No. _____

IN THE SUPREME COURT OF THE UNITED STATES

GARY WAYNE SUTTON,

Petitioner

v.

STATE OF TENNESSEE,

Respondent

On Petition for Writ of Certiorari
To The Tennessee Supreme Court

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

In *Hurst v. Florida*, 136 S. Ct. 616 (2016), this Court held that the Sixth Amendment mandates that every fact or determination necessary to support a death sentence must be made by a jury. In Mr. Sutton's case, the trial court instructed the jury that Mr. Sutton had prior violent felony convictions that would support a statutory aggravating circumstance. This was the sole aggravating circumstance in the case. Based on the trial court's instruction, the jury found it applicable and imposed death. Sutton timely sought relief under *Hurst*, arguing the trial court, not the jury, found the key parts of the aggravating circumstance. The state court denied relief, characterizing the trial court's determination as a permissible legal finding.

These facts give rise to this question: May a State restrict the Sixth Amendment's application to only part of an aggravating circumstance?

TABLE OF CONTENTS

INDEX OF APPENDIX CONTENTS:

TABLE OF AUTHORITIES

Cases

Statutes and Rules

Constitutional Provisions

PETITION FOR A WRIT OF CERTIORARI

Petitioner Gary Wayne Sutton respectfully petitions this Court for a writ of certiorari to review the opinion of the Tennessee Supreme Court.

OPINIONS BELOW

On January 6, 2017, Sutton moved to reopen his post-conviction proceedings based upon *Hurst v. Florida*, 136 S. Ct. 616 (2016). The motion alleged that the trial court violated Mr. Sutton's Sixth Amendment rights when it instructed the jury that the prior violent felony aggravator existed.

On June 12, 2017, the trial court denied the motion to reopen. (Appendix A).

Sutton timely sought permission to appeal to the Tennessee Court of Criminal Appeals pursuant to Tennessee Supreme Court Rule 28, § 10(B). On September 13, 2017, the intermediate court denied the appeal. (Appendix B). On January 18, 2018, the Tennessee Supreme Court denied review. (Appendix C). This Court granted an extension of time within which to file a petition for writ of certiorari on April 5, 2018. This petition is timely filed.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257.

RELEVANT CONSTITUTIONAL PROVISIONS

The Fourteenth Amendment to the United States Constitution provides in pertinent part, "... nor shall any State deprive any person of life, liberty, or property, without due process of law."

The Sixth Amendment to the United States Constitution provides, in relevant part, "In all criminal prosecutions, the accused shall enjoy the right to ... have the assistance of counsel for his defense."

STATEMENT OF THE CASE

Mr. Sutton pleaded not guilty to a one-count indictment charging first degree murder and proceeded to a jury trial. After conviction, his case moved to the sentencing phase. The single aggravating circumstance was that he had prior felony convictions that involved violent conduct.

The trial court instructed the jury:

> Tennessee law provides that no sentence of death shall be imposed by a jury but upon a unanimous finding that the state has proven beyond a reasonable doubt the existence of one (1) or more aggravating circumstances, which shall be limited to the following:
>
> The defendant *was previously convicted of one (1) or more felonies, other than the present charge, the statutory elements of which involve the use of violence to the person.* As to the defendant Gary Wayne Sutton the State is relying on the crimes of aggravated assault in Cobb County Georgia and first degree murder in Sevier County Tennessee *which are felonies involving the use or threat or violence to the person.*

(Sutton Trial Tech. Rec. Vol. 2 p. 245) (emphasis added).

The jury did not consider the conduct underlying the convictions. *Id.* Instead, pursuant to the trial judge's instructions, the jury returned a verdict finding the prior violent felony aggravating circumstance and imposed death.

On direct appeal, the Tennessee Court of Criminal Appeals and the Tennessee Supreme Court affirmed Mr. Sutton's conviction and sentence. *State v. Sutton*, No. E1997-00196-CCA-R3-DD, 2001 WL 220186 (Tenn. Crim. App. Mar. 7,

2001); *State v. Dellinger*, 79 S.W.3d 458 (Tenn. 2002), *cert. denied*, 537 U.S. 1090 (2002).

Pursuant to Tennessee Code Annotated § 40-30-101 *et seq.*, Mr. Sutton filed a Pro Se Petition for Post-Conviction Relief on March 3, 2003 (PC Tech. Rec. Vol. 1, pp. 1-15), and thereafter amended his petition with the assistance of appointed counsel on June 2, 2003 (PC Tech. Rec. Vol. 1, pp. 26-40) and March 31, 2004 (PC Tech. Rec. Vol. 1, pp. 55-56). After holding an evidentiary hearing, the trial court denied relief on September 1, 2004. (PC Tech. Rec. Vol. 1, pp. 103-13). The Court of Criminal Appeals affirmed the judgment of the post-conviction trial court. *Sutton v. State*, No. E2004-02305-CCA-R3-PD, 2006 WL 1472542 (Tenn. Crim. App. May 30, 2006).

The federal courts denied habeas corpus relief. *Sutton v. Bell*, 683 F. Supp. 2d 640 (E.D. Tenn. 2010); *Sutton v. Bell*, No. 3:06-cv-388, 2011 WL 1225891 (E.D. Tenn. 2011); *Sutton v. Carpenter*, 617 Fed. Appx. 434 (6th Cir. 2015), *cert. denied*, No. 15-918, 136 S. Ct. 1494 (Mar. 28, 2016).

On January 12, 2016, the United States Supreme Court issued its opinion in *Hurst v. Florida,* holding that every finding necessary to support imposition of a death sentence must be made by a jury..

On January 6, 2017, Mr. Sutton filed a motion to reopen his petition for post-conviction relief, alleging his death sentence is unconstitutional because the trial court instructed the jury that the prior violent felony conviction aggravating circumstance existed in Mr. Sutton's case.

On June 12, 2017, the trial court entered an order denying the motion to reopen. (Appx. 1-17). The court concluded "the trial court's determination that Mr. Sutton's prior offenses involved the use or threat of violence to the person was a legal determination which did not violate Petitioner's rights under the Sixth Amendment or *Hurst.*" (Appx. 14).

On September 13, 2017, the Tennessee Court of Criminal Appeals denied permission to appeal. (Appx. 18-21). The intermediate court affirmed the reasoning that the determination of whether prior convictions were for violent offenses was a legal determination that was permissible for the judge, not the jury, to make. (Appx 20-21).

The Tennessee Supreme Court denied review on January 18, 2018. (Appx. Appx. 22).

REASONS FOR GRANTING WRIT

I. The Sixth Amendment cannot apply partially to an aggravating circumstance.

A. The Holding in *Hurst v. Florida.*

On January 12, 2016, the United States Supreme Court issued its opinion in *Hurst v. Florida*, 136 S. Ct. 616 (2016), holding that any determination which authorizes the imposition of the death penalty must be made by a jury. Justice Sotomayor began *Hurst* by recalling the fundamental precept of the Sixth Amendment: "any fact that 'expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict' is an 'element' that must be submitted to a jury." 136 S. Ct. at 621 (quoting *Apprendi v. New Jersey,* 530 U.S. 466, 494

(2000)). This Court explained that in all criminal prosecutions, the Sixth Amendment guarantees the right to an "impartial jury." *Id.* (quoting U.S Const. amend. XI) (internal quotation marks omitted). The Court further explained, "This right, in conjunction with the Due Process Clause, requires that each element of a crime be proved to a jury beyond a reasonable doubt." *Id.* (citing *Alleyne v. United States*, 570 U.S. ___, 133 S. Ct. 2151, 2156 (2013)). Any finding that subjects the defendant to a greater punishment than what is permitted by the jury's guilty verdict alone must be submitted to the jury. *Id.*

In light of these principles, this Court found Florida's death penalty statute unconstitutional. Under the now defunct Florida statute, the jury rendered a verdict, Fla. Stat. § 921.141(2), but the death penalty could not be imposed until the trial court, "after weighing the aggravating and mitigating circumstances," determines death was the appropriate sentence. *Hurst*, 136 S. Ct. at 620 (quoting Fla. Stat. § 921.141(3)) (internal quotation marks omitted). This Court held that placing the decision as to whether mitigating circumstances are outweighed by aggravating circumstances in the hands of the judge violates the Sixth Amendment requirement that the jury make the "necessary factual finding[s]" to support imposition of the death sentence. *Hurst*, 136 S. Ct. at 622.

This Court recognized that it was reversing a line of its own precedent:

> We now expressly overrule *Spaziano* and *Hildwin* in relevant part.
>
> *Spaziano* and *Hildwin* summarized earlier precedent to conclude that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made

> by the jury." *Hildwin,* 490 U.S. [638, 640-41 (1989)]. Their conclusion was wrong, and irreconcilable with *Apprendi*.
>
> ...
>
> Time and subsequent cases have washed away the logic of Spaziano and Hildwin. The decisions are overruled to the extent they allow a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is necessary for imposition of the death penalty.

Hurst, 136 S. Ct. at 623-24 (emphasis added).

This Court rejected the State of Florida's argument that the jury necessarily found the aggravating circumstance and thus the Constitution was satisfied. This Court explained, "[t]he State fails to appreciate the central and singular role the judge plays under Florida law." *Hurst,* 136 S. Ct. at 622. Where the "trial court *alone*" made findings regarding the determinations necessary to impose death, the trial court invaded the jury's province. *Id.* (emphasis in original).

If a feature or characteristic of the offense or of the defendant boosts the possible punishment, that feature or characteristic is an "element" that must be found by the jury. It falls within the ambit of the Sixth Amendment and must be found by a jury beyond a reasonable doubt. *Hurst,* 136 S. Ct. at 621.

In *Ring v. Arizona*, the Supreme Court held that if an aggravating circumstance renders a defendant subject to the death penalty, it is the "'functional equivalent of an element of a greater offense' ... [and] the Sixth Amendment requires that [it] be found by a jury." 536 U.S. 584, 609 (2002) (quoting *Apprendi,* 530 U.S. at 494, n. 12). While *Ring* extended the Sixth Amendment to the finding of aggravating circumstances, it acknowledged the use of "hybrid" capital sentencing schemes in which a jury renders a verdict but the judge makes the findings

necessary to impose the ultimate sentence. *Ring*, 536 U.S. 608 n.6.

Hurst makes clear that a hybrid sentencing system, where the judge makes certain determinations necessary to impose the death penalty and the jury makes other necessary determinations, is unconstitutional. *Hurst* recognized the error of logic in holding that the Sixth Amendment applies to some findings that increase the punishment but not to other sentence-enhancing findings. *Hurst* recognized there is no rational way to conclude that the Sixth Amendment applies to certain findings but not others. The Sixth Amendment cannot partially apply to an aggravating circumstance.

In Sutton's case, the state court fragmented the protections afforded by the Sixth Amendment when it held that the trial judge could determine the prior convictions were based on violent conduct.[1]

When the trial court instructed the jury the prior convictions involved violence, the judge made a determination that the aggravating factor existed. This determination exposed Sutton to a greater punishment than that authorized by a guilty verdict and violated Sutton's Fifth, Sixth, Eighth, and Fourteenth Amendment rights under the United States Constitution, and his rights under Article I, §§ 8, 9, 16 and 17, and Article XI, § 16 of the Tennessee Constitution. *Hurst, supra.*

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[1]The rule of *Almendarez-Torres v. United States,* 523 U.S. 224 (1998), which held that the fact of a prior conviction may be made by a judge is not implicated here because the finding the judge made here was that the conduct supporting the offenses involved the use or threat of violence. That finding is qualitatively different from the finding of the fact of a conviction.

As *Hurst* makes clear, the Constitution requires that all findings necessary to support imposition of the death penalty must be made by the jury. *Hurst*'s holding could not be more clear: prior case law "[is] overruled to the extent they allow a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is necessary for imposition of the death penalty" *Hurst,* 136 S. Ct. at 624. Under the plain language of *Hurst,* the trial court violated Mr. Sutton's Constitutional rights when it instructed the jury his prior convictions qualified as violent felonies.

The state court's conclusion that the trial court made a legal finding does not accurately reflect the statute Mr. Sutton was sentenced under. The statute in place at the time of Mr. Sutton's crime provides that if the *jury* determined the State had proved *beyond a reasonable doubt* an aggravating circumstance and that it outweighed the mitigating evidence *beyond a reasonable doubt*, the sentence "shall be death." Tenn. Code Ann. § 39-13-204(g)(1)(A)(B) (1992) (emphasis added). The legislature included the finding that the prior convictions are for crimes of violence to be made by the jury. Further, the jury is to make this finding beyond a reasonable doubt. *Id.* "[A] standard of proof represents an attempt to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." *In re Winship*, 397 U.S. 358, 370 (1970) (Harlan, J., concurring); *see also Addington v. Texas*, 441 U.S. 418, 423 (1979). Although the lower courts dismissed the *Hurst* claim by characterizing the trial court's actions merely as a legal determination,

Tennessee's death penalty statute in effect, as well as Tennessee controlling law, make it clear the trial court made fact findings necessary to support the aggravating circumstance.

By couching the judge's finding as a permissible legal finding, the lower courts failed to "appreciate the central and singular role the judge play[ed]." *Hurst*, 136 S. Ct. at 622. Once the trial court instructed the jury the prior convictions were for violent felonies, there was nothing else for the jury to find. Just as in *Hurst,* the trial court alone impermissibly found the aggravating circumstance existed. *Id.* The judge did not instruct the jury on the meaning of the word "violence," which would have been necessary for the jury to determine whether the aggravating circumstance existed.

Further, in *Hurst,* the Supreme Court explained that any determination that "'expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict' is an 'element' that must be submitted to a jury." *Hurst*, 136 S. Ct. at 621 (quoting *Apprendi,* 530 U.S. at 494). Here, the determination that Mr. Sutton had prior violent felony convictions exposed him to a greater punishment than that authorized by the jury's finding of guilt. Thus, the determination should have been made by the jury.

Describing a finding as a "legal" determination does not shield it from the Sixth Amendment. As Justice Scalia reasoned in his concurrence in *Ring,* "[A]ll facts essential to imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the offense, sentencing factors,

or Mary Jane—must be found by the jury beyond a reasonable doubt." *Ring,* 536 U.S. at 610 (Scalia, J., concurring).

Sutton's death sentence is based on judicial findings in violation of the Sixth Amendment. Relief is warranted.

B. *Hurst* applies retroactively.

The *Hurst* rule makes all necessary facts—including the fact that aggravation outweighs mitigation—"essential to the death penalty" and thus findings that must be made by a jury. *Schriro v. Summerlin*, 542 U.S. 348, 354 (2004). This rule does more than change procedures; it holds that these facts are elements which must be found by a jury, and it therefore prevents a court from imposing a sentence in excess of that authorized by a jury's findings. This is a substantive holding. *See id.* ("A decision that modifies the elements of an offense is normally substantive rather than procedural."). As a substantive change in the law which puts matters outside the scope of the State's power, *Hurst* should apply retroactively.

In *Summerlin*, the Court held that *"this Court's making a certain fact essential to the death penalty ... would be substantive."* 542 U.S. at 354 (emphasis in original). Explaining that the rule in *Ring v. Arizona* was procedural (and not retroactive) the Court reasoned that, because the State had already made statutory aggravators elements for federal constitutional purposes, the *Ring* rule did not modify elements of an offense; it simply affirmed the allocation of decision-making

authority to the jury.[2] *Id.* The *Hurst* rule, on the other hand, newly includes the fact that "there are insufficient mitigating circumstances to outweigh the aggravating circumstances" among the predicates for imposing the death penalty. *Hurst*, 136 S. Ct. at 621-22 (quoting Fla. Stat. 921.141(3)) (internal quotation marks omitted). This portion of *Hurst* adds a consideration (or element) that must be determined by the jury. *See, e.g.*, *Krieger v. United States*, 842 F.3d 490, 499-500 (7th Cir. 2016) (holding that *Burrage v. United States*, 571 U.S. 204, 134 S. Ct. 881 (2014), announced a new substantive rule that is not principally about who decides a question but rather what must be proved).

The *Hurst* rule newly defines the facts that increase a sentence to include the death penalty as *all* facts necessary to impose a death sentence. Accordingly, all such facts are elements that then must be found by a jury beyond a reasonable doubt. Because it primarily directs what must be found, the *Hurst* rule is substantive. *See Summerlin*, 542 U.S. at 354.

The principal nature of the *Hurst* rule is illustrated by the Florida Supreme Court's decision on remand where it found that the procedural jury-sentencing rule follows the primary Sixth Amendment determination of what constitutes elements. *Hurst v. State*, 202 So. 3d 40, 53 (Fla. 2016). The state supreme court explicitly rejected the State's argument that *Hurst v. Florida* "only requires that the jury

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[2] *Ring* held that, under *Apprendi*, a defendant is entitled to a jury determination of aggravating factors. *Ring*, 536 U.S. at 608.

unanimously find the existence of one aggravating factor and nothing more." *Hurst*, 202 So. 3d at 53 n.7. The Court explained:

> *Hurst v. Florida* made clear that the jury must find "each fact necessary to impose a sentence of death," 136 S.Ct. at 619, "any fact that expose[s] the defendant to a greater punishment," *id.* at 621, "the facts necessary to sentence a defendant to death," *id.*, "the facts behind" the punishment, *id.*, and "the *critical findings* necessary to impose the death penalty," *id.* at 622 (emphasis added).

Id. Because Florida law required a finding that aggravating circumstances were sufficient for a death sentence and that they outweighed mitigating circumstances before a death sentence could be imposed, those determinations were elements within the Sixth Amendment's scope. *Id.*

Also following *Hurst*, the Delaware Supreme Court found its State's death penalty statute, where the judge made independent findings and weighed aggravating and mitigating circumstances, unconstitutional. *Rauf v. State*, 145 A.3d 430, 433-34 (Del. 2016). In *Rauf*, the state court overruled its prior decision, issued following *Ring v. Arizona*, that the same statutory scheme was constitutional. *Id.* at 486 (Holland, J., concurring) (noting overruling of *Brice v. State*, 815 A.2d 314 (Del. 2003)).

Delaware's now-defunct capital punishment statute, Del. Code Ann. tit. 11, § 4209, provided that upon a conviction of first-degree murder, the jury unanimously determined, beyond a reasonable doubt, the presence of an aggravating circumstance. *Rauf*, 145 A.3d at 433-34; *id.* at 457 (Strine, C.J., concurring). Once it did so, however, the trial judge made additional factual findings authorizing a death sentence. *Id.* The statute provided that "the Court ... shall impose a sentence of

death if the Court finds by a preponderance of the evidence ... that the aggravating circumstances found by the Court to exist outweigh the mitigating circumstances found by the Court to exist." *Id.* at 433 fn.3 (quoting Del. Code Ann. tit. 11, § 4209(d)(1) (internal quotation marks omitted). The Delaware Supreme Court concluded that this determination was essential to the sentence and therefore must be made by the jury beyond a reasonable doubt. *Id.* at 434; *see also id.* at 485, 486-87 (Holland, J., concurring) ("[T]he weighing determination in Delaware's statutory sentencing scheme is a factual finding necessary to impose a death sentence."). Justice Holland's concurring opinion explained the broader rule in *Hurst*:

> Although the United States Supreme Court holding in *Hurst* only specifically invalidated a judicial determination of aggravating circumstances, it also stated unequivocally that the jury trial right recognized in *Ring* now applies to *all* factual findings *necessary* to impose a death sentence under a state statute.

Rauf, 145 A.3d at 487.

Hurst dramatically changed capital sentencing law by including essential, Constitutional safeguards which promote fundamental fairness and accuracy in capital sentencing.

Hurst's unequivocal statement that the Sixth Amendment right to a jury applies specifically to capital sentencing represents a sweeping and dramatic change in the law. The *Hurst* rule, by mandating a jury finding of all facts necessary to impose the death penalty, "alter[ed] our understanding of the bedrock procedural elements essential to the fairness of a [capital sentencing] proceeding." *See Whorton v. Bockting*, 549 U.S. 406, 421 (2007) (quoting *Sawyer v. Smith*, 497 U.S. 227, 242

(1990)) (internal quotation marks omitted). Indeed, the Court's earlier decision in *Ring v. Arizona* "ha[d] nothing to do with jury sentencing." 536 U.S. at 612 (Scalia, J., concurring). The decision in *Hurst* rendered a fundamental change in death penalty jurisprudence.

Applying jury trial rights to capital sentencing necessarily increased fairness and reliability. "[T]rial by jury in criminal cases is fundamental to the American scheme of justice[.]" *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968) (holding the Sixth Amendment right to trial by jury is guaranteed by the Fourteenth Amendment to defendants tried in state courts). As initially conceived regarding a determination of guilt, a critical function of a jury is to protect against arbitrary rule by unanimously confirming every accusation leveled against a defendant. *Id.* at 151-52. A jury is "necessary to protect against unfounded criminal charges ... and against judges too responsive to the voice of higher authority." *Id.* at 156. A jury functions, also, to afford the same protections with respect to legal penalties.[3] *Apprendi*, 530 U.S. at 482-85. But, before *Hurst* was decided, all facts essential to imposition of the death penalty—including the ultimate life-or-death decision—were not considered elements deserving of Sixth Amendment jury trial rights. The determination that a jury must decide all necessary facts in capital cases,

[3] The Court in *Summerlin*, 542 U.S. at 355-58, indicated that the requirement that juries and not judges find aggravating factors is not predicated upon a superior accuracy of jury fact-finding, but is a result of the command of the Sixth Amendment. The reasons for such a command, as explored in *Duncan v. Louisiana*, *supra*, reveals that the judgment of a collective of peers as opposed to a single jurist is viewed as more independent of outside influences, if not more "accurate."

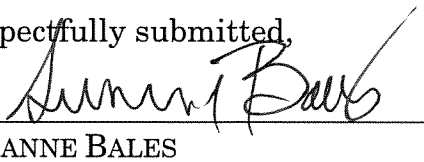
implicates fundamental fairness and accuracy of capital proceedings by acting as a buffer against arbitrary rule and improper influences. "If the right to a jury means anything, it means the right to have a jury drawn from the community and acting as a proxy for its diverse views and mores, rather than one judge, make the awful decision whether the defendant should live or die." *Rauf,* 145 A.3d at 436 (Strine, J., concurring).

The jury trial right includes the reasonable doubt standard which also promotes reliability. "[T]he reasonable-doubt standard is indispensable, for it 'impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue.'" *Hankerson v. North Carolina*, 432 U.S. 233, 241 (1977) (quoting *In re Winship*, 397 U.S. at 364). The reasonable doubt standard "overcome[s] an aspect of the criminal trial that substantially impairs its truth-finding function," and increases the accuracy of verdicts. *Ivan V. v. City of New York*, 407 U.S. 203, 204 (1972) (quoting *Williams v. United States*, 401 U.S. 646, 653 (1971)). The *Hurst* rule announced that all necessary findings are essential elements of the death penalty which require jury findings beyond a reasonable doubt and, therefore, the rule "reduce[s]" the "margin of error" in sentencing a defendant to death. *In re Winship*, 397 U.S. at 364 (internal citation and quotation marks omitted).

CONCLUSION

The state court ran afoul of the Sixth Amendment when it held that the aggravating circumstance was a legal conclusion that a judge could make. There is no such thing as a partial element. The aggravating circumstance was an element of the offense that should have been found by a jury. For the foregoing reasons, petitioner requests that this Court grant the petition for certiorari.

Respectfully submitted,



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