No. 15-533

IN THE
Supreme Court of the United States

KEVIN CHARLES ISOM,
Petitioner,

v.

STATE OF INDIANA,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Indiana

SUPPLEMENTAL BRIEF

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Pursuant to Rule 15.8, Petitioner Kevin Charles Isom files this Supplemental Brief.

This Court's opinions in *Hurst v. Florida*,[1] and *Kansas v. Carr*,[2] – issued since petitioner's Reply Brief was filed – provide additional support for the petition's suggestion that the time is ripe for this Court to consider whether the jury's finding that aggravating circumstances outweigh mitigating circumstances be made beyond a reasonable doubt.

1. Hurst v. Florida

In *Hurst*, the Court, considering the constitutionality of Florida's death penalty scheme, held that it violated the Sixth Amendment for a judge, rather than a jury, to make the ***findings*** (plural) "necessary to impose a sentence of death." The Florida statutory scheme, like the Indiana statutory scheme at issue required two separate findings: first the existence of an aggravating circumstance, and second that there are insufficient mitigating circumstances to outweigh the aggravating circumstances. *Hurst* held the Florida statute unconstitutional because the jury's function with regard to both of these findings was advisory:

> As described above and by the Florida Supreme Court, the Florida sentencing statute does not make a defendant eligible

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[1] *Hurst v. Florida*, 577 U.S. ___ (January 12, 2016).

[2] *Kansas v. Carr*, 577 U.S. ___ (January 20, 2016).

> for death until "*findings* by the court that such person shall be punished by death." Fla. Stat. §775.082(1) … The trial court alone must find "the facts . . . [t]hat sufficient aggravating circumstances exist" ***and*** "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances."

Hurst, slip op. at 7 (emphasis supplied); *id.* at 6-7 ("Florida does not require the jury to make the critical ***findings*** necessary to impose the death penalty."); *id.* at 9 (overruling earlier precedent that did not "'require that the specific *findings* authorizing the imposition of the sentence of death be made by a jury.'").

The State's BIO argues that the weighing of aggravators against mitigators is a traditional sentencing determination not subject to Sixth Amendment protections. See State's BIO at 7 ("*Ring*, however, did not address whether *Apprendi* applies to weighing aggravators against mitigators."); *id* at 8 ("Weighing information is not a "fact"; rather, it is the traditional method of determining a defendant's sentence from a range of options."); *id* ("It is nothing more than systematic guidance to juries on matters of opinion, not facts. The jury's weighing function is a moral judgment that serves to channel the discretion to impose death.").

The BIO argument was on all-fours with the Court's decision in *Spaziano*, where the Court upheld Florida's sentencing scheme where the determination that aggravating circumstances

outweighed mitigating circumstances was made by a judge. *Spaziano v. Florida*, 468 U.S. 447, 462 (1984) ("The sentencer is responsible for weighing the specific aggravating and mitigating circumstances the legislature has determined are necessary touchstones in determining whether death is the appropriate penalty."). But in *Hurst*, this Court explained:

> 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., at 640–641. Their conclusion was wrong, and irreconcilable with *Apprendi*. Indeed, today is not the first time we have recognized as much. In *Ring*, we held that another pre-*Apprendi* decision—*Walton*, 497 U. S. 639— could not "survive the reasoning of *Apprendi*." 536 U. S., at 603.

Hurst, slip op. at 9. The clear implication of *Hurst* is that the jury's determination that aggravators outweigh mitigators – where statutorily required – is a factual finding that must be made "beyond a reasonable doubt." See *Hurst*, slip op. at 4-5 (citing *Alleyne v. United States*, 570 U.S. __ (2013).[3]

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[3] The BIO does not argue, nor has any Court found, that findings required by the Sixth Amendment can be made based upon a lesser standard of proof.

2. Kansas v. Carr

The decision in *Kansas v. Carr* similarly adumbrates this understanding. In *Carr*, the Court rejected the notion that the Eighth Amendment required courts to instruct a jury that mitigating circumstances need not be proved beyond a reasonable doubt. *Carr,* at 11 ("[O]ur case law does not require capital sentencing courts 'to affirmatively inform the jury that mitigating circumstances need not be proved beyond a reasonable doubt.'").

The *Carr* holding was, however, predicated upon the Court's commitment to the requirement that each of the jury's determination***s*** be made beyond a reasonable doubt. The death sentences imposed in *Carr* were constitutional because:

> The instruction makes clear that ***both*** the existence of aggravating circumstances and the conclusion that they outweigh mitigating circumstances ***must be proved beyond a reasonable doubt***; mitigating circumstances themselves, on the other hand, must merely be "found to exist."

Kansas v. Carr, slip op., at 12 (emphasis added). While the Court held that no instruction was necessary on the standard of proof for mitigating circumstances, it held that the instruction was constitutionally sufficient because the jury was instructed to find – beyond a reasonable doubt – that aggravating circumstances outweighed mitigating circumstances.

3. Application of *Hurst* and *Carr* to *Isom*

This Court's capital punishment jurisprudence has made clear that States have wide latitude over how they structure their capital sentencing schemes, but that this latitude is subject to constitutional constraints imposed both by the Eighth and the Sixth Amendment. Even in the death penalty context, the Sixth Amendment requires that any factual determination that serves as a pre-requisite to a death sentence must be found by a unanimous jury beyond a reasonable doubt; if *Carr* means that the Sixth Amendment requires no more than that, then *Hurst* certainly means it requires no less.

Like the Florida statute referenced in *Hurst*, and the Kansas statute referenced in *Carr*, Indiana imposed two separate determinations on a capital jury – first, the finding of an aggravating circumstance, and second the finding that aggravating circumstances outweighed mitigating circumstances. In Indiana, the aggravating circumstance serves as a ticket to enter the arena, but to be found *noxii sine missione* required a second jury determination. Not much diminishes the significance of the jury trial right, like a judge's instruction to the jury that their culpability finding need not be made beyond a reasonable doubt.

The holdings in *Hurst* and *Carr* were adumbrated in Justice Scalia's concurrence in *Ring* which recognized that it is ultimately not possible to discern whether a state's "aggravating factor requirements" were "the product of [Furman]," or a

"social belief that murder simpliciter does not deserve death." *Ring v. Arizona,* 536 U.S. 584, 610-611 (2002) (Scalia, J., *concurring*); id at 612 ("[W]hether or not the States have been erroneously coerced into the adoption of "aggravating factors," wherever those factors exist they must be subject to the usual requirements of the common law, and to the requirement enshrined in our Constitution, in criminal cases: they must be found by the jury *beyond a reasonable doubt*.").

Ultimately, whether Indiana's dual eligibility component was adopted by the legislature in response to this Court's ruling in *Furman*, or as part of the Indiana Legislature's concern that death be reserved for the most culpable of offenders responsible for the most aggravated offenses, in the end, does not matter.[4] Having identified the element as an essential component to the jury's finding, Due Process Clause and the Sixth Amendment require that the finding be established beyond a reasonable doubt.

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[4] This case need not reach the question of whether the Sixth and Eighth Amendments compel a state to adopt a "beyond a reasonable doubt standard" for the determination that death is the appropriate punishment. That question, as well as the question of the constitutionality of capital punishment for murder, is separately before the Court in *Tucker v. Louisiana* (15-946).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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