked up their second car and returned to Spencer's home, where they divided the money. They even gave $100 to Spencer, who in turn gave the money to McCants. (*Id.* at 4.)

B. Trial and direct appeal

On April 16, 1992, Burton was convicted of one count of robbery-murder, a violation of section 13A-5-40(a)(2) of the Code of Alabama. The jury unanimously recommended the death penalty, and the trial court accepted that recommendation. (*Id.* at 1–2.)

The Alabama Court of Criminal Appeals affirmed Burton's conviction and sentence on direct appeal in 1993, the Alabama Supreme Court affirmed in 1994, and this Court denied certiorari in 1995. (*Id.* at 2.)

As for Burton's codefendants, Derrick DeBruce, the triggerman, was also convicted of capital murder and sentenced to death. *DeBruce v. State*, 651 So. 2d 599, 602 (Ala. Crim. App. 1993). Willie Brantley pleaded guilty to murder and was sentenced to life imprisonment. *State v. Brantley*, 61-CC-91-342 (Talladega Cty. Cir. Ct. May 22, 1992). Deon Long pleaded guilty to felony murder and was sentenced to twenty-five years' imprisonment. *State v. Long*, 61-CC-91-343 (Talladega Cty. Cir. Ct. May 28, 1992). Andre Jones pleaded

guilty to felony murder and was sentenced to life imprisonment as a habitual offender. *State v. Jones*, 61-CC-91-345 (Talladega Cty. Cir. Ct. May 26, 1992). LuJuan McCants, who was sixteen at the time of the crime, testified against both Burton and DeBruce. He pleaded guilty to first-degree robbery and was sentenced to twenty-five years' imprisonment. *State v. McCants*, 61-CC-91-344 (Talladega Cty. Cir. Ct. May 28, 1992).

C. State and federal postconviction proceedings

Burton filed a state petition for postconviction relief pursuant to Rule 32 of the Alabama Rules of Criminal procedure in 1996. The circuit court dismissed the petition after a hearing in 2001, the Alabama Court of Criminal Appeals Affirmed in 2004, and the Alabama Supreme Court denied certiorari. *Burton v. State*, CR-00-2472 (Ala. Crim. App. Feb. 20, 2004), *cert. denied*, No. 1031200 (Ala. Sept. 24, 2004).

Turning then to the federal courts for relief, Burton filed a habeas petition pursuant to 28 U.S.C. § 2254 in the Northern District of Alabama. The district court denied the petition in 2009, and the Eleventh Circuit affirmed in a published opinion. *Burton v. Comm'r, Ala. Dep't of Corrs.*, 700 F.3d 1266 (11th Cir. 2012). This Court once again denied certiorari in 2013, thus concluding Burton's standard appeals. *Burton v. Thomas*, 134 S. Ct. 249 (2013) (mem.).

D. Second Rule 32 petition

In a 2–1 decision in 2014, the Eleventh Circuit remanded Derrick DeBruce's case for a new penalty-phase hearing upon finding that his trial counsel conducted an insufficient mitigation investigation. *DeBruce v. Comm'r, Ala. Dep't of Corrs.*, 758 F.3d 1263 (11th Cir. 2014). As this order came almost twenty-three years after the robbery-murder, the Talladega County District Attorney's office agreed to settle the case, and DeBruce was resentenced to life without parole in 2015. Order, DeBruce v. Dunn, 1:04-cv-2669-KOB (N.D. Ala. Sept. 22, 2015), Doc. 55.

On January 11, 2017, Burton filed a successive Rule 32 petition alleging two claims: (1) his death sentence is arbitrary and disproportionate because DeBruce, the shooter, was resentenced to life without parole, and (2) Alabama's capital sentencing scheme is unconstitutional after *Hurst v. Florida*, 136 S. Ct. 616 (2016). (Pet. App'x D.) Two months later, the circuit court granted the State's motion to dismiss, finding that Burton's petition was procedurally barred as successive and time-barred under the one-year statute of limitations, and that *Hurst* did not entitle Burton to relief. *Burton v. State*, 61-CC-91-341.61 (Talladega Cty. Cir. Ct. Mar. 31, 2017).

The Alabama Court of Criminal Appeals affirmed in February 2018. (Pet. App'x B.) That court noted that *Hurst* had no bearing upon Alabama's

capital sentencing scheme, and that even if it had, *Hurst* has no retroactive application. (*Id.* at 18–27.) As for Burton's claim of disproportionate sentencing, the court discussed the comparable case of Michael Samra, who argued that he was entitled to have his death sentence vacated after his juvenile codefendant's death sentence was vacated post–*Roper*. (Pet. App'x B at 14–18.) During habeas proceedings, the district court disagreed, concurring with the Alabama Court of Criminal Appeals that Samra's argument was unsupported by law. Mem. Op. at 95–110, Samra v. Price, 2:07-cv-01962-LSC (N.D. Ala. Sept. 5, 2014), Doc. 52.

The Alabama Supreme Court denied certiorari without opinion on April 20, 2018 (Pet. App'x A), and the present petition for writ of certiorari followed.

REASONS THE PETITION SHOULD BE DENIED

No issue in Burton's petition is worthy of certiorari.

The first issue is yet another attempt by a death-sentenced defendant to convince this Court to invalidate Alabama's capital sentencing scheme after *Hurst*. This Court held Alabama's capital punishment statute to be constitutional in *Harris v. Alabama*, 513 U.S. 504 (1995), despite the fact that it allowed judicial sentencing. While Burton, remarkably, fails to mention *Harris* in his petition, this Court has consistently declined to consider petitions seeking to overrule or limit *Harris* in light of *Hurst*. For example, in *Bohannon v. Alabama*, 137 S. Ct. 831 (2017) (mem.), the Court denied certiorari when the Alabama Supreme Court held in *Ex parte Bohannon*, 222 So. 3d 525 (Ala. 2016), that Alabama's capital scheme remained constitutional after *Hurst*. Burton has presented no compelling argument for this Court to reverse that case or to grant relief in his, particularly as the jury unanimously recommended death and the trial court adopted that recommendation. Moreover, Alabama has changed its capital sentencing statute to provide for jury sentencing going forward. The Court should not grant certiorari to consider overruling a longstanding precedent, *Harris*, when such overruling would have no prospective effect on any future cases because of a change in state law.

Moreover, Burton's contention that it is a violation of *Caldwell v. Mississippi*, 472 U.S. 320 (1985), to instruct a jury rendering an advisory penalty-phase verdict that its verdict is advisory is hardly novel. As this Court explained in *Romano v. Oklahoma*:

> *Caldwell* [is] relevant only to certain types of comment—those that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision. Thus, [t]o establish a *Caldwell* violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law.

512 U.S. 1, 9 (2004) (quotation and citations omitted). At the time of Burton's trial, the jury's penalty-phase verdict *was* a recommendation, and the jury was properly advised of that fact, in accordance with *Romano*. This Court recently denied certiorari in cases raising similar *Caldwell* claims. *See Guardado v. Jones*, 138 S. Ct. 1131, 1132–34 (2018) (mem.) (Sotomayor, J., dissenting); *Middleton v. Florida*, 138 S. Ct. 829, 829–30 (2018) (mem.) (Sotomayor, J., dissenting). There is no reason for this Court to grant certiorari now to consider a question the Court has already resolved.

The second issue—whether the *Hurst* rule should be given retroactive application in Alabama—is similarly familiar to this Court, and similarly meritless. *See, e.g.*, *Lee v. Alabama*, 138 S. Ct. 1440 (2018) (mem.) (denying certiorari). *Hurst* is merely an application of *Ring* to the particular circumstances of Florida's capital sentencing scheme, and this Court has

already held that *Ring* is not retroactive. *Schriro v. Summerlin*, 542 U.S. 348 (2004). As *Hurst* is neither a new substantive rule nor a watershed rule of criminal procedure, *see Teague v. Lane*, 489 U.S. 288 (1989) (plurality opinion), there is no reason that it must be given retroactive application. That Florida and Delaware have chosen to apply it retroactively on state-law grounds does not obligate Alabama to do so.[2]

The third issue asks this Court to vacate Burton's death sentence because his triggerman codefendant was resentenced to life without parole by agreement. He has cited no decision from this Court mandating that he be resentenced, nor can he. In *Pulley v. Harris*, 465 U.S. 37, 43–44 (1984), this Court rejected the proposition that the Eighth Amendment requires a state appellate court to compare a defendant's sentence to those of similarly situated defendants before affirming. Three years later, in *McCleskey v. Kemp*, 481 U.S. 279, 306–07 (1987), this Court wrote, "[A]bsent a showing that the [state] capital punishment system operates in an arbitrary and capricious manner, [a defendant] cannot prove a constitutional violation by demonstrating that other

2. As discussed below, Florida retroactively applies *Hurst* only to those cases decided between *Ring* and *Hurst*—i.e., the period in which Florida's capital sentencing scheme was unconstitutional—a decision based on Florida law. *Mosley v. State*, 209 So. 3d 1248, 1283 (Fla. 2016). Delaware held that its capital scheme was unconstitutional after *Hurst* for several reasons, including the failure to require a unanimous jury finding of an aggravating circumstance beyond a reasonable doubt. *Rauf v. State*, 145 A.3d 430 (Del. 2016). In *Powell v. Delaware*, 153 A.3d 69 (Del. 2016), the Supreme Court of Delaware found that the *Rauf* rule fit Delaware's "watershed procedural rule" retroactivity exception.

defendants who may be similarly situated did *not* receive the death penalty." Here, the ringleader of an armed robbery that resulted in the death of an innocent bystander was properly—and unanimously—sentenced to death. That the triggerman codefendant was resentenced to life without parole so as to avoid calling a new penalty-phase hearing twenty-three years after the fact is unfortunate, as the State maintains that DeBruce's death sentence was properly imposed. However, the infirmity that the Eleventh Circuit found in DeBruce's case, ineffective assistance of counsel, was not found in Burton's, and Burton does not merit a lesser sentence solely because his **codefendant** had inadequate counsel. For the reasons that follow, Burton's petition is not cert-worthy.

I. The petition is directed to the wrong state appellate court.

Before this Court can consider the merits of Burton's petition, it needs to resolve a procedural problem: the petition is directed to the wrong state appellate court.

Burton appealed the summary dismissal of his second Rule 32 petition to the Alabama Court of Criminal Appeals, an intermediate appellate court with statewide jurisdiction. That court affirmed in a twenty-seven-page opinion. (Pet. App'x B.) Burton then petitioned the Alabama Supreme Court for certiorari review, but that court denied review. (Pet. App'x A.) When a state

supreme court denies discretionary review, this Court reviews "the judgment of the intermediate court rather than the order of refusal by the higher court." *See* EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE 179 (9th ed. 2008) (citing *Sullivan v. Texas*, 207 U.S. 416 (1908), and *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 678 n.1 (1968)).

Burton's petition erroneously seeks a writ of certiorari "to the Alabama Supreme Court." Pet. cover, 1. The Court has already recaptioned the case so that it reflects the correct lower court. *E.g.*, *Miller v. Alabama*, 132 S. Ct. 2455, 2475 (2012) (reversing Alabama Court of Criminal Appeals). It must also decide whether the petitioner's failure to identify the proper lower court is a defect of jurisdictional significance.

II. Certiorari is unwarranted because Burton's death sentence was constitutionally imposed and remains constitutional post-*Hurst*.

In Burton's first claim, he contends that the Alabama Supreme Court erred in *Ex parte Bohannon*, 222 So. 3d 525 (Ala. 2016), when it held that *Hurst* did not invalidate Alabama's capital sentencing statutes, including Alabama's provision permitting judicial sentencing in capital cases. (Pet. 11–19.) This claim is utterly meritless.

A. Even if *Hurst* applied in exactly the way Burton argues it should, Burton would be due no relief.

At the outset, Burton's case is a poor vehicle for this claim, as this is not a case of judicial override.[3] Burton's jury unanimously found an aggravating circumstance necessary to expose him to the death penalty—the murder was committed during a robbery, a fact proven by the jury's guilt-phase verdict, *see* ALA. CODE §§ 13A-5-45(e), -49(4) (1975)—and after weighing the aggravating and mitigating evidence, the jurors unanimously recommended that he be sentenced to death, a recommendation the trial court adopted.[4] (Pet. App'x B at 1–2.) Thus, even if *Hurst* applied here in exactly the way Burton argues it should, Burton would not be entitled to be resentenced. The Sixth Amendment right to a jury trial cannot require more than what happened here—a unanimous jury vote on an aggravating factor and a unanimous jury vote that death is the appropriate sentence.

3. The override provision of the Alabama's capital sentencing scheme was eliminated by legislation in April 2017. *See* Ala. Laws Act 2017-131. The current capital sentencing scheme is provided in ALA. CODE §§ 13A-5-45, -46, -47 (1975).
4. Burton presents the Court with affidavits from three jurors suggesting that he be resentenced because DeBruce was resentenced by agreement. (Pet. App'x G.) That he was able to send an investigator and social worker to procure these affidavits in 2016, twenty-four years after the fact, neither impeaches his 1992 sentencing verdict nor warrants resentencing.

B. Alabama's former capital sentencing scheme was constitutional, and *Hurst* did not overrule *Harris*.

Importantly, while arguing that *Hurst* invalidated Alabama's capital sentencing statutes, Burton does not attempt to distinguish *Harris*—indeed, he fails to mention this precedent. In *Harris*, this Court rejected the argument that Alabama's capital sentencing scheme was unconstitutional because it allowed judges instead of juries to impose a capital sentence. Alabama has relied on *Harris* to sentence hundreds of murderers since 1995. "[T]he States' settled expectations deserve our respect." *Ring*, 536 U.S. at 613 (Kennedy, J., concurring).

The Court has consistently declined to grant a petition to address whether to overrule *Harris* in light of *Hurst*. For the same reasons that the Court declined to grant cert in *Bohannon v. Alabama*, 137 S. Ct. 831 (2017) (mem.)—an appeal from the Alabama Supreme Court's decision finding that Alabama's capital scheme was constitutional after *Ring* and remained so post-*Hurst*—and has continued to decline to consider the issue in every subsequent certiorari petition raising it, the Court should not grant certiorari in Burton's case.

Alabama's capital punishment system is constitutional under *Hurst*. In *Ring*, the Court applied the rule of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), to death penalty cases, holding that although a judge can make the "selection

decision," the jury must find the existence of any fact that makes the defendant "eligible" for the death penalty by increasing the range of punishment to include the imposition of the death penalty. There, the Court held that Arizona's death penalty statute violated the Sixth Amendment right to a jury trial "to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty." *Ring*, 536 U.S. at 585. Thus, a trial court cannot make a finding of "any fact on which the legislature conditions an increase in their maximum punishment." *Id.* at 589. Only the jury can.

Hurst did not add anything of substance to *Ring*. In *Hurst*, Florida prosecuted a defendant for first-degree murder. *Hurst*, 136 S. Ct. at 620. The jury did not unanimously find the existence of an aggravating circumstance at either the guilt or penalty phase of trial, but it returned an advisory recommendation of 7–5 in favor of death. *Id.* Because the jury found no aggravating circumstance, the trial court should have imposed a life-without-parole sentence. Instead, the judge found an aggravating circumstance herself and imposed a death sentence, making both the eligibility and selection determinations. *Id.* Applying *Ring*, the Court held the death sentence unconstitutional because "the judge alone [found] the existence of an aggravating circumstance" that expanded the range of punishment to include the death penalty. *Id.* at 624.

In *Ex parte Bohannon*, the Alabama Supreme Court considered *Ring*, *Hurst*, and its prior decision in *Ex parte Waldrop*, 859 So. 2d 1181 (Ala. 2002), then found that Alabama's capital scheme remained constitutional. First, the court noted that "*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." 222 So. 3d at 532. "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." *Id.* As for the claim that *Hurst* requires that the jury weigh the aggravating and mitigating circumstances, the court explained 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." *Id.* Finally, the court concluded that *Hurst* does not hold that "the Sixth Amendment requires that a jury **impose** a capital sentence." *Id.* at 533. Indeed, Alabama's capital sentencing scheme at the time of Bohannon's trial—and Burton's—was in line with Justice Scalia's concurrence in *Ring*:

> What today's decision says is that the jury must find the existence of the **fact** that an aggravating factor existed. Those States that leave the ultimate life-or-death decision to the judge may continue

> to do so—by requiring a prior jury finding or aggravating factor in the sentencing phase or, more simply, by placing the aggravating-factor determination (where it logically belongs anyway) in the guilt phase.

Ring, 536 U.S. at 612–13 (Scalia, J., concurring).

Burton's case does not bear the infirmity present in *Hurst*. Burton's jury unanimously found the existence of an aggravating circumstance when it convicted him of robbery-murder, as the fact that a murder was committed during a robbery is an "overlapping" statutory aggravator. ALA. CODE § 13A-5-49(4) (1975). This is all that *Ring* and *Hurst* required to make a capital defendant death-eligible. That the trial judge conducted his own weighing of the aggravating and mitigating evidence and **agreed with the jury's unanimous death recommendation** does not offend *Hurst* (nor *Ring*), and this Court's decision in *Harris* remains untouched—as it should. Moreover, the Court should not call into question a longstanding precedent like *Harris* because its decision on the question would have no prospective effect, given that Alabama amended its sentencing procedure in 2017 to end judicial sentencing. *See* Ala. Laws Act 2017-131.

C. Informing jurors rendering an advisory penalty-phase verdict that their verdict is advisory does not violate *Caldwell v. Mississippi*.

Burton attempts to downplay the jury's unanimous death recommendation by claiming that its responsibility for the ultimate sentencing

determination was unconstitutionally minimized, in violation of *Caldwell*. (Pet. 17–18.) This contention is meritless.

In *Caldwell*, a plurality of the Court held that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." 472 U.S. at 328–29. In that case, the prosecution had informed the jury that its decision would be automatically reviewed by the Mississippi Supreme Court, thereby limiting the jurors' responsibility for rendering a death sentence and shifting the responsibility to the appellate court.

Nine years later, in *Romano v. Oklahoma*, the Court considered the *Caldwell* rule in a different context. An Oklahoma defendant objected when a copy of his judgment and death sentence from his first capital trial was introduced during the penalty phase of his second capital trial. The defendant argued that introducing the first conviction violated *Caldwell* because it reduced the second jury's sense of responsibility for its sentencing verdict. 512 U.S. at 3, 5. The Court disagreed:

> [W]e have since read *Caldwell* as "relevant only to certain types of comment—those that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision." *Darden v. Wainwright*, 477 U.S. 168, 184 n.15 (1986). Thus, "[t]o establish a *Caldwell* violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the

> jury by local law." *Dugger v. Adams*, 489 U.S. 401, 407 (1989); *see also Sawyer v. Smith*, 497 U.S. 227, 233 (1990).

Id. at 9 (citations edited). Following *Caldwell*, *Dugger*, and *Romano*, the Eleventh Circuit Court of Appeals has held that "references to and descriptions of the jury's sentencing verdict . . . as an advisory one, as a recommendation to the judge, and of the judge as the final sentencing authority are not error under *Caldwell*" when they "accurately characterize the jury's and judge's sentencing roles under [state] law." *Davis v. Singletary*, 119 F.3d 1471, 1482 (11th Cir. 1997); *see Belcher v. Sec'y, Dep't of Corrs.*, 427 F. App'x 692 (11th Cir. 2011) (quoting *Davis*); *Carr v. Schofield*, 364 F.3d 1246, 1258 (11th Cir. 2004) (same).

At the time of Burton's trial, the jury's penalty-phase verdict was properly described as advisory. Section 13A-5-46(a) of the Code of Alabama provided that the penalty-phase jury "shall return an advisory verdict," while subsection (e) repeatedly described the verdict as an "advisory" verdict "recommending to the trial court" a penalty. Section 13A-5-47 then provided the procedure for the trial court's post-trial sentencing hearing, including ordering a presentence investigation report and taking additional testimony; subsection (e) stated:

> In deciding upon the sentence, the trial court shall determine whether the aggravating circumstances it finds to exist outweigh the mitigating circumstances it finds to exist, and in doing so the trial court shall consider the recommendation of the jury contained in its advisory verdict, unless such a verdict has been waived pursuant to Section 13A-5-46(a) or 13A-5-46(g). While the jury's

> recommendation concerning sentence shall be given consideration, it is not binding upon the court.[5]

Still, the prosecution recognized that the jury's decision was a weighty one, concluding:

> You do what you think is right. You do what you think is just. But I submit this to you, the verdict under the law, and it is a tough verdict[,] I know it is[,] as it should be, the verdict under the law speaks for itself when you weigh aggravation and when you weigh mitigation.

(R. 1118.)[6] While the trial court correctly referred to the jury's decision as a recommendation throughout the penalty-phase charge, the court also reminded the jury of the seriousness of its choice:

> The fact that the determination of whether 10 or more of you can agree to recommend a sentence of death or seven or more of you can recommend or agree to recommend a sentence of life imprisonment without parole can be reached by a single ballot should not influence you to act hastily or without due regard to the gravity of these proceedings. You should hear and consider the views of your fellow jurors. Before you vote, you should carefully weigh, sift, and consider the evidence and all of it realizing that a human life is at stake. And you should bring about your best judgment on the sole issue which is before you. That issue is whether the defendant should be sentenced to life imprisonment without parole or death.

(R. 1133–34.)

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5. The versions of these statutes in effect at the time of Burton's trial are found in Ala. Laws Act 2017-131, including the textual edits made for the current versions.
6. In accordance with the Alabama courts' format for records on appeal, citations to the trial transcript are designated "R. __."

Because the trial court correctly informed the jury that its verdict was a recommendation, yet still impressed upon the jury the weight of its decision, there was no *Caldwell* violation in this case. Burton's jury was given accurate instructions, and nothing in this claim merits certiorari.

D. There is no conflict for this Court to resolve.

Burton makes much out of this meritless claim by trying to create a split among the state courts of last resort for this Court to resolve. His claim is baseless. While Burton is correct that the Florida and Delaware Supreme Courts have found that *Hurst* applies to their capital sentencing statutes, both have done so on state-law grounds.

As the Florida Supreme Court wrote in *Hurst v. State*:

> As we will explain, we hold that the Supreme Court's decision in *Hurst v. Florida* requires that all the critical findings necessary before the trial court may consider imposing a sentence of death must be found unanimously by the jury. **We reach this holding based on the mandate of *Hurst v. Florida* and on Florida's constitutional right to jury trial, considered in conjunction with our precedent concerning the requirement of jury unanimity as to the elements of a criminal offense.** In capital cases in Florida, these specific findings required to be made by the jury include the existence of each aggravating factor that has been proven beyond a reasonable doubt, the finding that the aggravating factors are sufficient, and the finding that the aggravating factors outweigh the mitigating circumstances. **We also hold, based on Florida's requirement for unanimity in jury verdicts, and under the Eighth Amendment to the United States Constitution, that in order for the trial court to impose a sentence of death, the jury's recommended sentence of death must be unanimous.**

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> We also conclude that, just as elements of a crime must be found unanimously by a Florida jury, all these findings necessary for the jury to essentially convict a defendant of capital murder—thus allowing imposition of the death penalty—are also elements that must be found unanimously by the jury. Thus, we hold that in addition to unanimously finding the *existence* of any aggravating factor, the jury must also unanimously find that the aggravating factors are *sufficient* for the imposition of death and unanimously find that the aggravating factors *outweigh* the mitigation before a sentence of death may be considered by the judge. **This holding is founded upon the Florida Constitution and Florida's long history of requiring jury unanimity in finding all the elements of the offense to be proven**; and it gives effect to our precedent that the "final decision in the weighing process must be supported by 'sufficient competent evidence in the record.'"
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> We are mindful that a plurality of the United States Supreme Court, in a non-capital case, decided that unanimous jury verdicts are not required in all cases under the Sixth Amendment to the United States Constitution. *See Apodaca v. Oregon*, 406 U.S. 404 (1972) (plurality opinion). **However, this Court, in interpreting the Florida Constitution and the rights afforded to persons within this State, may require more protection be afforded criminal defendants than that mandated by the federal Constitution.** This is especially true, we believe, in cases where, as here, Florida has a longstanding history requiring unanimous jury verdicts as to the elements of a crime.

202 So. 3d 40, 44, 53–54, 57 (Fla. 2016) (citation edited, footnotes omitted, emphasis added).

The Delaware Supreme Court also found fault with its capital statutes post-*Hurst*. In *Rauf v. State*, 145 A.3d 430, 434 (Del. 2016), that court held that a jury, not a judge, must weigh the aggravating and mitigating circumstances

"because, under 11 DEL. C. § 4209, this is the critical finding upon which the sentencing judge 'shall impose a sentence of death.'"

As noted above, Alabama amended its capital sentencing scheme by legislation in April 2017. *See* Ala. Laws Act 2017-131. The current capital sentencing scheme is found in ALA. CODE §§ 13A-5-45, -46, -47 (1975) and provides that the jury will make the ultimate determination as to sentence in capital cases. Thus, Burton's alleged "conflict" is a non-issue.

III. Certiorari is unwarranted because *Hurst* has no retroactive application.

In his second claim, Burton contends that *Hurst* should have retroactive application to his case. (Pet. 19–23.) For the reasons that follow, this claim is meritless.

First, as before, this case is a poor vehicle for this claim because even if *Hurst* applied, Burton would be due no relief. His **jury** unanimously recommended death, and the trial court agreed with the jury's weighing of the aggravating and mitigation circumstances.

Second, *Hurst* did not announce a new rule of constitutional law, but rather was an application of *Ring* to the unique circumstances in Florida. As this Court has explicitly held that *Ring* is not retroactively applicable to cases on postconviction review, *Schriro v. Summerlin*, 542 U.S. 348 (2004), *Hurst* must also have no retroactive effect.

As support for retroactive application, Burton again points to Florida and Delaware. While those states decided to apply *Hurst* retroactively, they did so on state-law grounds.

Florida retroactively applies *Hurst* only to those cases decided between *Ring* and *Hurst*—in other words, to those defendants sentenced during the period in which Florida's capital sentencing scheme was not in compliance with *Ring*. *Mosley*, 209 So. 3d at 1283. This decision was based on Florida law:

> We now turn to the issue of whether *Hurst* should apply retroactively to Mosley. We approach our retroactivity analysis based on the United States Supreme Court's holding in *Hurst v. Florida* under the United States Constitution's Sixth Amendment right to trial by jury and our opinion in *Hurst*, interpreting the meaning of *Hurst v. Florida* as applied to Florida's capital sentencing scheme and considering Florida's independent right to trial by jury in article I, section 22, of the Florida Constitution. We first review our precedent holding that certain decisions should be given retroactive effect on the basis of fundamental fairness, such as *James v. State*, 615 So. 2d 668 (Fla. 1993). We then review the factors in the *Witt v. State*, 387 So. 2d 922 (1980), retroactivity framework, explaining the unique jurisprudential conundrum caused by the United States Supreme Court's delay in reviewing the constitutionality of Florida's capital sentencing scheme in light of *Ring*. After reviewing these considerations, we conclude that *Hurst* should apply retroactively to Mosley.

Id. at 1274.

Turning then to Delaware, in *Rauf*, the Delaware Supreme Court held that its capital scheme was unconstitutional after *Hurst* for several reasons, including the failure to require a unanimous jury finding of an aggravating circumstance beyond a reasonable doubt. 145 A.3d at 433–34. Four months

later, that court determined that under **Delaware's** retroactivity rules, *Rauf* had announced a watershed rule of criminal procedure:

> In *Danforth v. Minnesota*, 552 US. 264 (2008), the United States Supreme Court explained that "*Teague*'s general rule of nonretroactivity was an exercise of [its] power to interpret the federal habeas statute" and "cannot be read as imposing a binding obligation on state courts." Nevertheless, more than twenty-five years ago this Court recognized the *Teague* general rule of non-retroactivity and its two exceptions as persuasive authority for deciding whether new state and federal precedents are to be applied retroactively in Delaware postconviction proceedings. In doing so, we noted that the federal *Teague* "new rule" doctrine was evolving and that State courts may grant postconviction "relief to a broader class of individuals than is required by *Teague*." Therefore, we declined to adopt a formal static test for determining the meaning of a "new rule" for the purposes of deciding a Delaware postconviction proceeding. . . . Accordingly, the retroactivity issue that is presented by Powell's motion is a matter of Delaware law. In analyzing that issue we look to *Teague* and its progeny for guidance. However, as the United States Supreme Court held in *Danforth*, the postconviction retroactivity remedy that a state court provides for "violations of the Federal Constitution is primarily a question of state law."
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> *Ring* only implicated the Sixth Amendment right to a jury. The same was true in *Hurst* because Florida also already required proof beyond a reasonable doubt. . . . Thus, unlike *Rauf*, neither *Ring* nor *Hurst* involved a Due Process Clause violation caused by the unconstitutional use of a lower burden of proof. This significant distinction in *Ring* and *Hurst* is fatal to the State's reliance upon *Summerlin* and is dispositive of why the *Rauf* holding fits within *Teague*'s second exception to nonretroactivity.

Powell, 153 A.3d at 72–74 (citation added, footnotes omitted).

While Florida and Delaware are free to give *Hurst* retroactive application based on their unique state laws, no federal law or decision from

this Court obligates Alabama to do likewise. Therefore, certiorari should be denied.

IV. Certiorari is unwarranted because "evolving standards of decency" do not mandate that Burton be resentenced.

Finally, Burton contends that he is entitled to be resentenced because his triggerman codefendant, DeBruce, was resentenced to life without parole. (Pet. 24–34.) This claim does not merit certiorari.

A. Procedural background

As discussed above, in 2014, a split panel of the Eleventh Circuit Court of Appeals found that DeBruce's counsel had rendered ineffective assistance and ordered that he be given a new penalty-phase hearing. The District Attorney and DeBruce reached an agreement to avoid that hearing, and DeBruce was sentenced to life without parole in 2015.

In January 2017, Burton filed a successive Rule 32 petition for postconviction relief, arguing that he was entitled to be resentenced as well. The circuit court correctly dismissed the claim under Rule 32.2(b) of the Alabama Rules of Criminal Procedure, as it arose in a successive petition that failed to show either (1) that the trial court was without jurisdiction to render judgment or impose sentence or (2) that good cause exists why the new ground was not known or could not have been ascertained at the time of the first

petition, and failure to entertain the successive petition would result in a miscarriage of justice. The court pointed out that on direct appeal, Burton had raised a claim alleging that DeBruce was more culpable as the triggerman, and therefore, the claim underlying Burton's new claim could have been raised during the first petition. (Pet. App'x B at 7–9.)

The Alabama Court of Criminal Appeals agreed with the circuit court. (*Id.* at 6–18.) First, Burton had based his argument in part on *State v. Gamble*, 63 So. 3d 707 (Ala. Crim. App. 2010), a case in which the defendant's death sentence had been set aside as disproportionate to that of his triggerman codefendant, who had been resentenced to life without parole after *Roper*. The Alabama Court of Criminal Appeals had disagreed and ordered that the death sentence be reinstated, explaining, "Alabama recognizes that capital-murder codefendants have a right to an individualized sentencing determination and do not have to be sentenced to the same punishment." *Id.* at 726. Indeed, as this Court has made clear, "[t]he Constitution permits qualitative differences in meting out punishment and there is no requirement that two persons convicted of the same offense receive identical sentences." *Williams*, 399 U.S. at 243); *see Zant v. Stephens*, 462 U.S. 862, 879 (1983) ("What is important . . . is an **individualized** determination on the basis of the character of the individual and the circumstances of the crime."). The Alabama Court of Criminal Appeals noted that while appellate courts must consider

codefendants' sentences when deciding the appropriateness of a death sentence, those other sentences "are not controlling per se." *Gamble*, 63 So. 3d at 727 (quoting *Ex parte Thomas*, 462 So. 2d 216, 226 (Ala. 1984)). As such, the court held that Gamble had no right to be resentenced on proportionality grounds because "there is no constitutional right to a proportionality review in death-penalty cases." *Id.* at 728; *see McCleskey*, 481 U.S. at 306–07 (defendant "cannot prove a constitutional violation by demonstrating that other defendants who may be similarly situated did **not** receive the death penalty").

Second, in affirming the dismissal of Burton's claim, the Alabama Court of Criminal Appeals considered its decision in *Samra v. State*, CR-11-0084 (Ala. Crim. App. Aug. 10, 2012), and the federal district court's subsequent decision in *Samra v. Price*, 2:07-cv-01962-LSC (N.D. Ala. Sept. 5, 2014). Samra, like Gamble, argued that he should be resentenced after his juvenile codefendant's death sentence was vacated following *Roper*. The Alabama Court of Criminal Appeals disagreed, citing *Gamble*. *Samra*, CR-11-0084, at 7–12. On habeas review, the federal district court affirmed, explaining:

> 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 (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 (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 (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 (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 (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.
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> [. . .]
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> Because the ACCA held that the trial court's finding regarding the aggravating and mitigating circumstances was supported by the evidence and because the court found that Samra's death sentence was neither excessive nor disproportionate to the penalty imposed in similar cases, the court affirmed his death sentence. *Id.* Nothing has happened in Samra's case that alters the state courts' finding that his death sentence is proportionate to his crime.

Mem. Op. at 103–06, 108–09, Samra v. Price (footnotes omitted, emphasis added).[7]

As Burton's claim was not jurisdictional and failed to meet either exception to successive petitions in Rule 32.2(b), the Alabama Court of Criminal Appeals held that the claim was procedurally barred and untimely. (Pet. App'x B at 17–18.)

7. While Samra appealed to the Eleventh Circuit and petitioned this Court for certiorari, he abandoned his resentencing claim.

B. "Evolving standards of decency" do not entitle Burton to be resentenced.

Faced with clear precedent from this Court and the state courts showing that a defendant is not entitled be resentenced solely due to the sentences his codefendants receive, Burton contends that, as in *Atkins* and *Roper*, "evolving standards of decency" forbid his execution. (Pet. 24–25.) Here, Burton barely pays lip service to *Tison v. Arizona*, 481 U.S. 137 (1987), in which the Court held that it does not offend the Eighth Amendment for a major participant in a felony that results in murder, such as Burton, to be sentenced to death if he exhibited reckless indifference to human life, even if he was not the triggerman. As in *Gamble* and *Samra*, both Burton and DeBruce were originally sentenced to death as the leader of the robbery and the triggerman. Gamble and Samra's codefendants were resentenced due to *Roper*, and DeBruce was similarly resentenced due to a factor that had nothing to do with Burton or his culpability. Indeed, while Burton argues that he is less culpable than DeBruce, the evidence adduced at trial shows that he was just as culpable, if not more so. Burton was the organizer and point man in the robbery, the other participants followed his orders, and five of the six men went into the store with guns. Burton even forced the store manager to open the safe at gunpoint. Having heard testimony concerning Burton's planning, involvement, and leadership, his jury unanimously determined that death was

appropriate in his case because he was the ringleader of the robbery, and the trial court concurred. The fact that DeBruce was resentenced decades later by agreement does not call into question **Burton's** sentencing determination.

Unable to support his position with case law, Burton instead cites four instances in which state governors commuted death sentences for non-shooters. (Pet. 26–29.) This does not constitute proof of "evolving standards of decency," nor are the decisions of these governors binding upon the State of Alabama or this Court. Moreover, these cases are distinguishable from Burton's. Kenneth Foster was a getaway driver, and the Texas Board of Pardons and Paroles overwhelmingly recommended commutation. Ralph Blumenthal, *Governor Commutes Sentence in Texas*, N.Y. TIMES, Aug. 31, 2007, at A14, https://tinyurl.com/ycjvs9lj. Ivan Teleguz's sentence was commuted by a governor opposed to the death penalty who reviewed thousands of pages of documents concerning the case and came to the independent conclusion that Teleguz's sentencing was "terribly flawed and unfair." Rachel Weiner & Gregory Schneider, *Virginia Governor Commutes Sentence of Death Row Prisoner*, WASH. POST, Apr. 20, 2017, https://tinyurl.com/y965sphh. Jason McGehee's sentence was commuted after the Arkansas Parole Board overwhelmingly recommended it, explaining that he was young at the time of the crime, that he had a nearly perfect prison record, and that two codefendants who were equally or more culpable had received sentences less

than death. *Parole Board Recommends Death Row Inmate Receive Clemency from Governor*, KATV.COM (Apr. 5, 2017), https://tinyurl.com/yas684xj; *Clemency for AR Death Row Inmate Jason McGehee*, FOX16.COM (Aug. 25, 2017), https://tinyurl.com/y9y8az3q. Most recently, Thomas Whitaker's sentence was commuted because his surviving victim—his father, who is deeply religious and lost the rest of his family to Whitaker's crime—pleaded for his life to be spared; Whitaker's clemency petition also noted that the gunman had not been sentenced to death. Tracy Connor, *Texas Grants Clemency to Thomas Whitaker Minutes Before Execution*, NBCNEWS.COM (Feb. 22, 2018), https://tinyurl.com/yc4n8l3g. None of these cases is a perfect reflection of Burton's, a case in which both the mastermind of a crime and the triggerman are rightly sentenced to death, but the triggerman is later resentenced to life without parole in order to avoid redoing a trial proceeding decades after the fact.[8]

Burton's sentence is not disproportionate, nor does decency dictate that he be resentenced. He was the leader of the robbery and a major participant in

8. Burton makes much of the State's petition for certiorari in DeBruce's case, in which the State argued that the Eleventh Circuit's vacatur "creates an unusual and arguably unjust situation in which the ringleader of DeBruce's gang—a man names Charles Burton—has had his death sentence affirmed, although DeBruce, the triggerman, has not." Pet. for Cert. at 24, Dunn v. DeBruce, 125 S. Ct. 2854 (2015) (No. 14-807). The State maintains that DeBruce's death sentence was proper. Regardless, the fact that the State and DeBruce ultimately reached an agreement to avoid a new penalty-phase proceeding does not entitle Burton to be resentenced.

the events that ultimately led to Doug Battle's murder. Burton is at least as culpable for Battle's death as DeBruce is, and his properly imposed death sentence should stand. Therefore, this Court should deny certiorari.

CONCLUSION

This Court should deny certiorari.

Respectfully submitted,

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