No. 18-5937

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*

REPLY TO STATE'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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*The Clerk of the Supreme Court re-captioned the title of this case after the filing of the original petition for certiorari. This caption reflects that change. See also the discussion herein on pp. 1-3.

CAPITAL CASE

QUESTIONS PRESENTED

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

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

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

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JURISDICTION

The State cites no authority, nor is there any, for its proposition that there may be "a defect of jurisdictional significance"[1] in this case.

In an attempt to distract this Court from the important substantive issues, the State notes that Mr. Burton filed his petition for a writ of certiorari directed to the Alabama Supreme Court, and that the Clerk's office has relabeled the petition, directing it to the Alabama Court of Criminal Appeals.[2] Citing a well-known Supreme Court practice treatise, the State notes that generally, where a state's highest court declines to exercise its authority to grant discretionary review, "the judgment of the intermediate court rather than the order of refusal by the higher court is the judgment reviewable under [28 U.S.C.] § 1257."[3]

The State then surmises, without citation to authority, that a petition labeled as seeking certiorari to the higher state court might be "a defect of jurisdictional significance," that this Court "must" decide.[4] This is incorrect and confuses matters of this Court's general practice and procedures with the question of jurisdiction.

This Court has never held that a petition seeking certiorari to a higher court, which had jurisdiction to hear the case and declined to exercise its discretion to do so, divests this Court of proper jurisdiction, where certiorari may more properly be directed to a lower court. A review of the section of Gressman's treatise — and the authorities it

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[1] Br. in Opp'n (BIO) at 13.
[2] *Id.* at 12-13.
[3] *Id.* at 13 (quoting EUGENE GRESSMAN, ET AL., SUPREME COURT PRACTICE 179 (9th ed. 2008) (citing *Sullivan v. Texas*, 207 U.S. 416 (1908); *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 678 n.1 (1968)).
[4] *Id.* at 13.

cites — establishes it concerns merely the nature of which decision this Court will review and, if warranted, reverse. The only question of this Court's *jurisdictional* authority in *Sullivan*, for instance, revolved around whether a federal constitutional question was properly presented to the last state court issuing a reasoned opinion.[5] Such a concern is not at issue here, as all claims raised in Mr. Burton's petition were properly asserted under federal law, which the State does not contest.

Mr. Burton's petition recognized that the last reasoned decision was that of the Alabama Court of Criminal Appeals,[6] and attached that decision for this Court's review.[7] Indeed, Gressman's treatise notes that there are some grey areas in terms of whether this Court will review the higher court's order, such as whether the lower court's decision was dismissed or denied, and further notes: "If an appeal in such a case is dismissed by the higher state court in a manner amounting to an affirmance, the order of dismissal is the judgment reviewable by the Supreme Court."[8]

Here, the Alabama Supreme Court did not dismiss Mr. Burton's petition for certiorari, but denied it in what it denoted as a "certificate of judgment."[9] Further, because the Alabama Court of Criminal Appeals was bound, on one of the issues upon which Mr. Burton seeks certiorari, by a prior decision of the Alabama Supreme Court,[10] the only State court that had authority to grant relief was the Alabama Supreme Court.

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[5] *Sullivan*, 207 U.S. at 422.
[6] Pet. at 1.
[7] Pet. at App. B.
[8] EUGENE GRESSMAN, ET AL., SUPREME COURT PRACTICE 167 (10th ed. 2013) (citing *Tumey v. Ohio*, 273 U.S. 510, 515 (1927)).
[9] Pet. App. A.
[10] *See Burton v. State*, No. 16-0812, slip op. at 27 (Ala. Crim. App. Feb. 2, 2018); Pet. App. B.

In any event, the State cites no authority, nor is there any, for its claim that a petitioner identifying the state's highest court, rather than the court issuing the last reasoned decision, in the petition's heading represents "a defect of jurisdictional significance" that this Court "must" decide.[11] While it is beyond dispute that this Court has jurisdiction to review the last reasoned state court decision—that of the Alabama Court of Criminal Appeals—and issue a writ to that court, it does not follow that this Court is without *jurisdiction* to hear the case if certiorari was sought to the Alabama Supreme Court.

In fact, the plain language § 1257(a) confers upon this Court jurisdiction over "[f]inal judgments or decrees rendered by the highest court of a State in which a decision *could* be had . . . ."[12] The highest court in Alabama that *could* have issued a decision in Mr. Burton's case, and which issued a "judgment" declining to do so, was the Alabama Supreme Court.[13] The State's jurisdictional argument is without merit, and is an attempt to distract this Court from the important, cert-worthy, substantive issues raised in the petition.

[11] BIO at 13.
[12] 28 U.S.C. § 1257(a) (emphasis added).
[13] Pet. App. A.

RESPONSES REGARDING REASONS FOR GRANTING THE WRIT

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

A. *Harris v. Alabama*[14] cannot stand in light of *Hurst*.

The State first argues that, despite Florida and Delaware having recognized the invalidity of their substantively indistinguishable death sentencing schemes in light of *Hurst*, Mr. Burton's contention that Alabama's refusal to do so contravenes *Hurst* is "utterly meritless."[15] Emphasizing this Court's previous holding in *Harris*, which upheld Alabama's scheme, the State terms it "remarkabl[e]" that Mr. Burton did not address *Harris* in his initial petition.[16]

The State's reliance on *Harris* is misplaced, as it was issued decades before *Hurst*, and even well before *Ring* or *Apprendi*.[17] Based on Mr. Burton's arguments in his initial petition, Alabama's death penalty scheme is unconstitutional pursuant to this Court's analysis in *Hurst*, and the State's continued reliance on *Harris* is unavailing.

In *Harris*, this Court described Alabama's death penalty system as equivalent to Florida's in all relevant respects, even noting that the only main difference revolved around the fact that, in Florida, the judge at least was required to give "great weight" to the jury's recommendation, while in Alabama, the judge must only "consider" it.[18]

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[14] 513 U.S. 405 (1995).
[15] BIO at 13.
[16] *Id.* at 9.
[17] *Compare Harris*, 513 U.S. 405 (decided in 1995) *with Hurst*, 136 S. Ct. 616 (decided in 2016); *Ring*, 536 U.S. 584 (decided in 2002) and *Apprendi*, 530 U.S. 466 (decided in 2000).
[18] *Harris*, 513 U.S. at 508-9 (citations omitted).

This Court relied on the Alabama Court of Criminal Appeals' description of Alabama's system as derived from Florida's,[19] in which that court held that "the constitutionality of Alabama's statutory sentencing scheme was approved by the U.S. Supreme Court in *Proffitt v. Florida*, 428 U.S. 242, 252 . . . (1976), and the jury verdict override provisions were specifically found constitutional in *Spaziano v. Florida,* 468 U.S. 447, 457–67 . . . (1984)."[20] Neither of these cases had Alabama's system under review,[21] yet the ACCA recognized the equivalence between Alabama's system and Florida's.

The Alabama Supreme Court has agreed with this comparison: "Alabama's procedure permitting judicial override is almost identical to the scheme used in Florida."[22] The State of Alabama has also equated the two systems. In *Harris*, the State argued that "the Alabama statute is essentially the same as Florida's capital sentencing statute which has been found by this Court to be constitutional."[23] More recently, the State has reiterated this position: "States like Florida and Alabama responded to *Furman*[24] by creating hybrid systems under which the jury recommends an advisory sentence, but the judge makes the final sentencing decision."[25]

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[19] *Id.* at 508 (citing *Harris v. State*, 632 So. 2d 503, 538 (Ala. Crim. App. 1992)).
[20] 632 So. 2d at 538.
[21] *Proffitt* did not mention Alabama at all, much less the constitutionality of its death sentencing provisions. *Spaziano* referenced Alabama only in its discussion of the applicability of the holding in *Beck v. Alabama*, 447 U.S. 625 (1980), that capital juries must be permitted to consider lesser included offenses, where the facts would support them. 468 U.S. at 454-57. As to the death penalty scheme, the *Spaziano* opinion references Alabama's system as one of the three allowing override, *id.* at 463-64, but does not otherwise discuss that feature.
[22] *Ex parte Harrell*, 470 So. 2d 1309, 1317 (Ala. 1985).
[23] Br. of Resp't, 1994 WL 514669, at *13 n.5, *Harris v. Alabama*, 513 U.S. 504 (1995) (No. 93-7659).
[24] *Furman v. Georgia*, 408 U.S. 238 (1972).
[25] Br. of *Amici Curiae* Alabama and Montana in Support of Resp't at 4, *Hurst v. Florida*, No. 14-7505, 136 S. Ct. 616 (2016), 2015 WL 4747983. *See also id.* at 7 ("Three states – Delaware, Florida, and Alabama – allow a judge to impose a sentence regardless of a jury's recommendation. *See* Ala. Code § 13A-5-47; Fla. Stat. § 921.141; Del. Code tit. 11, § 4209(d).").

For the reasons outlined in his initial petition, this Court's description of the Florida system it invalidated in *Hurst* demonstrates that these comparisons are valid and render Alabama's system equally unconstitutional. Mr. Burton detailed *Hurst*'s incompatibility with Alabama's capital scheme, thus obviating the need for discussion of *Harris*, which cannot survive *Hurst*. Indeed, *Harris* relied upon *Spaziano*,[26] which this Court overruled in *Hurst*.[27]

The State also contends that Mr. Burton should not be entitled to relief because "Alabama has relied on *Harris* to sentence hundreds of murderers since 1995," and noting that "the State's settled expectations deserve [this Court's] respect." This argument is invalid on its face. This Court struck down an almost identical capital sentencing scheme in Florida, even though Florida had "relied on [prior precedent] to sentence" multiple persons convicted of murder for decades as well. Although settled expectations deserve respect, the Constitution deserves more.

B. This Court's prior declination of certiorari in similar cases is of no significance.

The State further intimates that this Court's prior declination of certiorari in cases challenging Alabama's capital sentencing scheme demonstrates its assent to the scheme's validity.[28] This is also incorrect. As Justice Jackson once pointedly articulated: "as stare decisis, denial of certiorari should be given no significance whatever. It creates no precedent and approves no statement of principle entitled to weight in any other case."[29]

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[26] *Harris*, 513 U.S. at 508.
[27] 136 S. Ct. at 623.
[28] BIO at 15.
[29] *Brown v. Allen*, 344 U.S. 443 (1953) (Jackson, J., concurring).

C. The State persists in its total misreading of *Hurst*, ignoring the plain language of this Court's commands.

Finally, continuing to promote its, and the Alabama Supreme Court's, total misreading of *Hurst*, the State argues that "*Hurst* did not add anything of substance to *Ring*,"[30] while relying on that Court's 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."[31] In doing so, both the State and the Alabama Supreme Court ignore this Court's clear rejection of Florida's attempt to salvage its advisory jury sentencing scheme, which this Court struck down 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.'"[32] The fact that Alabama's executive and judicial branches continue to ignore this Court's determination on the weighing process underscores that the time has come for this Court to grant certiorari and vindicate its holding.

D. The State misreads *Caldwell*, and ignores its applicability to Mr. Burton's case.

The State insists that Mr. Burton's case is not a proper vehicle for this Court to address the proper application of *Hurst*, because Mr. Burton's jury unanimously recommended a death sentence.[33] To the contrary, this fact makes Mr. Burton's case the ideal vehicle to address the full breadth of *Hurst*'s applicability. In promoting its argument, the State first incorrectly asserts that, even if Mr. Burton's reading of *Hurst*

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[30] BIO at 16.
[31] *Id.* (citing *Ex parte Bohannon*, 222 So. 3d 525, 532 (Ala. 2016)).
[32] *Hurst*, 136 S. Ct. at 621-22. (emphasis, brackets, and ellipsis in original) (citations omitted).
[33] BIO at 14.

is correct, he would not be entitled to relief.[34] This assertion is false because it ignores Mr. Burton's argument that, together, *Hurst* and *Caldwell* require that a jury make the ultimate determination regarding whether the aggravating factors outweigh the mitigating factors with the full awareness that its decision will bind the trial court.

The State classifies Mr. Burton's argument (previously advanced by Justice Sotomayor[35]) as "meritless," because "[a]t the time of [Mr.] Burton's trial, the jury's penalty-phase verdict was properly described as advisory."[36] Essentially, the State argues that *Caldwell* requires only that a jury be properly informed of the state of the law, and that it was properly informed in Mr. Burton's case, because Alabama law at that time rendered the jury's verdict merely advisory. This, however, is sleight-of-hand. Although Alabama's capital sentencing statute rendered the verdict advisory, as *Hurst* makes clear, the Constitution prohibits such an advisory scheme. Thus, at the time of Mr. Burton's trial, the jury may have been properly informed regarding Alabama's "law," *i.e.*, its statutory provisions, but it was not properly advised pursuant to the ultimate law of the land: the United States Constitution. Thus, the jury was, as forbidden by *Caldwell*, mislead "as to its role in the sentencing process in a way that allow[ed] the jury to feel less responsible than it should for the sentencing decision."[37]

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[34] *Id.*
[35] *Guardado v. Jones*, 138 S. Ct. 1131, 1132 (2018) (Sotomayor, J., dissenting from denial of cert.).
[36] *Id.* at 20.
[37] *Darden v. Wainwright*, 477 U.S. 168, 184 n.15 (1986) (describing *Caldwell*).

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

A. The fact that Delaware and Florida recognized the retroactive application of *Hurst* pursuant to both State and federal retroactivity principles does nothing to eliminate the existence of a split.

All of this, of course, leads to the issue of retroactivity. If *Hurst* is retroactive to Mr. Burton's case, then the jury was misled about its proper role under the United States Constitution. In an attempt to thwart Mr. Burton's arguments relating to both the retroactive application of *Hurst*, and the existence of a split amongst the highest courts of various states regarding retroactivity, the State asks this Court to ignore Delaware and Florida's determinations regarding *Hurst*'s retroactivity, because they relied on state retroactivity provisions.[38] This Court should reject that misleading approach. While Florida and Delaware *also* cited state law regarding retroactivity, both courts also found retroactivity (to varying degrees) pursuant to federal retroactivity principles.[39]

Additionally, the State insists that *Hurst* is not amenable to retroactive application because this Court found that *Ring* was not retroactive.[40] This, however, completely ignores the Delaware Supreme Court's analysis detailing the important differences between *Hurst* and *Ring*, and finding that *Hurst* should have full retroactive effect, even though *Ring* did not.[41] Mr. Burton detailed this fully in his initial petition,[42] and the State simply ignores this argument.

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[38] BIO at 25-26.
[39] *See Powell v. Delaware*, 153 A.3d 69, 71-76 (Del. 2016) (applying *Teague v. Lane*, 489 U.S. 288, 310 (1989)); *Mosley v. State*, 209 So. 3d 1248, 1274-76 (Fla. 2016) (applying principles of fundamental fairness, thus implicating the Fifth and Fourteenth Amendments).
[40] BIO at 24-25.
[41] *Powell*, 153 A.3d at 71-76.
[42] Pet. at 19-23.

B. Delaware and Florida's partial reliance on state law in recognizing *Hurst*'s general applicability does not obviate the existence of a split.

The State makes a similar straw-man argument regarding the conflict between state courts of last resort as to *Hurst*'s general applicability to those state's capital sentencing schemes, otherwise addressed in the prior section. Again, the State argues that "[t]here is no conflict for this Court to resolve," because the Florida and Delaware Supreme Courts invalidated their state's respective capital sentencing processes pursuant to state law.[43] Once again, this argument is unavailing. Although both Courts also referenced their own state law in invalidating their capital sentencing schemes, they also recognized that those schemes were unconstitutional under the United States Constitution as interpreted and applied in *Hurst*.[44] Thus, Alabama's continued refusal to recognize *Hurst*'s applicability to its own impermissible capital sentencing scheme represents a split for this Court to resolve. The fact that Delaware and Florida also relied in part on their own state laws does nothing to undermine the fact that they recognized *Hurst*'s applicability, while Alabama does not.

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

Factually, the State goes to great lengths to paint Mr. Burton as the "ringleader of the robbery,"[45] and "organizer and point man in the robbery,"[46] while carefully avoiding

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[43] BIO at 22-24.
[44] *Hurst v. State*, 202 So. 3d 40, 44, 53 (Fla. 2016); *Rauf v. State*, 145 A.3d 430, 433-34 (Del. 2016).
[45] BIO at 33.
[46] *Id.* at 32.

the fact that Mr. Burton was most certainly *not* the ringleader of the *murder*. As detailed in the petition, not only was Mr. Burton not the triggerman, but he also did not direct, or even witness, the shooting. Indeed, the same confusion regarding the specific intent required for capital murder infected the trial, with the jury being instructed that Mr. Burton could be found to have the requisite intent, so long as the jury found he had intended to participate in "the crime."[47]

The State also attempts to distinguish the litany of instances Mr. Burton cited in his petition wherein non-shooters have recently been spared from death sentences where the shooters have not been subject to capital sentences – arguing that those cases are in some ways dissimilar to Mr. Burton's. Two points render this argument unpersuasive. First, no two cases are ever exactly alike.[48] Second, any differences only highlight Mr. Burton's vastly lesser culpability than those in the comparison cases.

The State points out that Ivan Teleguz's death sentence was commuted by "a governor opposed to the death penalty,"[49] yet ignores the fact that Teleguz actually *hired*

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

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

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

[48] *See*, *e.g.*, *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007) (explaining that a "nearly identical fact pattern" is not required in order to apply a general legal principle or rule).

[49] BIO at 33.

the more culpable defendant to kill the victim.[50] However, the State avoids discussion of the numerous cases, each of which involved commutations of death sentences for people vastly more culpable than Mr. Burton, by governors who have expressed, and demonstrated, strong support for the death penalty, including governors Hutchinson, Kasich, Abbot, and even Governor Perry, who, as pointed out in Mr. Burton's petition, was so stridently in favor of the death penalty that he publicly opposed this Court's decisions that evolving standards of decency require that the death penalty not be imposed in cases where the convicted person was intellectually disabled or a juvenile at the time of the offense.[51] Nonetheless, even Governor Perry saw the injustice of putting a non-triggerman to death. And, in that case, the shooter even *had* been executed.[52]

Similarly, another strongly pro-death penalty executive, Governor Abbott, commuted the death sentence of Thomas Whitaker in large part because he was a non-shooter.[53] The State notes that, in that case, the surviving victim pleaded for the commutation.[54] However, the State ignores the fact that, unlike Mr. Burton, who neither directed nor even witnessed the shooting, Whitaker willfully conspired—solely for

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[50] Press Release, Office of the Governor, Governor McAuliffe Commutes Sentence of Ivan Teleguz to Life Imprisonment, (Apr. 20, 2017) (https://governor.virginia.gov/newsroom/newsarticle?articleId=20103).

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

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

[53] *See*: "Proclamation by the Governor of the State of Texas," Feb. 22, 2018 (Attached as Ex. E to the petition).

[54] BIO at 34.

financial gain—to kill his father, mother, and brother, even arranging to have the codefendant shoot him (Whitaker) in order to cover up his participation.[55]

The State also attempts to distinguish the cases by pointing out that, in some of them, there were pardon and parole board recommendations supporting the commutations. This, of course, ignores the fact that, in Alabama, there is no pardon and parole board that reviews death sentences. Thus, there could be no such recommendation in Mr. Burton's case. Additionally, this only serves to highlight the fact that even more decision makers, charged with considering such cases, are recognizing the inherent injustice of putting non-shooters to death where the more culpable co-defendant is not subject to the same fate.

Finally, the State asserts that Mr. Burton is entitled to no relief because of this Court's holding in *Tison v. Arizona,*[56] which it criticizes Mr. Burton of "barely pay[ing] lip service to."[57] But this completely fails to recognize the very nature of *evolving* standards of decency. By the State's reasoning, this Court would have been precluded from finding people with intellectual disabilities ineligible for the death penalty in *Atkins v. Virginia.*[58] After all, it had previously found the practice acceptable in *Penry v. Lynaugh*.[59] Likewise, this Court would have been precluded from finding juvenile offenders ineligible for capital sentences, because it had previously approved the practice in *Stanford v. Kentucky*.[60] Yet, recognizing the evolving manner in which society viewed

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[55] *See* Meagan Flynn, *Texas governor spares inmate from execution after a father's pleas*, WASH. POST, Feb. 23, 2018. (https://www.washingtonpost.com/news/morning-mix/wp/2018/02/23/a-fathers-pleas-leads-texas-governor-to-spare-inmate-from-execution/?).
[56] 481 U.S. 137 (1987).
[57] BIO at 32.
[58] 536 U.S. 304 (2002).
[59] 492 U.S. 302 (1989).
[60] 492 U.S. 361 (1989).

the death penalty as applied to those situations, this Court, after 13 years of evolving sensibilities, abrogated *Penry*[61] and, after 16 years, overruled *Stanford*.[62]

It has been nearly 30 years since *Tison* was decided. With even vehemently pro-death penalty state executives like Governors Perry and Abbot recognizing the indecency and injustice of executing non-shooters (even far more culpable non-shooters) particularly when the triggermen are not subject to the death penalty, it is clear that standards of decency have evolved to such an extent that such capital sentences are now unconscionable.[63]

Finally, the State also notes that the reason the triggerman, DeBruce, is no longer subject to the death penalty was due to his counsel's ineffectiveness at sentencing and, thus, not due to the circumstances of the crime itself.[64] This, however, is beside the point. As described in the petition and herein, the circumstances of the crime itself amply

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[61] *Atkins*, 536 U.S. 313-20.

[62] *Roper v. Simmons*, 543 U.S. 551, 568-69 (2005).

[63] The State also notes that the ACCA found that this claim was not jurisdictional and "failed to meet either exception to successive petitions" under Alabama law. BIO at 31. The two exceptions are: 1) jurisdictional claims; and 2) claims where there is "good cause … why the new ground [was] not known or could not have been ascertained through reasonable diligence when the first petition was heard," and "failure to entertain [the claim] will result in a miscarriage of justice." Ala. R. Crim. App. 32.2(b) (1), (2). The ACCA did erroneously find that this was not a jurisdictional claim. Pet. App. B at 17-18 (ignoring prior precedent recognizing that a claim that a sentence is excessive represents "a jurisdictional claim." *See Jones v. State*, 724 So. 2d 75, 76 (Ala. Crim. App. 1998)). However the court did not even address Mr. Burton's argument that he also met the second exception. As described in the petition, this was an attempt by the ACCA to avoid this claim by merely quoting and crediting, without analysis, the circuit court's untenable assertion that Mr. "Burton raised this claim on direct appeal." *See* Pet. App. B at 8. This cannot be so. On direct appeal, Mr. Burton raised only a general disproportionality claim. The claim raised below and preserved for review by this Court, however, is that it is manifestly unjust for Mr. Burton, as a non-shooter, to be executed while the vastly more culpable shooter is no longer under a sentence of death. This claim could not possibly have been ascertained through reasonable diligence, nor did it even exist, during the pendency of Mr. Burton's direct appeal, because the more culpable triggerman had not been resentenced at that time.

[64] BIO at 29-31, 34 & n.8.

demonstrate Mr. Burton's vastly lesser culpability in the crime. Second, although the State insists it still believes death would be appropriate in DeBruce's case, and only acceded to resentencing him to save judicial and governmental resources, the State nonetheless, in so doing, acceded to something it directly admitted would result in an "arguably unjust" situation.[65]

CONCLUSION

Nothing in the State's brief in opposition undermines the important constitutional questions presented in the petition, nor alters the existence of the significant split between the highest courts of Alabama, Delaware and Florida regarding the application of *Hurst* to their capital sentencing schemes, and *Hurst*'s retroactive application. For the foregoing reasons, and those outlined in the original petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[65] State of Alabama's Pet. for Cert. at 24, *Dunn. v. DeBruce*, 125 S. Ct. 2854 (2015) (No. 14-807).