

No. \_\_\_\_\_

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**In The  
Supreme Court of the United States**

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CHARLES L. BURTON, JR.,

*Petitioner,*

v.

JOHN Q. HAMM, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS,

*Respondent.*

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**APPLICATION TO PROCEED *IN FORMA PAUPERIS***

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On Petition for a Writ of Certiorari to the United  
States Court of Appeals for the Eleventh Circuit

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**CAPITAL CASE**

**Execution scheduled during the time frame beginning at 12:00 a.m. on  
Thursday, March 12, 2026, and expiring at 6:00 a.m. on Friday, March 13, 2026  
Central Time**

MATT SCHULZ

SUPREME COURT BAR # 306494

*Counsel of Record*

DONNA VENABLE

FEDERAL DEFENDERS FOR THE  
MIDDLE DISTRICT OF ALABAMA

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February 27, 2026

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Petitioner Charles L. Burton, Jr., an indigent Alabama prisoner, respectfully requests this Court grant him leave to proceed *in forma pauperis*, without prepayment of costs or fees.

In support, Mr. Burton states:

1. He is in custody on death row at Holman Correctional Facility; and,
2. He was granted leave to proceed *in forma pauperis* in the courts below and was represented by appointed counsel below. A copy of the district court's order granting this leave is attached to this motion.

For the reasons set forth above, Mr. Burton respectfully requests this Court grant him *in forma pauperis* status.

Respectfully submitted,  
/s/ Matt Schulz  
Matt Schulz  
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**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ALABAMA  
EASTERN DIVISION**

**CHARLES L. BURTON, JR.,** )  
)  
**Petitioner,** )  
)  
**vs.** )  
)  
**DONAL CAMPBELL,** )  
**Commissioner, Alabama Dept.** )  
**Of Corrections,** )  
)  
**Respondent.** )

**Case No. 4:05-cv-308-CLS-PWG**

**ORDER**

Petitioner Charles L. Burton, Jr., a convicted state prisoner under sentence of death, has filed a Notice of Appeal from the denial of his petition for writ of habeas corpus filed under 28 U.S.C. § 2254, and denial of his motion to alter or amend the judgment. In connection with that appeal, Burton filed an Application for Certificate of Appealability (“COA”) on April 30, 2010, pursuant to 28 U.S.C. § 2253 and Federal Rule of Appellate Procedure 22. (doc. no. 37). Burton also requests to proceed on appeal *in forma pauperis*. (Doc. nos. 38 and 40). Pursuant to F.R.App.P. 24(a)(1) and (2) this Court finds that he is entitled to proceed *in forma pauperis*.

As amended in April of 1996, 28 U.S.C. § 2253(c)(1)(A) requires a “circuit justice or judge” to issue a certificate of appealability in order to allow an appeal to

be taken from a final order denying relief in a habeas corpus proceeding where the challenged detention “arises out of process issued by a State court.” But a certificate of appealability may only issue where the petitioner “has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). In addition, in the case of a petition with multiple claims for relief, “the certificate of appealability . . . shall indicate which specific issue or issues satisfy the showing required by [§ 2253(c)(2)].” 28 U.S.C. § 2253(c)(3) (bracketed alteration added). Petitioner requests a certificate of appealability with regard to eight issues:

(1) Improper jury instructions, combined with the prosecutor’s misleading statements, misled and failed to properly inform the jury that it was required to find, beyond a reasonable doubt, that Mr. Burton actually possessed a particularized intent to kill, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. (Doc. no. 9 at 35-38 and Doc. no. 21 at 76-78).<sup>1</sup>

(2) The trial court violated Mr. Burton’s rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments when it did not give an accomplice corroboration instruction. (Doc. no. 9 at 30-32).<sup>2</sup>

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<sup>1</sup> Document number 9 is the amended petition and document number 21 is Burton’s reply brief. Further, this is not but one, two issues pertaining to intent to kill: trial error as to jury instruction and improper prosecutorial argument. Moreover, the issues were averred and argued as separate claims in the amended habeas petition. Burton’s citation only encompasses trial error, which was discussed in the Memorandum Opinion as Claim IV(I). (*See* Doc. no. 32 at 115-127).

To the extent the court has been able to dissect petitioner’s COA argument (*see* doc. no. 37 at 12-17), and determine separate claims of improper prosecutorial argument that were actually raised in the habeas petition, the court’s discussion of those claims in the Memorandum Opinion may be found in Claims IV(D)(4) and (6). (*Id.* at 78-85). *Cf.* (Doc. no. 9 at 20-22 (amended petition)).

<sup>2</sup> Claim VI.(G)in the Memorandum Opinion. (*See* Doc. no. 32 at 108-115).

(3) The trial court interfered with, and irreparably harmed, defense counsel's mitigation strategy when it forced Mr. Burton's counsel to call two co-defendants as witnesses during the penalty phase, thus depriving Mr. Burton of effective assistance of counsel, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. (Doc. no. 9 at 47 and Doc. no. 21 at 116).<sup>3</sup>

(4) Reasonable jurists could debate whether trial counsel provided ineffective assistance of counsel by failing to object when the court interfered with, and irreparably harmed, defense counsel's mitigation strategy by forcing Mr. Burton's counsel to call two co-defendants as witnesses during the penalty phase, in violation of the Sixth, Eighth and Fourteenth Amendments. (Doc. no. 9 at 108-109).<sup>4</sup>

(5) Mr. Burton received ineffective assistance of counsel, when trial counsel failed to review and utilize critical, available impeachment evidence, in violation of the Sixth and Fourteenth Amendments. (Doc. no. 9 at 63, 123 and Doc. no. 21 at 28-57).<sup>5</sup>

(6) Trial counsel were ineffective by failing to present powerful, available mitigating evidence during the penalty phase of Mr. Burton's trial, in violation of the Sixth and Fourteenth Amendments. (Doc. no. 9 at 87 and Doc. no. 21 34-40, 43-49).<sup>6</sup>

(7) The trial court violated Mr. Burton's constitutional rights under the Fifth, Sixth, Eighth and Fourteenth Amendments when it

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<sup>3</sup> Claim IV(N) in the Memorandum Opinion. (See Doc. no. 32 at 160-171).

<sup>4</sup> Claim V(P) in the Memorandum Opinion. (See Doc. no. 32 at 273-276).

<sup>5</sup> Claims VII in the Memorandum Opinion. (See Doc. no. 32 at 297-307 (page numbers include this court's 2254(d) denial of the *Brady* claim (Claim VI) associated with the same videotape)).

<sup>6</sup> Claim V(E) in the Memorandum Opinion. (See Doc. no. 32 at 245-254).

refused to find any statutory and non-statutory mitigating circumstances. (Doc. no. 9 at 13-16).<sup>7</sup>

(8) The prosecutor used his peremptory challenges in a discriminatory manner to exclude African-Americans from the jury, in violation Mr. Burton's constitutional rights under the Fifth, Sixth, Eighth and Fourteenth Amendments. (Doc. no. 9 at 5-11 and Doc. no. 21 at 59).<sup>8</sup>

(Doc. no. 37 at 1-2).

With the standard enunciated by § 2253(c)(2) in mind, a certificate of appealability is GRANTED IN PART and DENIED IN PART as follows.

A certificate of appealability is GRANTED as to issues 3 (trial court interference) and 4 (ineffective assistance of counsel for failing to object to trial court interference) because petitioner has made a substantial showing of the denial of constitutional rights in connection with the claims. The factual allegations underlying the claims are the same. At issue is whether the decision to call witnesses at trial is ultimately a fundamental right of the defendant, or reserved for counsel as an inalienable strategic matter. Legal determinations made as to the nature and application(s) of the foregoing question by this court have resolved the analytical interplay between the standards that are applied to the constitutional claims (*i.e.*, court

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<sup>7</sup> Claim IV(C) in the Memorandum Opinion. (*See* Doc. no. 32 at 57- 66).

<sup>8</sup> Claim IV(A) in the Memorandum Opinion. (*See* Doc. no. 32 at 32-49).

interference and ineffectiveness). However, reasonable jurists might find this court's decisions debatable since there is a dearth of Supreme Court precedent with regard to this narrow issue.

A certificate of appealability is DENIED as to the remaining issues in Burton's application because petitioner has not made a substantial showing of the denial of constitutional rights in connection with those claims.

The court finds that only issue 5 (Claim VII in the § 2254 petition) merits additional discussion. The crux of that claim is an allegation that trial counsel failed to examine and utilize co-defendant LuJuan McCants's videotaped statement at trial for the purpose of impeaching McCants's testimony with alleged, prior-inconsistent statements.<sup>9</sup> In his application, Burton speculates that this court may have rejected the claim in part because he "failed to provide actual evidence of the videotaped statement," and thus failed to meet his burden to prove by clear and convincing evidence that the state court made an unreasonable determination of the facts in light of the evidence before it. *Id.* at 29-30. He argues that it was the respondent's responsibility to provide the videotape to the court, and that he believed the tape had

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<sup>9</sup> As set out in note 5 *supra.*, this claim was dealt with in conjunction with Burton's *Brady* claim. The state court rejected Burton's contention that the State failed to notify and allow counsel to view the McCants videotape prior to trial. The court credited the testimony of the state's witness who testified that he had proffered the tape to defense counsel for viewing. (*See* Rule 32 C.R. Vol. 25, Tab.59 at 79-81). Burton cannot show the state court's adjudication of that claim is an affront to 28 U.S.C. § 2254(d)(1) and (2).

been provided because the State's record identified the videotape as an exhibit. *Id.* at 30.

This court did find that Burton failed to show the state appellate court's determination that McCants's videotaped statement was "wholly inconsistent" with McCants's trial testimony was not an unreasonable determination of the facts in light of the evidence before it. (Doc. no. 32 at 306) (quoting *Burton v. State*, CR-00-2472, slip. op. (Ala. Crim. App. 2004) (in turn quoting Burton's appellate brief); *see also*, Rule 32 C.R. Vol. 25, Tab.59 at 16-18, 24-26)). The videotape was not made a part of the habeas record. However, in his habeas pleadings Burton did not rely on the videotape itself as proof of its content. Instead, he relied upon the testimony given by his trial counsel during a post-conviction evidentiary hearing concerning the content of the videotape — and his trial counsel's testimony has never been affirmatively disputed by the State. (*See* Rule 32 R. Vol. 14, Tab. 47 at 69-98).

In fact, and although he argues otherwise, Burton is still relying on trial counsel's testimony as support for his application for certificate of appealability,<sup>10</sup> because a review of the videotape itself actually shows more accurate, but even fewer facts favorable to Burton's position<sup>11</sup> than those testified to by trial counsel at the

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<sup>10</sup> Doc. no. 37 at 31, n. 15.

<sup>11</sup> This court takes judicial notice of the McCants videotape, which has been made a part of the habeas record in *DeBruce v. Campbell*, No. 1:04-cv-2669-IPJ-JEO as document number 24.

Rule 32 hearing. Regardless, the state court's rejection of the claim is neither contrary to, or an unreasonable application of, clearly established federal law nor is it an unreasonable determination of the facts in light of the evidence before the state court. As previously stated, a petitioner is entitled to a Certificate of appealability ("COS") only upon a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Moreover,

a COA should issue only if the petitioner shows "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 478, 120 S.Ct. 1595, 1601, 146 L. Ed.

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*United States v. Glover*, 179 F.3d 1300, 1302 n. 5 (11th Cir. 1999) ("A court may take judicial notice of its own records and the records of inferior courts.").

Petitioner claims that McCants repeatedly that Burton told the group not to "hurt anyone, unless it was necessary." This is untrue. Contrary to Burton's assertion, in the videotape McCants does not mention this statement or a derivative thereof once, much less repeatedly. McCants only answers 'no' twice when asked if Burton told the group to shoot someone if they did not cooperate. The videotape also does not demonstrate that Burton was genuinely upset over the shooting. Instead, it shows that McCants stated to Burton that he (McCants) did not know why DeBruce shot the victim, to which Burton responded, "I don't know why he shot the boy either," and there would be no more discussion about it since "what's happened, happened."

As a matter of notation, the comments about hurting someone if necessary did come from another co-defendant, Deon Long. A transcript of Long's statement is in the habeas record in Burton's case. (Rule 32 C.R. Vol. 17 at 216-260). In it, Long asserts that Burton did repeatedly instruct the group not to hurt anyone, unless they had to. *Id.* at 222-24, 237. However, if someone had to be hurt, Derrick DeBruce would be the member responsible for doing so. *Id.* In the AutoZone store, it was Derrick DeBruce who told customers not to move or he would shoot them. *Id.* at 243. After the robbery, Charles Burton and Derrick DeBruce split the largest cut (\$900 of the \$1700) taken from the robbery, telling the others that they (Burton and DeBruce) deserved the biggest part of money because they were in charge and played bigger parts in the robbery. *Id.* at 254-55.

2d 542 (2000). “[B]oth showings [must] be made before the court of appeals may entertain the appeal.” *Id.* at 485, 120 S. Ct. at 1604.

*Lawrence v. Florida*, 421 F.3d 1221, 1225 (11th Cir. 2005).

Applying the foregoing standards and recognizing the severity of the sentence imposed in this matter, the undersigned declines to issue a certificate of appealability as to issue 5.

For the foregoing reasons, a certificate of appealability (doc. no. 37) is due to be, and hereby is, **GRANTED** as to issues 3 and 4, and **DENIED** as to the remaining issues.

Petitioner is **ADVISED** that he may file a request for certificate of appealability directly with the Court of Appeals for the Eleventh Circuit.

DONE and ORDERED this 26th day of April, 2011.

  
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United States District Judge