

NO. 17-9409

**IN THE
SUPREME COURT OF THE UNITED STATES**

**GARY WAYNE SUTTON,
Petitioner,**

v.

**TENNESSEE,
Respondent.**

**ON PETITION FOR WRIT OF CERTIORARI
TO THE TENNESSEE COURT OF CRIMINAL APPEALS**

RESPONDENT'S BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED

Does this Court have jurisdiction to decide whether its opinion in *Hurst v. Florida* requires Tennessee courts to grant successive collateral review of a criminal judgment?

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OPINIONS BELOW

The order of the Tennessee Supreme Court denying petitioner's application for permission to appeal is unreported but available at *Sutton v. State*, No. E2017-01394-SC-R11-PD, 2018 Tenn. LEXIS 21 (Jan. 18, 2018). (Pet. App. 22.) The order of the Tennessee Court of Criminal Appeals denying petitioner's application for permission to appeal the denial of his motion to reopen state post-conviction proceedings is also unreported. (Pet. App. 18-21.)

JURISDICTIONAL STATEMENT

The Tennessee Supreme Court denied petitioner's application for permission to appeal on January 18, 2018. (Pet. App. 22.) Justice Kagan extended the time for filing a petition for writ of certiorari until June 17, 2018. *Sutton v. Tennessee*, No. 17A1073 (U.S. Apr. 5, 2018). Petitioner filed his petition on June 14, 2018. He invokes this Court's jurisdiction under 28 U.S.C. § 1257. (Pet. 1.)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., art. III, § 2 provides in pertinent part:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority

...

In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

28 U.S.C. § 1257(a) provides:

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the

Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

Tenn. Code Ann. § 40-30-102 establishes filing limitations for petitions under the Tennessee Post-Conviction Procedure Act. Section 40-30-102(c) provides in pertinent part:

This part contemplates the filing of only one (1) petition for post-conviction relief. In no event may more than one (1) petition for post-conviction relief be filed attacking a single judgment. . . . A petitioner may move to reopen a post-conviction proceeding that has concluded, under the limited circumstances set out in § 40-30-117.

Tenn. Code Ann. § 40-30-117(a) authorizes the reopening of state post-conviction proceedings under the following pertinent circumstance:

(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. 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

Tenn. Code Ann. § 40-30-122 defines the appellate rulings that qualify as a basis for reopening: “[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.”

STATEMENT OF THE CASE

In 1996, petitioner and his codefendant, James Dellinger, were convicted of first-degree murder and sentenced to death for the premeditated killing of Tommy Griffin. *State v. Dellinger*, 79 S.W.3d 458, 462 (Tenn. 2002). Petitioner had been previously convicted of first-degree murder for the killing of Mr. Griffin’s sister, Connie Branam, and the State relied on that prior conviction as an aggravating circumstance to support capital sentencing. *Id.* at 476.

The Tennessee Supreme Court affirmed petitioner’s conviction and sentence, expressly

noting the jury's finding as an aggravating circumstance that petitioner had been previously convicted of a violent felony. *Id.* at 462, 466. Rejecting petitioner's claim based on *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Tennessee Supreme Court explained "that the principles of *Apprendi* do not apply to Tennessee's capital sentencing procedure" because that procedure "requires that a jury make findings regarding the statutory aggravating circumstances." *Id.* at 467. This Court denied certiorari. *Dellinger v. Tennessee*, 537 U.S. 1090 (2002).

Petitioner unsuccessfully sought post-conviction relief in state court. *Sutton v. State*, No. E2004-02305-CCA-R3-PD, 2006 Tenn. Crim. App. LEXIS 465, at *88 (May 30, 2006); *Sutton v. State*, No. E2004-02305-SC-R11-PD, 2006 Tenn. LEXIS 924 (Oct. 2, 2006). Affirming the denial of post-conviction relief, the Tennessee Court of Criminal Appeals reiterated that "the jury found the aggravating circumstance that the petitioner had a previous conviction involving violence." *Sutton*, 2006 Tenn. Crim. App. LEXIS 465, at *3.

In 2007, petitioner sought a writ of habeas corpus under 28 U.S.C. § 2254, which the federal district court denied. *Sutton v. Bell*, No. 3:06-cv-388, 2010 U.S. Dist. LEXIS 5292, at *5 (E.D. Tenn. Jan. 22, 2010); *Sutton v. Bell*, No. 3:06-CV-388, 2011 U.S. Dist. LEXIS 34016, at *41-48 (E.D. Tenn. Mar. 30, 2011). The Sixth Circuit affirmed that denial. *Sutton v. Carpenter*, 2015 U.S. App. LEXIS 10805 (6th Cir. 2015). This Court denied certiorari. *Sutton v. Westbrooks*, 2016 U.S. LEXIS 2145 (Mar. 28, 2016)

On January 6, 2017, petitioner filed a motion to reopen post-conviction proceedings under Tenn. Code Ann. § 40-30-117(a)(1), claiming that this Court's opinion in *Hurst v. Florida*, 136 S. Ct. 616 (2016), announced a new constitutional right that requires retroactive application. (Pet. App. 1.) The post-conviction court denied the motion. (Pet. App. 1-16.) The Tennessee Court of Criminal Appeals denied petitioner's application to appeal, finding that "*Hurst v. Florida* did not

announce a new constitutional rule requiring retrospective application.” (Pet. App. 21.) The Tennessee Supreme Court denied further review. *Sutton*, 2018 Tenn. LEXIS 21.

REASONS FOR DENYING THE WRIT

This Court lacks jurisdiction to decide whether its opinion in *Hurst* requires Tennessee courts to grant successive collateral review of a criminal judgment. In short, the state court’s decision that petitioner’s claim does not satisfy Tennessee’s statutory criteria for successive collateral review did not resolve any federal question that would implicate this Court’s jurisdiction.

In any event, certiorari should also be denied because the state court correctly found that the holding in *Hurst* is (1) merely derivative of prior opinions by this Court and (2) inapt to the Tennessee sentencing procedures that applied to petitioner’s case.

I. THIS COURT LACKS JURISDICTION TO REVIEW A DECISION ENFORCING A STATE STATUTORY RESTRICTION ON SUCCESSIVE COLLATERAL REVIEW.

This Court lacks jurisdiction to entertain the question presented by petitioner because it is solely a question of state law. Section 2 of Article III of the United States Constitution grants this Court “appellate Jurisdiction” to review state cases “arising under” the Constitution, federal laws, or treaties “with such Exceptions, and under such Regulations as the Congress shall make.” U.S. Const., art. III, § 2. With 28 U.S.C. § 1257(a), Congress has limited the Court’s jurisdiction over “[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had” to issues governed by binding federal law. *See Mu’Min v. Virginia*, 500 U.S. 415, 422 (1991) (holding that the Court’s appellate jurisdiction under § 1257(a) is limited “to enforcing the commands of the United States Constitution”). *See* Stephen M. Shapiro, *Supreme Court Practice* 208 (10th ed. 2013) (“[T]he Court lacks jurisdiction to review matters of state law. That principle in turn reflects the Article III limitations on federal judicial power, as well as the jurisdictional

restrictions imposed on the Court by 28 U.S.C. § 1257.”).

“[I]n a case coming from a state court this court can consider only Federal questions, and ... it cannot entertain the case unless the decision was against the plaintiff in error upon those questions.” *Leathe v. Thomas*, 207 U.S. 93, 98 (1907). In contrast, this Court “must accept as controlling” a state court ruling on a state law issue. *Am. Ry. Express Co. v. Kentucky*, 273 U.S. 269, 272 (1927). Consequently, this Court’s appellate jurisdiction over state court decisions is limited to “correct[ing] them to the extent that they incorrectly adjudge federal rights.” *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945). That is, this Court may intervene on a state court decision “only to correct wrongs of constitutional dimension.” *Smith v. Phillips*, 455 U.S. 209, 221, 102 S. Ct. 940, 948 (1982).

Here, the state court’s decision that successive collateral review is not available to petitioner’s Sixth Amendment claim does not involve an issue of constitutional dimension because the States have no constitutional obligation to provide any procedures for the collateral review of criminal judgments. *See Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987).

Though not compelled by the Constitution, Tennessee provides several avenues to collaterally attack criminal judgments. One avenue is through the “Post-Conviction Procedure Act.” Tenn. Code Ann. § 40-30-101. The Act has built-in restrictions on the availability of collateral review. For example, it permits the filing of only one petition for post-conviction relief. Tenn. Code Ann. § 40-30-102(c). But, as pertinent here, “[a] petitioner may move to reopen a post-conviction proceeding that has been concluded, under the limited circumstances set out in [Tenn. Code Ann.] § 40-30-117.” Tenn. Code Ann. § 40-30-102(c).

Tenn. Code Ann. § 40-30-117(a)(1) permits reopening if (1) the claim in the motion to reopen is based on a final ruling of an appellate court establishing a constitutional right that was

not recognized as existing at the time of trial, (2) retrospective application of that right is required, and (3) the motion is filed within one year of the qualifying appellate ruling. A qualifying appellate ruling is, by statutory definition, “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.

When the petitioner moved to reopen post-conviction proceedings under the state Post-Conviction Procedure Act, the Tennessee Court of Criminal Appeals affirmed the denial of the motion. Applying the definition in the Act, it concluded that *Hurst* does not provide a basis for reopening because it did not meet the definition of a qualifying appellate ruling.

This Court lacks jurisdiction to review the Court of Criminal Appeals’ decision because that decision “rests on a state law ground that is independent of [any] federal question and adequate to support the judgment. *See Coleman v. Thompson*, 501 U.S. 722, 729 (1991). The state court simply applied Tennessee statutes that restrict successive collateral review—Tenn. Code Ann. §§ 40-30-117, -122—and concluded that *Hurst* does not meet the criteria for such review. (Pet. App. 20.) Because the state court’s decision rests solely on the application of state law, there is no federal question invoking this Court’s jurisdiction.

Montgomery v. Louisiana, 136 S.Ct. 718 (2016), requires no different result. In *Montgomery*, this Court held that the conclusion in *Teague v. Lane*, 489 U.S. 288 (1989), “establishing the retroactivity of new substantive rules is best understood as resting upon constitutional premises.” 136 S. Ct. at 729. But *Montgomery* says nothing about a state court’s authority to determine, as a matter of limiting successive collateral review, when a “final ruling of an appellate court establish[es] a constitutional right that was not recognized as existing at the time

of trial.” Tenn. Code Ann. § 40-30-117(a). Tenn. Code Ann. § 40-30-122 sets forth the state law criteria for qualifying appellate rulings. Petitioner can produce no authority that those criteria encompass a federal question.

Moreover, *Montgomery*’s discussion about the supremacy of this Court’s decisions on the retroactivity of new constitutional rules is inapposite under the circumstances of this case. *Montgomery* held 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.” 136 S. Ct. at 729. But *Montgomery* concerned the retroactive application of a new rule to an Eighth Amendment claim that was “properly presented in the case.” *Id.* at 732. Thus, the Court held that “[i]n *adjudicating claims* under its collateral review procedures a State may not deny a controlling right asserted under the Constitution.” *Id.* (emphasis added).

The state court did not adjudicate petitioner’s Sixth Amendment claim because the claim did not meet the procedural criteria for review under Tenn. Code Ann. §§ 40-30-117, -122. *Montgomery* does not preclude Tennessee’s enforcement of these gate-keeping provisions for successive collateral review. And *Hurst* does not require Tennessee courts to adjudicate petitioner’s Sixth Amendment claim when that claim was not properly presented under state law.

Through application of Tenn. Code Ann. §§ 40-30-117, -122, the state court’s decision that *Hurst* does not provide a basis for successive collateral review rests on a state law ground that is independent of any federal retroactivity question and adequate to support the judgement. This Court lacks jurisdiction to second-guess that enforcement of a state procedural bar on successive collateral review, particularly since such review is not constitutionally required.

II. THE STATE COURT CORRECTLY FOUND THAT THE HOLDING IN *HURST* IS NEITHER NEW NOR APT TO THE TENNESSEE SENTENCING PROCEDURES THAT APPLIED IN THIS CASE.

Even if this Court were to find that it has jurisdiction, certiorari should be denied because the state court correctly concluded that *Hurst* is (1) merely derivative of *Apprendi* and *Ring v. Arizona*, 536 U.S. 584 (2002) and (2) inapt to the Tennessee sentencing procedures followed in this case. (Pet. App. 20-21.)

Hurst is merely derivative of *Apprendi* and *Ring*; it did not announce a new constitutional rule requiring retroactive application. In *Hurst*, this Court invalidated the aspect of Florida’s capital sentencing scheme that required the judge alone, rather than the jury, to find the existence of aggravating circumstances to support a capital sentence. 136 S. Ct. at 624. The Court concluded 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 conclusion, the Court first reiterated its previous holding from *Apprendi* that any fact “‘expos[ing] 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). The Court then cited *Ring*, which applied *Apprendi* to overturn Arizona’s capital sentencing scheme, because “[l]ike Arizona at the time of *Ring*, Florida d[id] not require the jury to make the critical findings necessary to impose the death penalty.” *Hurst*, 136 S.Ct. at 622. The state court correctly concluded that *Hurst* announced no new constitutional rule because it simply mirrored *Ring*’s application of *Apprendi*. (Pet. App. 19-20.) And this Court’s recognition that the holding in *Ring* does not apply retroactively to cases on collateral review demonstrates that neither does the holding in *Hurst*. See *Schriro v. Summerlin*, 542 U.S. 348, 358 (2004).

Moreover, the Tennessee sentencing procedures that were followed in petitioner's case do not run afoul of *Hurst*. In Tennessee, no judge may impose a capital sentence for first-degree murder unless the jury first returns a verdict for that sentence, after its own finding and weighing of aggravating and mitigating circumstances. Tenn. Code Ann. § 39-13-204. Petitioner's death sentence was imposed according to these procedures, which bear no resemblance to the Florida procedures struck down in *Hurst*.

Petitioner's claim that "the judge made a determination that the aggravating factor existed" is wrong. (Pet. 7.) The judge merely instructed the jury, as a matter of law, that the offenses the State attributed to petitioner qualified as violent felonies. The jury still had to resolve a question of fact about whether the proof showed that petitioner was the person convicted of those offenses. The jury made that finding, not based on any instructions from the judge, but on the testimony of the Assistant District Attorney and certified copies of the prior judgments. *Dellinger*, 79 S.W.3d at 472. Petitioner is mistaken in his assertion that "there was nothing else for the jury to find" once the trial court instructed that the prior convictions were for violent felonies. (Pet. 9.)

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing document has been sent by first class mail, to counsel for petitioner: Susanne Bales, at 800 S. Gay Street, Suite 2400, Knoxville, Tennessee 37929 on the 18th day of July, 2018. I further certify that all parties required to be served have been served.

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