

No. 17-9409

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

REPLY TO RESPONSE TO
PETITION FOR WRIT OF CERTIORARI

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REPLY TO RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

Mr. Sutton's petition for writ of certiorari raises the issue of whether the Sixth Amendment may only apply to part of an aggravating circumstance, in light of *Hurst v., Florida*, 136 S. Ct. 616 (2016). He also raises the question of whether *Hurst* applies retroactively. Respondent answers that this Court lacks jurisdiction because Mr. Sutton has not presented a federal question.

Mr. Sutton respectfully replies.

ARGUMENT

Respondent argues this Court lacks jurisdiction to consider Mr. Sutton's petition for writ of certiorari. (Reply at 4-7). Respondent is in error.

Section 1257(a), 28 U.S.C., grants this Court jurisdiction to review claims arising under the federal constitution. Mr. Sutton's petition raises a substantial federal question concerning application of this Court's precedent, *Hurst*, 136 S. Ct. 616 (2016), and the Sixth Amendment, U.S. Const.. The petition raises a substantial question of federal constitutional law, namely whether the Sixth Amendment may only apply to part of an aggravating circumstance. The petition relies upon numerous of this Court's Sixth Amendment precedent, including *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Ring v. Arizona*, 536 U.S. 584 (2002). Of course the petition raises a federal question.

Mr. Sutton presented his federal question to the state trial court in a timely and proper manner. See *Godchaux Co. v. Estopinal*, 251 U.S. 179, 181 (1919); *Beck v. Washington*, 369 U.S. 541, 550-54 (1962). Mr. Sutton moved to reopen his petition for post-conviction relief in a timely fashion, within one year of this Court's holding

in *Hurst. Sutton v. Tennessee*, Blount County Circuit Court No. C-14433 (filed Jan. 6, 2017). On July 10, 2017, he timely appealed the denial of relief. *Sutton v. Tennessee*, Order, Tennessee Court of Criminal Appeals No. E2017-01394-CCA-R28-PD (Appx. 18). The state court found he timely moved to reopen his petition for post-conviction relief. *Sutton v. Tennessee*, Order Denying Motion to Reopen, Blount County Circuit Court No. C-14433 (Appx. 5).

Respondent asserts the state court's opinion rests on a state law ground that is independent of a federal question and adequate to support the judgment. (Reply at 7). In fact, the state court found that the Sixth Amendment permits the trial judge to make the "legal determination" that an aggravating circumstance exists. (Appx. 21). The state court determined *Hurst* "did not announce a new constitutional rule requiring retrospective application to permit reopening" of Mr. Sutton's case. (Appx. 20). Mr. Sutton strongly maintains these rulings are incorrect interpretations and applications of federal constitutional principles. They rest upon unsound federal constitutional analysis, not state law.

Also, the state statute governing Mr. Sutton's case rests upon federal constitutional principles. It first requires the motion to reopen be based upon a newly recognized "*constitutional right*." Tenn. Code Ann. § 40-30-117(a)(1) (emphasis added). The state statute also requires that the newly recognized right apply retroactively. Tenn. Code Ann. § 40-30-117(a)(1) ("if retrospective application of that right is required"). This Court has held that retroactivity "is best understood

as resting upon *constitutional* premises.” *Montgomery v. Louisiana*, 136 S. Ct. 718, 729 (2016) (emphasis added).

The state court found the trial judge’s instruction to the jury that an aggravating circumstance existed did not run afoul of the Sixth Amendment. (Appx. 14; Appx. 20-21). The state court ruled upon the constitutional question presented. The state court also found *Hurst* does not apply retroactively, a determination this Court has held rests upon constitutional principles. This Court has jurisdiction to review these determinations.

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.

This Court has jurisdiction to review this case.

For the foregoing reasons, petitioner requests that this Court grant the petition for certiorari.

Respectfully submitted,



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