Capital Case

Case No. 18-7442

In the Supreme Court of the United States

KEVIN RAY UNDERWOOD,
Petitioner,
v.
MIKE CARPENTER, Warden,
Oklahoma State Penitentiary,
Respondent.

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

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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REPLY TO BRIEF IN OPPOSITION

The State requests certiorari review be denied, claiming there is no compelling, unresolved issue or split in case law. Brief in Opposition at 7. This claim is without merit. Certiorari should be granted.

First, the State cites to the Tenth Circuit's pronouncement in the instant case that *Hurst v. Florida*, 136 S. Ct. 616 (2016) post-dates Mr. Underwood's direct appeal to the Oklahoma Court of Criminal Appeals ("OCCA") and the corresponding order handed down therefrom, and as such, provides no recourse. Brief in Opposition at 7 (citing *Underwood v. Royal*, 894 F.3d 1154, 1184-86 (10th Cir. 2018)). However, the State does not acknowledge that Mr. Underwood has never relied on the same as clearly established law. *See* Petition for Certiorari at 23 (noting *Hurst* need not be treated as clearly established law for the Court's review; "*Hurst* simply illuminates what *Ring*[1] and *Apprendi*[2] have already made clear.") (internal citations omitted). To this end, the State never addresses the crux of Mr. Underwood's assertion: namely, that *Hurst* illuminates the clearly established law of *Ring* and *Apprendi*. *Id*. at n.8.

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[1]*Ring v. Arizona*, 536 U.S. 584 (2002).

[2]*Apprendi v. New Jersey*, 530 U.S. 466 (2000).

Respondent wrongly characterizes Mr. Underwood's argument as "merely disagree[ing] with the Tenth Circuit's application of a properly stated rule." Brief in Opposition at 7. Yet, Mr. Underwood's assertion has always remained that the Tenth Circuit consistently refuses to analyze the Oklahoma death penalty scheme under the mandates of this Court's rulings in *Ring* and *Apprendi*.

> The Tenth Circuit's decision conflicts with settled precedent of this Court. Specifically, this Court's opinion in *Ring v. Arizona* holds that capital juries must make *any* factual finding bearing on capital punishment *beyond a reasonable doubt*. It does not matter what label the jury's required finding is given. *Apprendi v. New Jersey*.

See Petition for Certiorari at 18 (internal citations omitted).

Respondent asserts as fact that the Tenth Circuit's application was that of a "properly stated rule." Brief in Opposition at 7. However, whether the Tenth Circuit's application was "proper" is the very question at issue. Application of a rule is in no way "proper" if it is made in contravention of the constitutional strictures set forth by this Court. *Ring* and *Apprendi* have made clear that *any* factual finding bearing on capital punishment must be made *beyond a reasonable doubt* and whether a punishment enhancement is a "sentencing factor" or "element" of an offense is irrelevant because the "inquiry is one not of form, but of effect."

Apprendi, 530 U.S. at 494. *See also Ring*, 536 U.S. at 602.

While the State argues Petitioner is "attempt[ing] to broaden this Court's holding [in *Ring*] to require Oklahoma juries [to] find not only the aggravating circumstances beyond a reasonable doubt . . . but to also require the jury to find the aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt," the same rings hollow. Brief in Opposition at 9. There is no need to broaden *Ring*. *Ring* already encompasses this requirement. Indeed, *Ring* requires sentencing factors "operat[ing] as the 'functional equivalent of an element of a greater offense'" to be found by a jury. 536 U.S. at 609. And, *Apprendi* made clear that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum" is an element that "must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. The weighing finding in Oklahoma is a fact-finding that increases the penalty by allowing jurors to consider the ultimate penalty of death.

Respondent has yet to directly address how Oklahoma's scheme is exempt from these requirements. The moral determination of whether death is an appropriate punishment cannot be made until and unless the

jury finds both the aggravating circumstance(s) beyond a reasonable doubt and that the aggravating circumstance(s) outweigh mitigating circumstances. Both determinations are facts necessary to increase the penalty for the crime beyond the prescribed statutory maximum. Hence, they require being found beyond a reasonable doubt.

Citing *Woods v. Donald*, 135 S. Ct. 1372, 1378 (2016), Respondent argues that within the habeas content, *Ring*'s scope is not to be determined. Brief in Opposition at 10. However, this is not the proposition for which *Woods* stands. In *Woods*, no decision from this Court was identified as directly on point, but rather, the underlying case was deemed "similar to" this Court's case of *United States v. Cronic*, 466 U.S. 648 (1984). 135 S. Ct. at 1376. Here, there is direct, clearly established law from this Court dictating that any punishment enhancement – whether it be labeled a sentencing factor or element of an offense – is to be found beyond a reasonable doubt. *Apprendi*, 530 at 494. Indeed, *Apprendi* specifically spoke to the scope of its reach in identifying that the "inquiry is one not of form, but of effect." *Id*. *See also Ring*, 536 U.S. at 609 (noting that the aggravating factors "operate[d] as the

'*functional equivalent* of an element of a greater offense'") (emphasis added). These cases were specifically allowed for multiple "forms" and "equivalents," holding that it was the "effect" that was at issue. This is the same direct effect created by Oklahoma's scheme. Respondent's argument that the same is not to be considered now is without basis. This remains a compelling, unresolved issue warranting certiorari review.

Finally, the State alleges there is no split in authority because state courts are applying *Hurst* without the restrictions of the AEDPA. Brief in Opposition at 13. Specifically, the State reasons that the only split in authorities is post-*Hurst*. *Id*. As such, the same is irrelevant because the OCCA's decision was made prior to *Hurst*. But, as discussed herein, *Hurst* is not the clearly established law upon which Mr. Underwood relies. Instead, *Hurst* merely illuminates what *Ring* and *Apprendi* made clear. That the split in authorities comes on the heels of *Hurst* only further emphasizes the conflict amongst the courts as to the meaning and application of *Ring* and *Apprendi*. Certiorari review should be granted.

Respectfully submitted,

s/ *Sarah M. Jernigan*

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