IN THE CRIMINAL COURT FOR BLOUNT COUNTY, TENNESSEE
AT MARYVILLE

FILED
JUN 12 2017
TOM HATCHER
CIRCUIT COURT CLERK

GARY W. SUTTON, **Petitioner**	))	
v.	))	**No. C-14433** **(CAPITAL CASE)**
	)	**(POST-CONVICTION)**
STATE OF TENNESSEE, **Respondent.**	))	**(MOTION TO REOPEN)**

ORDER DENYING "MOTION TO REOPEN POST-CONVICTION PETITION"

I. Introduction

This matter is before this Court on Petitioner's January 6, 2017, motion to reopen his petition for post-conviction relief. Petitioner, Gary W. Sutton, with the assistance of counsel, has filed this motion to reopen pursuant to Tenn. Code Ann. § 40-30-117(a)(1) claiming he is entitled to relief based upon a new rule of law as announced in *Hurst v. Florida*, 136 S. Ct. 616 (2016). The State filed a response on January 30, 2017, asking for summary dismissal of Petitioner's motion to reopen, and Petitioner filed a reply on February 13, 2017. After reviewing the pleadings and the relevant authorities and for the reasons stated within this order, Petitioner's Motion To Reopen filed on January 6, 2017, is hereby DENIED.

II. Procedural History

Trial

In September 1996, a Blount County Jury convicted Petitioner of first degree murder in connection with the February 1992 death of Tommy Mayford Griffin. The jury found the following aggravating circumstance in sentencing Petitioner to death for the murder:

> *(1)* The defendant was previously convicted of one (1) or more felonies, other than the present charge, whose statutory elements involve the use of violence to the person.

See Tenn. Code Ann. § 39-13-204(i)(2) (1991 and 1996 Supp.).

On appeal, the Tennessee Supreme Court affirmed both his convictions and sentence. *State v. Dellinger*, 79 S.W.3d 458 (Tenn.), *cert. denied*, 537 U.S. 1090 (2002).

Post-Conviction

Petitioner subsequently filed a timely petition for post-conviction relief on March 3, 2003, which was subsequently amended on June 2, 2003, and March 31, 2004. After a hearing, the post-conviction court denied the petition by order on September 1, 2004. The Court of Criminal Appeals affirmed the judgment of the post-conviction court, and the Tennessee Supreme Court denied Mr. Sutton's application for permission to appeal. *See Gary W. Sutton v. State*, 2006 WL 1472542 (Tenn. Crim. App. May 30, 2006), *perm. app. denied*, (Tenn. Oct. 2, 2006).

On June 14, 2016, Petitioner filed a Motion to reopen his post-conviction proceedings based upon *Johnson v. United States*, 135 S. Ct. 2551 (2015). On

September 21, 2016, this Court denied Petitioner's motion, and he filed a Rule 28 application for appeal with the Tennessee Court of Criminal Appeals which was denied. *Gary W. Sutton v. State*, Order E2016-02112-CCA-R28-PD (Tenn. Crim. App. at Knoxville, Jan. 23, 2017), *perm. app. denied*, (Tenn. May 18, 2017).

Federal Habeas Corpus Proceedings

Mr. Sutton unsuccessfully sought federal habeas corpus relief in the United States District Court for the Eastern Division of Tennessee. *Gary W. Sutton v. Ricky Bell*, 683 F. Supp. 2d 640 (E.D. Tenn. 2010); and *Gary W. Sutton v. Ricky Bell*, 2011 WL 1225891 (E.D. Tenn. Mar. 30, 2011). The United States Court of Appeals for the Sixth Circuit affirmed the denial of habeas relief. *Sutton v. Carpenter*, 617 Fed. Appx. 434 (6th Cir. 2015), *cert. denied*, 136 S. Ct. 1494 (2016).

III. Motion To Reopen: Applicable Law

The statutes governing motions to reopen were summarized in *Harris v. State*, 102 S.W.3d 587, 590-91 (Tenn. 2003).

> Under the provisions of the Post-Conviction Procedure Act, a petitioner "must petition for post-conviction relief ... within one (1) year of the final action of the highest state appellate court to which an appeal is taken ... ." Tenn. Code Ann. § 40-30-202(a). Moreover, the Act "contemplates the filing of only one (1) petition for post-conviction relief." Tenn. Code Ann. § 40-30-202(c). After a post-conviction proceeding has been completed and relief has been denied, ... a petitioner may move to reopen only "under the limited circumstances set out in 40-30-217." *Id.* These limited circumstances include the following:
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> > (1) The claim in the motion is based upon a final ruling of an appellate court establishing a constitutional right that was not recognized as existing at the time of trial, if retrospective application of that right is required. Such motion must be filed within one (1) year of the ruling of the highest state appellate court or the United States Supreme Court

establishing a constitutional right that was not recognized as existing at the time of trial; or

(2) The claim in the motion is based upon new scientific evidence establishing that the petitioner is actually innocent of the offense or offenses for which the petitioner was convicted; or

(3) The claim in the motion seeks relief from a sentence that was enhanced because of a previous conviction and such conviction in the case in which the claim is asserted was not a guilty plea with an agreed sentence, and the previous conviction has subsequently been held to be invalid, in which case the motion must be filed within one (1) year of the finality of the ruling holding the previous conviction to be invalid; and

(4) It appears that the facts underlying the claim, if true, would establish by clear and convincing evidence that the petitioner is entitled to have the conviction set aside or the sentence reduced.

(Citing Tenn. Code Ann. § 40-30-217(a)(1)-(4))(now Tenn. Code Ann. § 40-30-117(a)(1)-(4)). The statute further states:

> The statute of limitations shall not be tolled for any reason, including any tolling or saving provision otherwise available at law or equity. Time is of the essence of the right to file a petition for post-conviction relief or motion to reopen established by this chapter, and the one-year limitations period is an element of the right to file the action and is a condition upon its exercise. Except as specifically provided in subsections (b) and (c) [of section 102], the right to file a petition for post-conviction relief or a motion to reopen under this chapter shall be extinguished upon the expiration of the limitations period. Tenn. Code Ann. § 40-30-102(a).

The post-conviction statutes further provide

> a new rule of constitutional criminal law is announced if the result is not dictated by precedent existing at the time the petitioner's conviction became final and application of the rule was susceptible to debate among reasonable minds. A new rule of constitutional criminal law shall not be applied retroactively in a post-conviction proceeding unless the new rule places primary, private individual conduct beyond the power of the criminal law-making authority to proscribe or requires the observance of fairness safeguards that are implicit in the concept of ordered liberty.

Tenn. Code Ann. § 40-30-122. Furthermore, the United States Supreme Court's opinion in *Montgomery v. Louisiana*, 577 U.S. ___, 136 S. Ct. 718, 729 (2016), provides that "when a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule."

A motion to reopen "*shall be denied* unless the factual allegations, if true, meet the requirements of [Tenn. Code Ann. § 40-30-117](a)." Tenn. Code Ann. § 40-30-117(b) (emphasis added).

Here, the *Hurst* opinion was issued on January 12, 2016, and Petitioner filed his motion to reopen on January 6, 2017. Therefore, Petitioner's motion is timely filed.

IV. *Hurst* Claims

Petitioner argues *Hurst v. Florida*, 136 S. Ct. 616 (2016), announced a new constitutional right not recognized at the time of trial and asserts retroactive application of the right is required. Petitioner claims the "new constitutional rule" announced in *Hurst* applies to his case based upon the following:

> (1) the trial court's instructing the jury that the prior convictions upon which the State justified the (i)(2) statutory aggravating circumstance involved the use or threat of violence to the person; and
>
> (2) the trial court's serving as thirteenth juror.

Relevant Case Law

In *Hurst v. Florida*, the United States Supreme Court held Florida's capital sentencing scheme violated *Ring v. Arizona*, 536 U.S. 584 (2002). Under the Florida law addressed in *Hurst*, a jury rendered an advisory verdict on capital sentencing, but the trial judge made the ultimate factual determinations necessary to sentence a defendant to death. *Hurst*, 136 S. Ct. at 621-22. The *Hurst* Court held this procedure was invalid because it did "not require the jury to make the critical findings necessary to impose the death penalty" in violation of the Sixth Amendment. *Id.* at 622.

In *Hurst*, the Supreme Court held as follows:

> The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ." 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. *Alleyne v. United States*, 570 U.S. ——, ——, 133 S. Ct. 2151, 2156, 186 L.Ed.2d 314 (2013). In *Apprendi v. New Jersey*, 530 U.S. 466, 494, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000), this Court held that 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. In the years since *Apprendi*, we have applied its rule to instances involving plea bargains, *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L.Ed.2d 403 (2004), sentencing guidelines, *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L.Ed.2d 621 (2005), criminal fines, *Southern Union Co. v. United States*, 567 U.S. ——, 132 S. Ct. 2344, 183 L.Ed.2d 318 (2012), mandatory minimums, *Alleyne*, 570 U.S., at ——, 133 S. Ct., at 2166 and, in *Ring*, 536 U.S. 584, 122 S. Ct. 2428, 153 L.Ed.2d 556, capital punishment.
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> In *Ring*, we concluded that Arizona's capital sentencing scheme violated *Apprendi*'s rule because the State allowed a judge to find the facts necessary to sentence a defendant to death. An Arizona jury had convicted Timothy Ring of felony murder. 536 U.S., at 591, 122 S. Ct. 2428. Under state law, "Ring could not be sentenced to death, the statutory maximum penalty for first-degree murder, unless further findings were made." *Id.*, at 592, 122 S. Ct. 2428. Specifically, a judge could sentence Ring to death only after independently finding at least one aggravating circumstance. *Id.*, at 592–593, 122 S. Ct. 2428. Ring's judge followed this procedure, found an aggravating circumstance, and sentenced Ring to death.
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> The Court had little difficulty concluding that "'the required finding of an aggravated circumstance exposed Ring to a greater punishment than that authorized by the jury's guilty verdict.'" *Id.*, at 604, 122 S. Ct. 2428 (quoting *Apprendi*, 530 U.S., at 494, 120 S. Ct. 2348; alterations omitted). Had Ring's judge not engaged in any factfinding, Ring would have received a life sentence. *Ring*, 536 U.S., at 597, 122 S. Ct. 2428. Ring's death sentence therefore violated his right to have a jury find the facts behind his punishment.
>
> The analysis the *Ring* Court applied to Arizona's sentencing scheme applies equally to Florida's. Like Arizona at the time of *Ring*, Florida does not require the jury to make the critical findings necessary to impose the death penalty. Rather, Florida requires a judge to find these facts. Fla. Stat. § 921.141(3). Although Florida incorporates an advisory jury verdict that Arizona lacked, we have previously made clear that this distinction is immaterial: "It is true that in Florida the jury recommends a sentence, but it does not make specific factual findings with regard to the

existence of mitigating or aggravating circumstances and its recommendation is not binding on the trial judge. A Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona." *Walton v. Arizona,* 497 U.S. 639, 648, 110 S. Ct. 3047, 111 L.Ed.2d 511 (1990); accord, *State v. Steele,* 921 So. 2d 538, 546 (Fla. 2005) ("[T]he trial court alone must make detailed findings about the existence and weight of aggravating circumstances; it has no jury findings on which to rely").

> As with Timothy Ring, the maximum punishment Timothy Hurst could have received without any judge-made findings was life in prison without parole. As with Ring, a judge increased Hurst's authorized punishment based on her own factfinding. In light of *Ring,* we hold that Hurst's sentence violates the Sixth Amendment.

136 S. Ct. at 621-22.

Does Hurst Require Retroactive Application?

Initially, this Court must consider whether *Hurst* announced a new rule of constitutional law which should be applied retroactively.

> A "case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government [or] ... if the result was not dictated by precedent existing at the time the defendant's conviction became final." *Teague v. Lane*, 489 U.S. 288, 301 (1989) (citations omitted); see also *Van Tran v. State*, 66 S.W.3d 790, 810–11 (Tenn. 2001). Courts addressing whether *Apprendi* sets forth a new rule have held that, in *Apprendi*, "the Supreme Court announced a new constitutional rule of criminal procedure by holding that 'other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to the jury, and proved beyond a reasonable doubt.'" *In re Clemmons*, 259 F.3d 489, 491 (6th Cir. 2001) (quoting *Apprendi*, 530 U.S. at 491); *see also United States v. Sanders*, 247 F.3d 139, 147 (4th Cir. 2001) (holding that "*Apprendi* is certainly a new rule of criminal procedure"); *United States v. Moss*, 252 F.3d 993, 997 (8th Cir. 2001)(holding that "*Apprendi* is obviously a 'new rule'"). Because *Apprendi* sets forth a new constitutional rule of criminal procedure, the fundamental question becomes whether *Apprendi* applies retroactively to the petitioner's case.
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> New rules of constitutional criminal procedure are generally not applied retroactively on collateral review. *Teague*, 489 U.S. at 310. However, this general rule is subject to two exceptions. *Id.* "First, a new rule should be applied retroactively if it places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.'" *Id.* at 307. Second, a new rule should be applied retroactively if it is a "watershed rule of criminal procedure, ... which

> implicates both the accuracy and fundamental fairness of criminal proceedings." *Moss*, 252 F.3d at 998 (citing *Teague*, 489 U.S. at 312). Clearly, the first exception is not applicable to the petitioner's claim, because the rule set forth in *Apprendi* "did not decriminalize any class of conduct or prohibit a certain category of punishment for a class of defendants." *McCoy v. United States*, 266 F.3d 1245, 1256 (11th Cir. 2001). Furthermore, the great weight of authority holds that *Apprendi* is not the type of watershed rule of criminal procedure that qualifies for retroactive application under the second exception. *Dukes v. United States*, 255 F.3d 912, 913 (8th Cir. 2001) (holding that "*Apprendi* presents a new rule of constitutional law that is not of 'watershed' magnitude and, consequently, petitioners may not raise *Apprendi* claims on collateral review"); *Sanders*, 247 F.3d at 151 (holding that "the new rule announced in *Apprendi* does not rise to the level of a watershed rule of criminal procedure which 'alters our understanding of the bedrock elements essential to the fairness of a proceeding'"); *McCoy*, 266 F.3d at 1257 (agreeing with the other circuits that "*Apprendi* is not sufficiently fundamental to fall within *Teague*'s second exception"). Accordingly, we conclude that the new constitutional rule of criminal procedure announced in *Apprendi* does not apply retroactively on collateral review.

William Steve Greenup v. State, No. W2001–01764–CCA–R3–PC, 2002 WL 31246136 (Tenn. Crim. App., at Jackson, Oct. 2, 2002); *see also Jerry A. Bell v. State,* 2013 WL 9570548 (Tenn. Crim. App. September 4, 2013)(quoting *Greenup).*

In *Cauthern v. State*, 145 S.W.3d 571 (Tenn. Crim. App.), *perm. app. denied*, (Tenn. 2004), a petitioner collaterally attacked the harmless error analysis undertaken on his direct appeal from his 1995 resentencing trial. On his direct appeal, the Tennessee Supreme Court had found the instruction given on one of the aggravating circumstances in 1995 to have been the wrong instruction. The court, however, had gone further and found the error was harmless. On collateral review, petitioner Cauthern argued the harmless error finding improperly substituted the court's judgment for the judgment of a correctly-charged jury and thus violated *Ring*. The Court of Criminal Appeals, however, found neither *Apprendi* nor *Ring* provided the petitioner any relief on his post-conviction claims, and the Tennessee Supreme Court denied permission to appeal that decision.

This Court has carefully considered Petitioner's claim and finds the *Hurst* Court simply applied its previous holdings in *Apprendi* and *Ring* to Florida's capital-sentencing scheme. Thus, the Court did not announce a new rule of constitutional law, nor did it expand its holdings in *Apprendi* and *Ring*; therefore, Mr. Sutton is not entitled to reopen his post-conviction proceedings based on *Hurst.*

In addition, Petitioner has raised claims based upon *Apprendi* more than once before. Accordingly, the issues raised here have either been previously determined and/or waived.

Although this Court does not find that *Hurst* presents a claim under Tennessee law which should be applied retroactively on collateral review, this Court will address the substance of the claim as well.

Trial Court's Actions Regarding (i)(2) Aggravating Circumstance

Petitioner first argues when the trial court instructed the jury that certain offenses constituted offenses involving the use or threat of violence to the person it impermissibly constituted a "finding" of the (i)(2) aggravating circumstance and, therefore, rendered his death sentence unconstitutional.

The Tennessee Supreme Court examined the same issue in *State v. Cole*, 155 S.W.3d 885 (Tenn. 2005), pre-*Hurst*. The appellate court examined the relevant case law as follows:

> The defendant's death sentence is based upon aggravating circumstance (i)(2), which applies when "[t]he defendant was previously convicted of one (1) or more felonies, other than the present charge, whose statutory elements involve the use of violence to the person." Tenn. Code Ann. § 39–13–204(i)(2) (1999)....
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> The defendant maintains that by instructing the jury that the statutory

elements of these felonies involve the use of violence to the person, the trial court violated the Fifth and Sixth Amendments to the United States Constitution. Relying upon *Apprendi v. New Jersey,* 530 U.S. 466, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000) and *Ring v. Arizona,* 536 U.S. 584, 122 S. Ct. 2428, 153 L.Ed.2d 556 (2002), the defendant maintains that when the prosecution is relying upon the (i)(2) aggravating circumstance to support imposition of the death penalty, the United States Constitution mandates that the jury, not the judge, determine whether "the statutory elements" of the prior felony conviction "involve the use of violence to the person." The defendant concedes that the trial court followed the procedure enunciated by this Court in *State v. Sims,* 45 S.W.3d 1 (Tenn. 2001), and applied in more recent decisions of this Court. Nonetheless, the defendant maintains that the *Sims* procedure is not constitutionally sound in light of the United States Supreme Court decisions in *Apprendi* and *Ring.* The State, in contrast, maintains that the trial court's jury instruction and the procedure enunciated by this Court in *Sims* do not violate *Apprendi* and *Ring.*

. . .

We begin our analysis with *Sims,* in which this Court considered how trial courts should proceed when the prior felony convictions upon which the prosecution relies to establish the (i)(2) aggravating circumstance include alternative statutory elements that do not necessarily involve the use of violence to the person. In *Sims,* after carefully considering the language of the aggravating circumstance as well as the procedure utilized by the trial court, this Court held that in determining whether the statutory elements of a prior felony conviction involve the use of violence against the person, "the trial judge must necessarily examine the facts underlying the prior felony...." 45 S.W.3d at 11–12. We explained that

> [t]o hold otherwise would yield an absurd result, the particular facts of this case being an ideal example. A plain reading of the statute indicates that the legislature intended to allow juries to consider a defendant's prior violent crimes in reaching a decision during the sentencing phase of a first degree murder trial. The underlying facts of Sims's prior felony convictions involve his shooting two people sitting in a car. To hold that these prior convictions do not involve use of violence against a person would be an absurd result contrary to the objectives of the criminal code. We cannot adhere to a result so clearly opposing legislative intent.

Id. at 12.

This Court has since reaffirmed the procedure developed in *Sims.* For example, in *State v. McKinney,* 74 S.W.3d 291, 305 (Tenn. 2002), we pointed out that, the "critical issue" for purposes of the (i)(2) aggravating circumstance is "whether the statutory elements of [the prior felony] involve the use of violence to the person *by definition.*" (Emphasis

added.) We reiterated that *Sims* provided the "appropriate analytical framework" for resolving this important issue. *Id.* at 306. In rejecting the defendant's challenge to the sufficiency of the evidence and in concluding that McKinney's prior conviction for aggravated robbery had been premised upon statutory elements that involve the use of violence to the person, this Court stated:

> Here, the defendant testified during sentencing that he did not participate in the aggravated robbery that served as the basis of the aggravating circumstance. The defendant admitted, however, that his co-defendant was armed with a weapon and that he waited in the getaway car while the co-defendant carried out the robbery. Moreover, as the State observes, the defendant pled guilty to an indictment alleging that he and his co-defendant "violently by the use of a deadly weapon" robbed the victim. This Court has frequently held that the entry of an informed and counseled guilty plea constitutes an admission of all of the facts and elements necessary to sustain a conviction and a waiver of any non-jurisdictional defects or constitutional irregularities.

Id. at 306 (citations omitted). The following summary of the *Sims* procedure from *State v. Powers*, 101 S.W.3d 383, 400–01 (Tenn. 2003), also provides guidance on the issue presented in this appeal:

> In *Sims*, the State introduced evidence of two prior convictions for aggravated assault to establish the prior violent felony circumstance. We recognized that the statutory elements of aggravated assault do not necessarily involve the use of violence. Accordingly, we approved a procedure in which the trial judge, outside the presence of the jury, *considers the underlying facts of the prior assaults to determine whether the elements of those offenses involved the use of violence to the person. If the trial court determines that the statutory elements of the prior offense involved the use of violence, the State may introduce evidence that the defendant had previously been convicted of the prior offenses. The trial court then would instruct the jury that those convictions involved the use of violence to the person.*

Id. at 400–01 (emphasis added).

Having summarized *Sims* and its progeny, we turn to *Apprendi* and *Ring*. In *Apprendi*, the defendant had been convicted of second-degree unlawful possession of a firearm, an offense carrying a maximum penalty of ten years imprisonment. 530 U.S. at 469–70, 120 S. Ct. 2348. On the prosecutor's motion, the sentencing judge found by a preponderance of the evidence that the crime had been committed "'with a purpose to intimidate ... because of race, color, gender, handicap, religion, sexual

orientation or ethnicity.'" *Id.* at 468–69, 120 S. Ct. 2348 (quoting N.J. Stat. Ann. § 2C:44–3(e) (West Supp. 1999–2000)). This judicial finding of racial motivation had the effect of doubling from ten years to twenty years the maximum sentence to which Apprendi was exposed. *Id.* at 469, 120 S. Ct. 2348. The judge sentenced Apprendi to twelve years in prison, two years more than the maximum that would have applied but for the judicial finding of racial motivation. Apprendi challenged the constitutionality of his sentence, arguing that under the Due Process Clause of the Fourteenth Amendment and the notice and jury trial guarantees of the Sixth Amendment, he was entitled to have a jury determine on the basis of proof beyond a reasonable doubt whether his crime had been racially motivated. *Id.* at 471–72, 120 S. Ct. 2348.

The United States Supreme Court concluded that Apprendi's constitutional challenge had merit. After commenting that its answer to the question presented had been "foreshadowed by [its] opinion in *Jones v. United States,* 526 U.S. 227, 119 S. Ct. 1215, 143 L.Ed.2d 311 (1999)," the Court in *Apprendi* held, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490, 120 S. Ct. 2348. Applying this rule, the Court struck down the challenged New Jersey procedure as "an unacceptable departure from the jury tradition that is an indispensable part of our criminal justice system." *Id.* at 497, 120 S. Ct. 2348.

Two years later, in *Ring,* the Court applied *Apprendi* to the Arizona capital sentencing statutes. 536 U.S. at 588–89, 122 S. Ct. 2428. The narrow question presented in *Ring* was "whether [an] aggravating factor may be found by the judge, as Arizona law specifies, or whether the Sixth Amendment's jury trial guarantee, made applicable to the States by the Fourteenth Amendment, requires that the aggravating factor determination be entrusted to the jury." *Id.* at 597. The Court emphasized the limited nature of the issue presented, noting that of the thirty-eight states with capital punishment, twenty-nine, including Tennessee, "commit sentencing decisions to juries." *Id.* at 608 n. 6, 122 S. Ct. 2428. Overruling its prior decision in *Walton v. Arizona,* 497 U.S. 639, 110 S. Ct. 3047, 111 L.Ed.2d 511 (1990), the Court in *Ring* held that, because Arizona's enumerated aggravating factors operate as "'the functional equivalent of [ ] element[s] of a greater offense,' " the Sixth Amendment requires that they be found by a jury, rather than by a judge. *Id.* at 609, 122 S. Ct. 2428 (quoting *Apprendi,* 530 U.S. at 494 n. 19, 120 S. Ct. 2348); *see Holton,* 126 S.W.3d at 863 (discussing the decision in *Ring*). Explaining its holding, the Court stated:

> The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the *factfinding* necessary to increase a defendant's sentence by two years, but not the *factfinding* necessary to put him to death. We hold that the Sixth Amendment applies to both.

536 U.S. at 609, 122 S. Ct. 2428 (emphasis added). Thus, the holdings of *Apprendi* and *Ring* were succinctly described by the following language from *Ring:* "If a State makes an increase in a defendant's authorized punishment contingent on the *finding of a fact,* that *fact*—no matter how the State labels it—must be found by a jury beyond a reasonable doubt." *Ring,* 536 U.S. at 602, 122 S. Ct. 2428 (emphasis added).

More recently, in *Blakely v. Washington,* 542 U.S. 296, [301], 124 S. Ct. 2531, 2536, 159 L.Ed.2d 403 (2004), the United States Supreme Court "appl[ied] the rule [ ] expressed in *Apprendi.*" The petitioner in *Blakely* had been:

> sentenced to more than three years above the 53–month statutory maximum of the standard range because he had acted with "deliberate cruelty." The facts supporting that finding were neither admitted by petitioner nor found by a jury. The State [of Washington] nevertheless contends that there was no *Apprendi* violation because the relevant "statutory maximum" is not 53 months, but the 10–year maximum for class B felonies in [Wash. Rev.Code Ann.] § 9A.20.021(1)(b). It observes that no exceptional sentence may exceed that limit. *See* [Wash. Rev. Code Ann.] § 9.94A.420. Our precedents make clear, however, that the "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. See Ring, supra,* at 602, 122 S. Ct. 2428 (" 'the maximum he would receive if punished according to the facts reflected in the jury verdict alone' " (quoting *Apprendi, supra,* at 483, 120 S. Ct. 2348)); *Harris v. United States,* 536 U.S. 545, 563, 122 S. Ct. 2406, 153 L.Ed.2d 524 (2002) (plurality opinion) (same); *cf. Apprendi, supra,* at 488, 120 S. Ct. 2348 (facts admitted by the defendant). In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment," [1 J.] Bishop, [Criminal Procedure] § 87, at 55, and the judge exceeds his proper authority.

Id. at [303-04], 124 S. Ct. at 2537.

Clearly, *Apprendi* and its progeny preclude judges from finding "additional facts," *id.,* that increase a defendant's sentence beyond the "statutory maximum," *id.,* which is defined as the maximum sentence a judge may impose "*solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" *Id.* Equally as clear is that *Apprendi* and its progeny do not limit a judge's authority to make *legal* determinations that precede a jury's fact-finding and imposition of sentence.

Cole, 155 S.W.3d at 899-903. Applying this case law to Mr. Cole's stated issue, the Court concluded,

> The *Sims* procedure involves a legal determination, and as such this procedure does not transgress the dictates of *Apprendi* and its progeny. The (i)(2) aggravating circumstance requires only that the *statutory elements* of the prior felony involve the use of violence to the person. The *Sims* procedure authorizes trial judges merely to examine the facts, record, and evidence *underlying* the prior conviction to ascertain which "statutory elements" served as the basis of the prior felony conviction. This is a legal determination that neither requires nor allows trial judges to make factual findings as to whether the prior conviction involved violence. This legal determination is analogous to the preliminary questions trial judges often are called upon to decide when determining the admissibility of evidence. *See* Tenn. R. Evid. 104.
>
> Furthermore, by making this legal determination, the trial court neither inflicts punishment nor usurps or infringes upon the jury's role as fact-finder. Once the trial court determines as a matter of law that the statutory elements of the prior convictions involve the use of violence, the jury must then determine as matters of fact whether the prosecution has proven the (i)(2) aggravating circumstance beyond a reasonable doubt and whether aggravating circumstances outweigh mitigating circumstances beyond a reasonable doubt. The jury alone must decide these factual questions, and these are the factual questions that determine whether the maximum sentence of death will be imposed. Additionally, the facts underlying prior convictions are themselves facts that either were found by a jury's verdict of guilt or facts that were admitted by a plea of guilty. Permitting the trial judge to examine such facts merely to determine which of the *statutory elements* formed the basis of the prior conviction does not violate *Apprendi* and its progeny.

*Id.*at 904.

After carefully considering the record, the issue raised and the applicable law, this Court finds 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.* Therefore, Mr. Sutton is not entitled to the relief sought on this issue.

Thirteenth Juror

Petitioner also argues when the trial court ruled as thirteenth juror in this case it violated his rights under the Sixth Amendment, because the trial court's service as thirteenth juror was a "required" finding necessary "in order to elevate the maximum sentence for first-degree murder from life in prison to death," therefore rendering his death sentence unconstitutional.

The Tennessee Supreme Court has summarized the thirteenth juror rule as follows:

> Tennessee Rule of Criminal Procedure 33(d) provides that a "trial court may grant a new trial following a verdict of guilty if it disagrees with the jury about the weight of the evidence." This procedural rule has been described as "the modern equivalent to the 'thirteenth juror rule,' whereby the trial court must weigh the evidence and grant a new trial if the evidence preponderates against the weight of the verdict." *State v. Blanton*, 926 S.W.2d 953, 958 (Tenn.Crim.App.1996). The rationale behind the thirteenth juror rule is that "[i]mmediately after the trial, the trial court judge is in the same position as the jury to evaluate the credibility of witnesses and assess the weight of the evidence, based upon the live trial proceedings." *State v. Moats*, 906 S.W.2d 431, 434 (Tenn.1995). Although trial judges have a "mandatory duty to serve as the thirteenth juror in every criminal case," a judge is not required to provide a specific statement on the record to indicate his or her approval of the jury's verdict. *State v. Carter*, 896 S.W.2d 119, 122 (Tenn.1995).

State v. Hall, 461 S.W.3d 469, 490 (Tenn.), *cert.* denied, 136 S. Ct. 479 (2015).

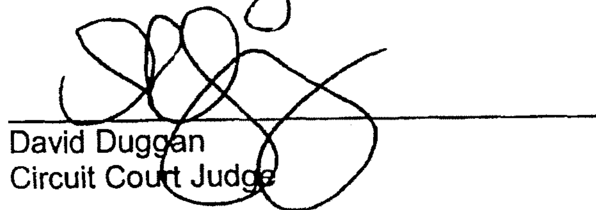
Although a trial court's service as thirteenth juror is mandatory, the trial court's assessment of the weight and credibility of the evidence relative to the jury's findings of fact and sentence imposed does not constitute a factual finding beyond a reasonable doubt that leads to a greater sentence than a defendant otherwise could have received by the jury's verdict. In a trial court's thirteenth juror review of a death sentence, the jury has already made the factual findings which make a defendant eligible for the death penalty; the trial court simply determines whether those factual findings are supported

by the weight of the evidence and affirms or overturns the jury's sentencing verdict. Thirteenth juror review does not expose a defendant to a greater penalty than the statutory maximum or the sentencing verdict of the jury. If a jury imposes a sentence of less than death, the trial judge, serving as thirteenth juror, cannot increase the sentence to death. On the other hand, a trial judge reviewing the death sentence as thirteenth juror may well find the death sentence is against the weight of the evidence and may overturn the sentence imposed by the jury, which only leaves a sentence of life or life without parole. Clearly, the thirteenth juror rule is meant to safeguard the defendant's rights under the Sixth Amendment, not infringe on those rights. Therefore, Petitioner also is not entitled to relief on this issue.

V. Conclusion

For the reasons stated above, Mr. Sutton's motion to reopen his petition for post-conviction relief is **DENIED**. Mr. Sutton is indigent, so any costs associated with these proceedings are taxed to the State

IT IS SO ORDERED this the 12 day of June, 2017.



David Duggan
Circuit Court Judge

CERTIFICATE OF SERVICE

I, Jon Hatcher, Clerk, hereby certify that I have mailed a true and exact copy of same to Petitioner, Gary W. Sutton (218364), Riverbend Maximum Security Institution, 7475 Cockrill Bend Boulevard, Nashville, TN 37209, to Attorney Jackson Whetsel, 1522 Highland Ave, Knoxville, TN 37916, and counsel for the State, this the 13 day of June, 2017.

Jon Hatcher by D. [illegible]
Deputy Clerk

FILED
09/13/2017
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Appellate Courts

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

GARY W. SUTTON v. STATE OF TENNESSEE

Circuit Court for Blount County
No. C-14433

No. E2017-01394-CCA-R28-PD

ORDER

On July 10, 2017, the petitioner, Gary W. Sutton, through counsel, filed an application for permission to appeal from the June 12, 2017 order of the Blount County Circuit Court denying his "Motion to Reopen Post-Conviction Proceedings." *See* Tenn. Code Ann. § 40-30-117(c); *see also* Tenn. S. Ct. R. 28, § 10(B). The State filed a response to the application on August 14, 2017.

The petitioner and a codefendant, James Henderson Dellinger, were convicted of the February 1992 first degree murder of Tommy Mayford Griffin. At sentencing, the jury found one aggravating circumstance: (1) "[t]he defendant was previously convicted of one (1) or more felonies, other than the present charge, whose statutory elements involve the use of violence to the person." Tenn. Code Ann. § 39-13-204(i)(2) (1995) (repealed). The jury further found that the aggravating circumstance outweighed the mitigating circumstances beyond a reasonable doubt and imposed a sentence of death. The petitioner's conviction and sentence were affirmed on direct appeal. *State v. Dellinger*, 79 S.W.3d 458 (Tenn.), *cert. denied*, 123 S. Ct. 695 (2002). The petitioner unsuccessfully sought post-conviction relief, the denial of which was affirmed on appeal to this court. *Gary W. Sutton v. State*, No. E2004-02305-CCA-R3-PD, 2006 WL 1472542 (Tenn. Crim. App., at Knoxville, May 30, 2006), *perm. app. denied* (Tenn. Oct. 2, 2006). The petitioner also unsuccessfully pursued a motion to reopen post-conviction proceedings alleging that the prior violent felony aggravating circumstance was unconstitutional under *Johnson v. United States*, 135 S. Ct. 2551 (2015). This court denied the petitioner's application for permission to appeal from the post-conviction court's denial of the motion to reopen. *Gary W. Sutton v. State*, No. E2016-02112-CCA-R28-PD (Tenn. Crim. App., at Knoxville, Jan. 23, 2017) (Order), *perm. app. denied* (Tenn. May 18, 2017).

On January 6, 2017, the petitioner filed in the trial court a motion to reopen post-conviction proceedings, claiming that the Supreme Court's opinion in *Hurst v. Florida*, 136 S. Ct. 616 (2016), announced a new constitutional rule requiring retrospective application precluding the death penalty in his case. As *Hurst* relates to his case, the petitioner argued that the trial court made two factual findings relative to his death sentence, rendering it unconstitutional. First, the trial court determined that certain prior offenses qualified as prior violent felonies for the jury's consideration of the prior violent felony aggravating circumstance. Also, the petitioner contends that the trial court's exercising its authority as thirteenth juror to approve the jury's sentencing verdict amounts to unconstitutional fact-finding by the judge, rather than the jury. On January 30, 2017, the State filed a response to the motion, arguing that *Hurst* did not announce a new constitutional rule requiring retrospective application because it derives from the Supreme Court's decisions in *Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000) and *Ring v. Arizona*, 122 S. Ct. 2428 (2002). Furthermore, the State argued that Tennessee's death penalty sentencing scheme did not violate *Apprendi* and its progeny; therefore, even if retrospective application were required, *Hurst* would avail the petitioner no relief. The post-conviction court denied the motion to reopen without a hearing, ruling that *Hurst* did not announce a new constitutional rule requiring retrospective application.

The Post-Conviction Procedure Act of 1995 provides that a motion to reopen a prior post-conviction proceeding may raise a claim "based upon a final ruling of an appellate court establishing a constitutional right that was not recognized as existing at the time of trial, if retrospective application of that right is required." Tenn. Code Ann. § 40-30-117(a)(1). "The motion must be filed within one (1) year of the ruling of the highest state appellate court or the United States supreme court establishing a constitutional right that was not recognized as existing at the time of trial[.]" *Id.* "[A] new rule of constitutional criminal law is announced if the result is not dictated by precedent existing at the time the petitioner's conviction became final and application of the rule was susceptible to debate among reasonable minds." Tenn. Code Ann. § 40-30-122.

This court must first determine whether, as the petitioner contends, *Hurst* "established a constitutional right that was not recognized at the time of trial" and whether "retrospective application of that right is required." Tenn. Code Ann. § 40-30-117(a)(1). In *Hurst*, the Supreme Court held unconstitutional Florida's capital sentencing scheme ruling that "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death." *Hurst*, 136 S.Ct. at 619. In reaching this decision, the *Hurst* Court applied the Court's holding in *Apprendi* that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 120 S. Ct. at 2362-63. Just as the Court had applied *Apprendi* to overturn Arizona's capital sentencing scheme in *Ring*, the *Hurst* Court held that "[t]he analysis the *Ring* Court applied to Arizona's sentencing scheme applies

equally to Florida's [because l]ike Arizona at the time of *Ring*, Florida does not require the jury to make the critical findings necessary to impose the death penalty." *Hurst*, 136 S. Ct. at 621-22. The application of *Apprendi* and *Ring* to Florida's capital sentencing scheme should have come as no surprise. *Ring*, 122 U.S. at 608 n.6 (noting that of the thirty-eight capital punishment states, twenty-nine states "commit sentencing decisions to juries," while five "commit both capital sentencing fact-finding and the ultimate sentencing decision entirely to judges" and four permit a hybrid determination, as Florida, with a jury recommendation to the trial judge who makes the ultimate decision). As the *Hurst* Court observed

> Although Florida incorporates an advisory jury verdict that Arizona lacked, we have previously made clear that this distinction is immaterial: "It is true that in Florida the jury recommends a sentence, but it does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation is not binding on the trial judge. A Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona."

Id. (quoting *Walton v. Arizona*, 110 S. Ct. 3047, 3054 (1990)).

Hurst is clearly derivative of *Apprendi* and *Ring*. As noted in *Hurst*, "[i]n the years since *Apprendi*, we have applied its rule to instances involving plea bargains, *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed.2d 403 (2004), sentencing guildelines, *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed.2d 621 (2005), criminal fines, *Southern Union Co. v. United States*, 567 U.S. -- , 132 S. Ct. 2344, 183 L. Ed.2d 318 (2012), mandatory minimums, *Alleyne [v. United States]*, 570 U.S. --, 133 S. Ct. [2151], 2166, 147 L. Ed.2d 314 (2013) and, in *Ring*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed.2d 556, capital punishment." *Id.* That said, the Supreme Court has held that the decision in *Ring* "announced a new procedural rule that does not apply retroactively to cases already final under direct review." *Schriro v. Summerlin*, 124 S. Ct. 2519, 2526 (2012). Therefore, it follows that *Hurst* did not announce a new constitutional rule requiring retrospective application to permit reopening of the post-conviction petition in this petitioner's case.

We also observe that an application of *Hurst* to the petitioner's case would not result in relief. First, the Supreme Court excluded its holding in *Ring* from the twenty-nine states, one of which is Tennessee, whose capital sentencing schemes "commit sentencing decisions to juries." *Ring*, 122 U.S. at 608 n.6.[1] Also, the Tennessee Supreme

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[1] We also note that the petitioner previously and unsuccessfully raised an *Apprendi* issue on direct appeal concerning the application of the prior violent felony aggravating circumstance. *See Dellinger*, 79 S.W.3d at 466-67.

Court has specifically held that the legal determination of a trial judge concerning qualifying prior violent felonies for the (i)(2) aggravating circumstance "does not transgress the dictates of *Apprendi* and its progeny." *State v. Cole*, 155 S.W.3d 885, 902 (Tenn.), *cert denied*, 126 S. Ct. 47 (2005). We also find unpersuasive the petitioner's argument that the trial court's exercising its duty as thirteenth juror results in unconstitutional judicial fact-finding because the trial judge's assessment as thirteenth juror is a legal determination concerning the weight of the evidence, not a factual determination. *See*, *generally*, *State v. Dankworth*, 919 S.W.2d 52 (Tenn. Crim. App. 1995).

Because the Supreme Court's decision in *Hurst v. Florida* did not announce a new constitutional rule requiring retrospective application, we conclude that the post-conviction court properly denied the appellant's motion to reopen post-conviction proceedings. The petitioner's application for permission to appeal from the order of the Circuit Court for Blount County dismissing the petitioner's "Motion to Reopen Post-Conviction Proceedings" is hereby DENIED. It appearing that the petitioner is indigent, the costs of this proceeding are taxed to the State of Tennessee.

PER CURIAM
(Montgomery, Witt, Easter, JJ.)

FILED
01/18/2018
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Appellate Courts

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

GARY W. SUTTON v. STATE OF TENNESSEE

Circuit Court for Blount County
No. C-14433

No. E2017-01394-SC-R11-PD

ORDER

Upon consideration of the application for permission to appeal of Gary W. Sutton and the record before us, the application is denied.

PER CURIAM