CAPITAL CASE
EXECUTION SCHEDULED FOR AUGUST 4, 2020 AT 7:00 CDT

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

HAROLD WAYNE NICHOLS,

Petitioner,

v.

STATE OF TENNESSEE,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

The death sentence in this case is supported by only one aggravating circumstance, Tennessee's prior violent felony conviction aggravator. The elected prosecutor recently assessed this case, including the problematic prior felony aggravator, and determined the death sentence is unjust. The parties prepared an agreed settlement where Mr. Nichols would move to dismiss his then-newly re-opened post-conviction petition in exchange for a life sentence. Mr. Nichols would today be serving a life sentence, instead of facing an August 4th execution date, if the post-conviction judge had not overridden the prosecutor's life sentence determination.

Moreover, Mr. Nichols should not be facing execution because he is not death eligible–the prior violent felony aggravator is facially vague and fails to provide defendants with fair notice of the consequences for subsequently committing the crime of first-degree murder. There is a close likeness between Tennessee's prior violent felony aggravator and those sentencing statutes struck down as facially vague in *Johnson* and its progeny.[1] Under Tennessee's aggravating circumstance, punishment can be increased from life imprisonment to the death penalty if "[t]he defendant was previously convicted of one or more felonies, other than the present charge, which involve the use or threat of violence to the person."[2] Like the residual

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[1] *Johnson v. United States*, 135 S. Ct. 2551 (2015); *see also Sessions v. Dimaya*, 138 S. Ct. 1204 (2018) and *United States v. Davis*, 139 S. Ct. 2319 (2019).
[2] Tenn. Code Ann. § 39-13-204(i)(2) (1988).

clause at issue in *Johnson*, this language is not defined and a prior conviction need not include violence as an element to qualify as a predicate crime for enhanced punishment.

The Tennessee court below rejected Mr. Nichols' constitutional challenge to the aggravator for the reason that the state "courts are to look to the actual facts of the prior felony [conviction] to determine the use of violence when such cannot be determined by the elements of the offense alone."[3] Accordingly, the following questions are presented:

(1) Does the judicial override of a life sentence settlement agreement result in an arbitrary and capricious death sentence in violation of the Eighth and Fourteenth Amendments?

(2) Is Tennessee's prior violent felony conviction aggravating circumstance unconstitutional under *Johnson v. United States*, 135 S. Ct. 2551 (2015), because its language is vague and it is applied based on an after-the-fact examination of the conduct involved in a prior conviction?

(3) Is Mr. Nichols actually innocent of the death penalty because the sole aggravating circumstance is void for vagueness?

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[3] *Nichols v. State*, No. E2018-00626-CCA-R3-PD, 2019 WL 5079357, at *6 (Tenn. Crim. App. Oct. 10, 2019) (Attached as Appendix A, Pet. App. 9a).

TABLE OF CONTENTS

Index of Appendices:

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

OPINIONS BELOW

The Tennessee Court of Criminal Appeals' Opinion, *Harold Wayne Nichols v. State of Tennessee*, No. E2018-00626-CCA-R3-PD, 2019 WL 5079357 (Tenn. Crim. App. Oct. 10, 2019), is unpublished and is attached as Appendix A, Pet. App. 1a-19a. The Tennessee Supreme Court's January 15, 2020 Order denying discretionary review of the Court of Criminal Appeals' decision, *State of Tennessee v. Harold Wayne Nichols*, No. E2018-00626-SC-R11-PD (Tenn. Jan. 15, 2020), is unpublished and is attached hereto as Appendix B, Pet. App. 20a. The March 7, 2018 Judgment of the Criminal Court for Hamilton County, Tennessee, denying Nichols' Amended Petition for Post-Conviction Relief, *Harold Wayne Nichols v. State of Tennessee*, No. 205863 (Hamilton Cty. Crim. Ct. Mar. 7, 2018), is unpublished and attached hereto as Appendix C, Pet. App. 21a-42a.

LIST OF PROCEEDINGS

- *State v. Nichols*, No. 175504 (Hamilton Co. Crim. Ct. May 12, 1990) (judgment of conviction and sentence) Appendix D, Pet. App. 43a.
- *State v. Nichols*, No. 03S01-9105-CR-00047, 877 S.W.2d 722 (Tenn. May 2, 1994) (direct appeal den.) Appendix E, Pet. App. 44a-65a.
- *Nichols v. Tennessee*, No. 94-6136, 513 U.S. 1114 (Jan. 17, 1995) (cert. den.)
- *Nichols v. State*, No. 205863 (Hamilton Co. Crim. Ct. Mar. 18, 1998) (post-conviction den.)
- *Nichols v. State*, No. E1998-00562-CCA-R3-PD, 2001 WL 55747 (Tenn. Crim. App. Jan. 19, 2001) (perm. app. granted) (Tenn. July 2, 2001) (affirming denial of post-conviction petition, subsequently affirmed by the Tennessee Supreme Court)
- *Nichols v. State*, No. E1998-00562-SC-R11-PD, 90 S.W.3d 576 (Tenn. Oct. 7, 2002)

- *Nichols v. Bell*, No. 1:02-cv-330, 440 F. Supp. 2d 730 (E.D. Tenn. Oct. 22, 2004) (habeas pet. den.) Appendix F, Pet. App. 66a-182a.

- *Nichols v. Bell*, No. 1:02-cv-330, 440 F. Supp. 2d 847 (E.D. Tenn. Jul. 25, 2006) (den. in part, granted in part, certificate of appealability)

- *Nichols v. Heidle*, No. 06-6495, 725 F.3d 516 (6th Cir. Jul. 25, 2013) (habeas appeal den.) Appendix G, Pet. App. 183a-219a.

- *Nichols v. Heidle*, No. 13-8570, 574 U.S. 1025 (Dec. 1, 2014) (cert. den.)

- *In re Harold Wayne Nichols*, No. 16-5665 (6th Cir. Aug. 15, 2016) (perm. to file second or successive habeas pet. den.)

- *Nichols v. Westbrooks*, No. 1:16-cv-00245 (E.D. Tenn. Sept. 30, 2016) (dismissing protective second habeas petition)

- *Nichols v. State*, No. 205863 (Hamilton Co. Crim. Ct. Mar. 7, 2018) (mot. to reopen post-conviction den.) Appendix C, Pet. App. 21a-42a.

- *Nichols v. State*, No. E2018-00626-CCA-R3-PD, 2019 WL 5079357 (Tenn. Crim. App. Oct. 10, 2019) (post-conviction appeal den.) Appendix A, Pet. App. 1a-19a.

- *Nichols v. State*, No. E2018-00626-SC-R11-PD (Tenn. Jan. 15, 2020) (app. perm. app. den.) Appendix B, Pet. App. 20a.
- *In re Harold Wayne Nichols*, No. 19-6460 (6th Cir. Feb. 13, 2020) (perm. to file second or successive habeas pet. den.)
- *In re Harold W. Nichols*, No. 19-8179 (Jun. 8, 2020) (habeas corpus den.)

JURISDICTION

Jurisdiction over the final state court judgment is invoked pursuant to 28

U.S.C § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. CONSTITUTION, Fifth Amendment, in relevant part: "nor shall any person ... be deprived of life, liberty, or property, without due process of law[.]"

U.S. CONSTITUTION, Eighth Amendment: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

U.S. CONSTITUTION, Fourteenth Amendment, § 1, cl. 2: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF CASE

Nichols pled guilty to first-degree felony murder. The sole aggravating circumstance justifying the death penalty is the prior violent felony conviction aggravator.[4]

To support the prior violent felony aggravator, the prosecutor introduced evidence of five convictions for the aggravated rape of four women that occurred after the capital murder. (Appendix H, Pet. App. 220a-224a). Violence is not a necessary element of aggravated rape in Tennessee because it can be committed in several ways, all of which do not require the use of violence: by "using a weapon to frighten the victim into submission;" by "inflicting personal injury beyond the rape itself;" or, by "using force or coercion." Tenn. Code Ann. § 39-2-603(a)(1)-(3) (1990).[5]

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[4] A jury sentenced Nichols to death upon two aggravating circumstances: (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;" and, (2) the murder occurred during the commission of a felony. (Appendix I, Pet. App. 226a-227a; Appendix E, Pet. App. 54-55a (citing Tenn. Code Ann. § 39-13-204(i)(2) & (7)). On appeal, the Tennessee Supreme Court struck the felony-murder aggravator for not performing a constitutional-narrowing function. (Appendix E, Pet. App. 57a-58a). The court, by a 3-1 vote, found the error harmless. (Appendix E, Pet. App. 64a). Only the prior violent felony aggravator continues to support the death sentence.

[5] Aggravated rape could be committed by (1) using a weapon to frighten the victim into submission, (2) inflicting personal injury beyond the rape itself, (3) using force or coercion. Tenn. Code Ann. § 39-2-603(a) (1990). Regardless whether Nichols' prior convictions in fact involved violence, the *Johnson* Court emphasized that an unconstitutionally vague statute is not saved by the fact that some conduct clearly falls within the purview of the statute. *Johnson*, 135 S. Ct. at 2561. To satisfy due process and provide adequate notice, the elements of a prior conviction must

Nichols' judgments of conviction do not specify which version(s) of the crime Nichols violated. (Appendix H, Pet. App. 220a-224a). The trial court instructed Nichols' jury he had prior violent felony convictions as follows:

> The defendant was previously convicted of one or more felonies, other than the present charge, whose statutory elements involve the use of violence to the person.
>
> The State is relying upon the crimes of Aggravated Rape, which are felonies involving the use of threat or violence to the person.

(Appendix I, Pet. App. 227a).

On direct appeal, Nichols challenged the aggravating circumstance based on the prosecution's use of crimes that occurred after the capital murder and based on the fact that those convictions were not final at the time of the capital sentencing. (Appendix E, Pet. App. 57a). The state court upheld the prior violent felony aggravator. (Appendix E, Pet. App. 57a-59a).

On June 26, 2015, this Court decided *Johnson v. United States*, ___ U.S. ___, 135 S. Ct. 2551 (2015). *Johnson* held that language used in the residual clause of the Armed Career Criminal Act (ACCA)—language materially identical to the language of Tennessee's prior violent felony aggravator—is unconstitutionally vague and, therefore, the sentencing provision is void. On April 18, 2016, this Court decided *Welch v. United States*, ___ U.S. ___, 136 S. Ct. 1257 (2016). *Welch* held that *Johnson* is a new rule of constitutional law that has retroactive effect in cases on collateral review.

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conclusively reveal the use of violence. *Id.*

Two months after *Welch* was decided, on June 24, 2016, Nichols' state post-conviction counsel properly filed a timely motion to reopen Nichols' state post-conviction petition based on the new retroactive rule in *Johnson*.

On October 4, 2016, the post-conviction court determined that Nichols' motion stated a colorable claim and the post-conviction proceedings were reopened.

The Hamilton County District Attorney General at first moved to dismiss the amended petition, but then engaged in settlement negotiations with Mr. Nichols' counsel. The District Attorney General determined, in fact, that the death sentence in this case is unjust and conceded relief on the *Johnson* claim, as well as on a claim under *Hurst v. Florida*, ___ U.S. ___, 136 S. Ct. 616 (2016). The parties agreed to settle the post-conviction claims for a sentence of life. At a December 8, 2017 status conference, the parties informed the court that they had reached a settlement for disposition of the case and asked the post-conviction court to set a date for disposition and the entry of a settlement order. The court responded by setting the case for disposition on January 31, 2018. The court raised no concerns with either party regarding the settlement and proposed orders for disposition.

At the disposition, the post-conviction court rejected the agreed upon settlement but scheduled the case for a hearing on the claims presented in the amended post-conviction petition. However, two days before Mr. Nichols was to be heard on the claims, the court entered an order summarily denying relief. (Appendix C, Pet. App. 21a-42a).

On October 10, 2019, the Tennessee Court of Criminal Appeals affirmed.

(Appendix A, Pet. App. 1a-19a). The appeals court applied *Johnson* to the prior violent felony aggravating circumstance but found no *Johnson* violation because Tennessee courts "are to look to the actual facts of the prior felony to determine the use of violence when such cannot be determined by the elements of the offense alone." (Appendix A, Pet. App. 9a). The court held that this "case-specific approach would avoid the vagueness problems that doomed the statute[] in *Johnson*[.]" (Appendix A, Pet. App. 8a) (citing *United States v. Davis*, ___ U.S. ___, 139 S. Ct. 2319, 2327 (2019)). The appeals court also determined that the post-conviction court did not violate due process principles when it dismissed the post-conviction petition without a hearing (Appendix A, Pet. App. 16a), and found the post-conviction court did not err in refusing the parties' settlement agreement. (Appendix A, Pet. App. 19a).

On December 6, 2019, Nichols applied to the Tennessee Supreme Court for discretionary review. The state court denied review on January 15, 2020. (Appendix B, Pet. App. 20a). Also on that date, the state court scheduled Mr. Nichols' execution for August 4, 2020. (Appendix K, Pet. App. 237a-238a).

Pursuant to this Court's Order of March 19, 2020, the deadline to file this petition was extended to 150 days.

REASONS FOR GRANTING THE WRIT

The sole aggravating circumstance justifying the death sentence in this case is void for vagueness and Mr. Nichols cannot be constitutionally executed on August 4, 2020. The state court denied relief to Mr. Nichols. It misused language from

Johnson and this Court's recent decision in *Davis* to excise the notice requirement from the Due Process Clause.

Nichols did not have constitutional notice on the day he committed the act of first-degree murder that the maximum punishment of life in prison could be increased to the punishment of death. The principle is firmly established that:

> [T]he terms of a penal statute …must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well-recognized requirement … and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.

Connally v. Gen. Const. Co., 269 U.S. 385, 391 (1926). A defendant must be so informed before he commits the act for which he is to be punished.

Under Tennessee law on the day of the crime, the maximum punishment Nichols faced for first-degree murder was life imprisonment unless there was a finding made at his capital sentencing proceeding that he "was previously convicted of one or more felonies, other than the present charge, which involve the use or threat of violence to the person." Tenn. Code Ann. § 39-13- 204(i)(2) (1988) (repealed and replaced 1989). *See also State v. Dicks*, 615 S.W.2d 126, 130 (Tenn. 1981) (discussing Tennessee's death penalty scheme).

On the day his capital sentencing proceeding began, Nichols had been newly adjudged guilty of aggravated rape in five separate convictions. Although violence is not a necessary element of aggravated rape in Tennessee,[6] and Nichols' judgments

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[6] Aggravated rape could be committed by (1) using a weapon to frighten the victim

of conviction do not specify whether he was convicted of a crime that includes violence as an element (Appendix H, Pet. App. 220a-224a), Nichols' jurors were instructed to consider the prior violent felony conviction aggravator (Appendix I, Pet. App. 227a), and they sentenced him death.

I. Mr. Nichols would currently be serving a life sentence but for the state court's judicial override of a settlement agreement

In January 2018, prison personnel escorted Mr. Nichols off death row, buckled him into a transport vehicle, and drove him to the Hamilton County Courthouse in Chattanooga, Tennessee, where the parties expected the post-conviction court to enter an agreed settlement order for life in prison.[7] The Hamilton County District Attorney had considered all the circumstances surrounding Mr. Nichols' case and had conceded error on the *Johnson* claim which was the focus of the newly re-opened post-conviction proceeding.[8]

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into submission, (2) inflicting personal injury beyond the rape itself, (3) using force or coercion. Tenn. Code Ann. § 39-2-603(a) (1990). Regardless whether Nichols' prior convictions in fact involved violence, the *Johnson* Court emphasized that an unconstitutionally vague statute is not saved by the fact that some conduct clearly falls within the purview of the statute. *Johnson*, 135 S. Ct. at 2561. To satisfy due process and provide adequate notice, the elements of a prior conviction must conclusively reveal the use of violence. *Id*.

[7] Mr. Nichols also has concurrent and consecutive sentences of 225 years for the rape convictions.

[8] The District Attorney General also conceded relief was warranted under *Hurst v. Florida*, 136 S. Ct. 616 (2016). In addition to the issues presented in the post-conviction petition, circumstances considered included the fact that over 80% of death sentences (13 out of 16 cases) imposed in Hamilton County since 1977 have been overturned. In addition, Nichols' trial attorneys failed to investigate and present mitigating evidence described by one court as comprising "a very compelling argument designed to persuade a jury to spare petitioner's life[.]" (Appendix F, Pet. App. 125a); *Nichols v. Bell*, 440 F.Supp.2d 730, 789 n.21 (E.D. Tenn. 2006). A three-judge panel of the Sixth Circuit Court of Appeals, found: "By any measure, Wayne

At the time of trial, Tennessee had not conducted an execution post-*Furman*, and members of the jury were afraid that Mr. Nichols would be paroled if the jury recommended a life sentence—as the State improperly argued in its closing statement. (Appendix J, Pet. App. 230a-236a). The jurors chose a death sentence to serve as a de facto sentence of life without the possibility of parole, which was not a sentence available at the time of Mr. Nichols' trial. Years later, the settlement order would accomplish what the jurors intended, sentencing Mr. Nichols to prison for the rest of his life.

When the District Attorney General presented the judge with the settlement papers, the judge balked. The judge rejected the agreed upon disposition of the case but set the case for a hearing on the claims in the post-conviction petition. Two days before the scheduled hearing, however, the court entered an order summarily denying relief. It denied the *Johnson* claim finding that the new rule *Johnson* announced was not retroactive. (Appendix C, Pet. App. 32a).

Twenty-five years ago, in *Harris v. Alabama*, 513 U.S. 504 (1995), the Supreme Court approved the practice of judicial override of jury sentencing in

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Nichols had an oppressive and forlorn childhood, due to his father's abuse, his mother's illness, their poverty, and the church-dominated society into which he was born." (Appendix G, Pet. App. 184a); *Nichols v. Heidle*, 725 F.3d 516, 520 (6th Cir. 2013). Nichols' mother died when he was young and his father physically, emotionally and sexually abused Nichols and his sister to such an extent that they were taken from their father and placed in an orphanage. The orphanage was not a safe place. Staff inflicted violent and sadistic punishment for the smallest infractions or for no reason at all. Nichols escaped by joining the military. Three jurors from Nichols' trial would not have voted for a death sentence had they known this information. (Appendix J, Pet. App. 230a-236a).

capital cases. The outcome in *Harris* was dictated by the similarity between the Alabama and Florida death penalty statutes and precedent upholding Florida's capital sentence scheme. *See Harris*, 513 U.S. at 508-11.

Justice Stevens dissented in *Harris*. "The Constitution," said Justice Stevens, "does not permit judges to determine" life-or-death sentencing decisions without consent of the accused. *Id.* at 519. In his view, Alabama's capital sentencing statute was "unique" because "the trial judge has unbridled discretion to sentence the defendant to death—even though a jury has determined that death is an inappropriate penalty[.]" 513 U.S. at 515. He wrote that the death penalty's only credible justification "is its expression of the community's outrage." *Id.* at 526; *see also Gregg v. Georgia*, 428 U.S. 153, 183-84 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.).

> To permit the State to execute a woman in spite of the community's considered judgment that she should not die is to sever the death penalty from its only legitimate mooring. The absence of any rudder on a judge's free-floating power to negate the community's will, in my judgment, renders Alabama's capital sentencing scheme fundamentally unfair and results in cruel and unusual punishment.

Harris, 513 U.S. at 526.

On the day that the Hamilton County District Attorney presented the post-conviction judge with the parties' settlement, this Court had already held in *Hurst v. Florida* that Florida's capital sentencing scheme was unconstitutional because judges made the critical findings needed for imposition of a death sentence. *Hurst v. Florida*, 136 S. Ct. 616 (2016). Following *Hurst*, Florida, Delaware and Alabama—the only states that permitted judicial override—abolished the practice.

The Hamilton County District Attorney is the chief prosecutor, elected by the people of Hamilton County. The District Attorney represents the community, and as a reflection of that community, should be the one to assess which crimes warrant the ultimate punishment. To permit the State to execute Mr. Nichols despite the District Attorney's considered judgment that Mr. Nichols should not die is "to sever the death penalty from its only legitimate mooring." *Harris*, 513 U.S. at 526 (Stevens, J., dissenting). Mr. Nichols' execution will not reflect the community's judgment that death is the appropriate sentence, therefore it will constitute cruel and unusual punishment. *Harris*, 513 U.S. at 525 (Stevens, J., dissenting).

The execution of Mr. Nichols after a judge vetoed the elected prosecutor's determination that a life sentence is a just sentence violates the Fourteenth Amendment's guarantee to equal protection of the laws and due process, as well as Mr. Nichols' fundamental rights against the arbitrary and capricious imposition of the death penalty. The clearest and most reliable objective evidence of contemporary values is state practice. *See Graham v. Florida*, 560 U.S. 48, 62 (2010). Although there are currently twenty-eight states that have active death penalty statutes, none of these states permits a judge to override a life sentence. This constitutes not merely national consensus, but unanimous agreement that a sentence due to judicial override does not comport with our evolving standards of decency and the Eighth Amendment. *See Trop v. Dulles*, 356 U.S. 86, 101 (1958). Here, the judge's rejection of the settlement—and the wishes of the elected prosecutor—is thus inconsistent with current societal values.

There are many capital cases in the State of Tennessee that have settled for a sentence of less than death during the post-conviction proceedings, for example: H.R. Hester, Joel Schmeiderer, John Freeland, Roy Keough, Devin Banks, Michael Coleman, Darell Taylor, and Richard Simon. Some of these cases, including the case of Joel Schmeiderer, settled for a life sentence in exchange for withdrawal of the defendant's post-conviction petition and without a determination on the merits of any claim by the post-conviction court. *See also State v. Williams*, 851 S.W.2d 828, 830 (Tenn. Crim. App. 1992) (a trial court has the discretion and inherent power to accept a settlement agreement in a criminal case). The judge presiding over Mr. Nichols' case below is the same judge who entered a settlement agreement in the Schmeiderer case. Arbitrary denial of the benefit of a judicial process to one defendant while it is afforded to many others is a violation of due process and equal protection. *See United States v. Moore*, 916 F.2d 1131, 1136 (6th Cir. 1990) ("By leaving the decision whether to accept or reject a plea to the 'exercise of sound judicial discretion,' the Supreme Court did not intend to allow district courts to reject pleas on an arbitrary basis.") (quoting *Santobello v. New York*, 404 U.S. 257, 262 (1971)). The post-conviction judge's override of the District Attorney General's determination that a just sentence in this case is a life sentence implicates both Equal Protection and Due Process. Arbitrary denial of the benefit of a judicial process to one defendant while it is afforded to many others is a violation of due process and equal protection which cannot be hidden behind the shield of judicial discretion.

Although no defendant has an absolute right to settle a case, this Court has instructed that "in those cases, '[w]hen a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution.'" *Lafler v. Cooper*, 566 U.S. 156, 168 (2012) (quoting *Evitts v. Lucey*, 469 U.S. 387, 401 (1985)). Plea and settlement negotiations, whether before or after trial, reflect deliberate state action and must be conducted within the bounds of the Constitution. *See Lafler*, 566 U.S. at 168. A state must follow both due process and equal protection principles once it has conferred a benefit on its citizens, even if that benefit is not mandated by the United States Constitution. *Evitts*, 469 U.S. at 400-01 (holding that the State of Kentucky's system of criminal appellate review, though not required by the United States Constitution, must be implemented in accordance with fundamental principles of due process and equal protection).

A recent court of appeals case dealing with abuse of discretion during an agreed disposition of a criminal case is instructive. In *United States v. Cota-Luna*, 891 F.3d 639 (6th Cir. 2018), the Sixth Circuit found that the trial court abused its discretion by rejecting a plea agreement and reversed and remanded with instructions for the sentencing court to again consider whether to accept the plea agreement. The sentencing court's vague references to the proposed sentence being inappropriate because of that court's own assessment of the defendant's "relevant conduct" and other commentary on the serious nature of the charges troubled the appellate court and formed the basis for its decision to grant relief. *Id.* at 648. Thus,

the Sixth Circuit also ordered that the case be reassigned to different judge due to the fact that the trial court had made up his mind that the defendant deserved a harsh sentence. Here, the judge made up his mind before affording Mr. Nichols an opportunity to be heard. The judge cancelled the previously scheduled hearing and issued its summary denial (erroneously concluding that the new rule in *Johnson*, *supra*, is not retroactive), and in doing so deprived Mr. Nichols of the fundamental right to be heard on his claims. *In re Rigs*, 612 S.W.2d 461 (1980); *see also Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner).

Mr. Nichols' death sentence is arbitrary and capricious, and deprives him of due process and equal protection of the law. Review should be granted.

II. Mr. Nichols is scheduled to be executed even though the sole aggravating factor is void for vagueness

The statutory language of Tennessee's prior violent felony conviction aggravating factor that increased the maximum punishment in this case to the death penalty is just as indefinite as the language of the ACCA's residual clause that this Court declared in *Johnson v. United States*, 135 S. Ct. 2551 (2015), is unconstitutionally vague. Any differences have no impact on the constitutional analysis.[9] The aggravating factor in effect at the time of the felony murder enhanced the maximum punishment from life imprisonment to death if:

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[9] Courts have determined that "a couple of minor distinctions between the text of the residual clause" and other definitions of violent felonies do not undermine "the applicability of *Johnson*'s fundamental holding[.]" *Dimaya v. Lynch*, 803 F.3d 1110, 1120 (9th Cir. 2015). Accordingly, the definition of "aggravated felony" for

> (2) The defendant was previously convicted of one or more felonies, other than the present charge, which involve the use or threat of violence to the person.

Tenn. Code Ann. § 39-13-204(i)(2) (1988).

Tennessee's aggravating circumstance does not conclusively define a violent felony and it is not limited to prior convictions where violence is a statutory element. Instead, it asks whether the previous conviction "involve[d]" the use or threat of violence to the person. *Compare* Appendix A, Pet. App. 9a, 2019 WL 5079357, at *6, *with Butcher v. State*, 171 A.3d 537, 540 n.16 (Del. 2017) (noting, "our General Assembly's decision to specifically enumerate those offenses deemed to be 'violent felonies' avoids the problem posed in *Johnson* of ascertaining which types of offenses are 'violent felonies.'"). The problematic inquiry into the conduct "*involve[d]*" includes an unknowable group of prior convictions which might or might not involve the use of violence. *State v. Sims*, 45 S.W.3d 1, 12 (Tenn. 2001) (rejecting argument that the State's use of the prior violent felony aggravator was improper because the statutory elements of aggravated assault do not necessarily involve the use of violence); *State v. Moore*, 614 S.W.2d 348, 351 (Tenn. 1981). The aggravator asks the same question posed by the ACCA's residual clause: whether

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immigration cases has been declared unconstitutionally vague under *Johnson*. *See, e.g.*, *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018) (applying *Johnson* to the INA's definition of a crime of violence). In addition, the residual clause of the definition of violent felony in a federal statute providing for mandatory minimum sentences based on using, carrying, or possessing a firearm in connection with a federal crime of violence was held unconstitutionally vague. *United States v. Davis*, 139 S. Ct. 2319 (2019).

the prior felony conviction "*involves*" a certain type of prior conduct. *See* 18 U.S.C. § 924(e)(2)(B)(ii)) (increasing punishment for a prior felony conviction which "otherwise involves conduct that presents a serious potential risk of physical injury to another").

Tennessee's prior violent felony aggravating circumstance shares functional and textual characteristics with the residual clause of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(2)(B)(ii). First, both sentencing provisions increase the maximum punishment for the crime in question. The maximum available punishment for the crime of being a felon in possession of a firearm is not more than ten years, 18 U.S.C. § 924(a)(2), unless the defendant had committed three or more qualifying felonies under 18 U.S.C. § 924(e)(1). In such an event, the minimum punishment becomes fifteen years and the maximum is life. Here, the maximum available punishment for the crime of first-degree murder was life in prison unless there was a finding of the prior violent felony conviction aggravator. In such an event, the maximum punishment becomes death.

Second, the applicability of both sentencing statutes turns upon the fact that a defendant had been convicted of a qualifying offense, not upon whether a defendant had engaged in prohibited conduct. Like the residual clause struck down in *Johnson* (which enhanced a defendant's maximum punishment for a prior felony conviction which "otherwise involves conduct that presents a serious potential risk of physical injury to another," *see* 18 U.S.C. § 924(e)(2)(B)(ii)), the enhancement of Nichols' maximum sentence to include the possibility of a sentence of death turned

entirely upon whether he had prior felony convictions "which involve the use or threat of violence to the person." Tenn. Code Ann. § 39-13-204(i)(2). Faced with almost identical language, this Court observed:

> the relevant part of the Armed Career Criminal Act "refers to 'a person who ... has three previous convictions' for—not a person who has committed—three previous violent felonies or drug offenses." 495 U.S., at 600. This emphasis on convictions indicates that "Congress intended the sentencing court to look only to the fact that the defendant had been convicted of crimes falling within certain categories, and not to the facts underlying the prior convictions." *Ibid.*

Johnson, 135 S. Ct. at 2562 (quoting *Taylor v. United States*, 495 U.S. 575 (1990)).

In both instances, the statutory language requires the sentencing court to determine whether the defendant's prior conviction fell within a particular category of crimes—previous convictions for violent crimes—not whether the defendant had previously engaged in violent and/or potentially violent acts. Indeed, in upholding the applicability of Tennessee's prior violent felony circumstance in Nichols' case, the Tennessee Supreme Court relied on the order of Nichols' convictions, and not the order of his conduct. (Appendix E, Pet. App. 55a); *State v. Nichols*, 877 S.W.2d at 736 ("For purposes of this aggravating circumstance, the order in which the crimes were actually committed is irrelevant so long as the convictions have been entered before the sentencing hearing at which they were introduced.")

Third, the ACCA's residual clause and Tennessee's prior violent felony conviction aggravator contain similar language. The residual clause required a conviction that "*involves conduct* that presents a serious potential risk of physical injury to another." *Johnson*, 135 S. Ct. at 2555-56. The language of the prior violent

felony aggravator required a conviction that "*involve[s] the use or threat of violence to the person*." Tenn. Code Ann. § 39-2-203(i)(2) (1988).[10]

For further comparison, the sentencing provision struck down in *Dimaya* increased the maximum penalty where the defendant had been convicted of:

> (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 16(b). Similarly, the residual clause struck down in *Davis* enhanced the defendant's sentence when the defendant had previously been convicted of a felony:

> (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 924(c)(3)(B).

The language of Tennessee's prior violent felony aggravator cannot be distinguished from the federal sentencing enhancements this Court has already struck down. The phrase "involves the threat of violence" in Tennessee's aggravator is synonymous with the phrase "presents a serious potential risk" in the ACCA's residual clause, § 924(e)(2)(B). It is even more linguistically similar to "involves a substantial risk" in § 16(b) and § 924(c)(3)(B), the provisions at issue in *Dimaya* and *Davis*, respectively.

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[10] "The defendant was previously convicted of one or more felonies, other than the present charge, which involve the use or threat of violence to the person." Tenn. Code Ann. § 39-13-204(i)(2) (1988) (repealed and replaced 1989).

Fourth, both statutes do not require violence as an element of the prior conviction. They allow for a chance that the prior conviction involved violence. *See Johnson*, 135 S. Ct. at 2557-58 (contrasting risk-based and elements-based definitions of prior violent felonies). In the residual clause, that "chance" is described as involving conduct that presents "a serious potential risk of physical injury to another." In Tennessee's aggravating circumstance, the "chance" is described as involving a "threat of violence." Though the language of the residual clause requires that the chance be "serious," and Tennessee's aggravator does not, neither statute further defines what level of threat the prior conviction must present.

The state court did not dispute that the language of Tennessee's prior violent felony aggravator is vague but it did determine that it is not unconstitutionally vague. The court misused language from *Johnson* and this Court's recent decision in *Davis* to excise the notice requirement from the Due Process Clause. It determined that when a capital defendant's prior conviction does not include "violence" as a necessary element the trial court is "to look to the actual facts of the prior felony to determine the use of violence[.]" (Appendix A, Pet. App. 9a). The state court reasoned that the aggravator "is not void for vagueness under *Johnson*[,]" (Appendix A, Pet. App. 10a), because state court judges do not use "a judicially imagined ordinary case in applying the prior violent felony aggravating circumstance." (Appendix A, Pet. App. 9a).

The first problem with the state court's reasoning is that it mistakes effect for causation. The federal court's use of a categorical approach to apply the residual clause resulted from the fact that the statutory language of the residual clause is vague. In other words, the vagueness problem did not originate with the use of the categorical approach but with the language of the sentence-enhancing statute. Vagueness caused the sentencer to look beyond the elements of the prior offense to determine whether the conviction qualified for the enhancement provision. *Johnson*, 135 S. Ct. at 2557. The *Johnson* decision clearly drew a constitutional line between definitions of a past conviction that rely on the elements of the crime versus definitions of a past conviction that turn on a determination of the type of conduct that was involved in the past crime. *Id.* For example, a sentencing enhancement based on a prior conviction that has violence *as an element* provides notice of its enhancement potential and is constitutional. *See, e.g.*, 18 U.S.C. § 924(e)(2)(B)(i) (the ACCA's "force" or "elements clause").

In contrast, Tennessee's prior violent felony aggravating circumstance requires a prior conviction that "involve[s] the use or threat of violence to the person." Tenn. Code Ann. § 39-13-204(i)(2) (1988). A sentencing enhancement—like Tennessee's prior violent felony aggravator—based on a prior conviction for a crime that *involves conduct* not identifiable by the elements of the conviction is vague and unknowable and, therefore, unconstitutional. *See, e.g.*, 18 U.S.C. § 924(e)(2)(B)(ii) (the ACCA's residual clause); *but cf. Shular v. United States*, ___ U.S. ___, 140 S. Ct. 779 (2020) (a sentencing provision based on a prior conviction that involves conduct

which *is* identifiable by the elements of conviction is constitutional). Accordingly, the fact that Tennessee courts may not use a judicially imagined ordinary case to apply the aggravating circumstance does not avoid the vagueness problem with the aggravator.

The second problem with the state court's reasoning is that it endorses a practice of moving beyond the elements of a prior conviction and reconstructing the conduct underlying that conviction to determine, in the first instance, whether such past conduct can enhance the punishment of an offense under prosecution. *Johnson*'s fundamental holding applies to instances where a sentencer engages in an after-the-fact consideration of conduct underlying a prior conviction based on a cold record to determine whether the prior conviction qualifies as a violent felony. *Johnson*, 135 S. Ct. at 2558; *see also Smith v. Goguen,* 415 U.S. 566, 575 (1974) (explaining that any judicial narrowing of a vague statute must occur before the defendant commits the crime for which the enhanced punishment is to be imposed). The "wide-ranging inquiry" into the factual circumstances of a prior conviction to demonstrate that the aggravator is "so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Johnson*, 135 S. Ct. at 2556. The state court's decision ignores the notice aspect of due process and the rule announced in *Johnson*.

The Tennessee courts apply the vague prior violent felony aggravator by looking beyond the elements of the prior conviction and examining the underlying facts, whereas the improperly wide-ranging inquiry undertaken by courts applying

the ACCA's residual clause involved a categorical approach. This distinction, however, does not cure the lack of notice resulting from such an inquiry. *See Commonwealth v. Beal*, 52 N.E.3d 998, 1008 (Mass. 2016) (holding a similar state statute unconstitutional under *Johnson*); *Commonwealth v. Rezendes*, 37 N.E.3d 672, 679-80 (Mass. App. Ct. 2015) (holding in light of *Johnson* that "unless the Commonwealth can prove, without inquiring into the manner in which the weapon was used, that a prior adjudication involved a deadly weapon, the adjudication cannot qualify as a predicate offense"). *See also Nordahl v. State*, 829 S.E.2d 99, 104-06 (Ga. 2019) (any interpretation of a state sentencing statute that allows an analysis of the conduct involved in a prior conviction—beyond consideration of only the elements of the conviction—is unconstitutional). A Tennessee defendant has no "principled and objective" way to know if a future sentencing body will deem violent the means of a prior conviction, and a defendant is unable to anticipate the consequences of future criminal convictions. *Shuti v. Lynch*, 828 F.3d 440, 450 (6th Cir. 2016).

A sentencing enhancement—like Tennessee's prior violent felony aggravator—based on a prior conviction for a crime that *involves conduct* not identifiable by the elements of the conviction is vague and unknowable and, therefore, unconstitutional. *See, e.g.*, 18 U.S.C. § 924(e)(2)(B)(ii) (the ACCA's residual clause); *but cf. Shular v. United States*, 140 S. Ct. 779 (2020) (a sentencing provision based on a prior conviction that involves conduct which *is* identifiable by the elements of conviction is constitutional). Determining whether any crime

involves any type of categorical conduct apart from its enumerated elements is an impossibly speculative task. *Johnson*, 135 S. Ct. at 2556 (the category of crimes that involve the use of violence to the person is "so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement"). The *Johnson* Court found this to be true even where "common sense" might dictate what type of conduct was involved in committing certain offenses. *Johnson*, 135 S. Ct. at 2559. The inquiry under Tennessee's aggravator as to whether elements of a prior conviction "*involves*" violent conduct is just as indefinite as the inquiry under the ACCA's residual clause as to whether a prior conviction "involves" violent conduct. Such uncertainty about what constitutes a violent felony is what rendered the sentence enhancement in *Johnson*, and subsequent cases, void-for-vagueness. "*Johnson establishes, in other words, that even the use of impeccable factfinding procedures could not legitimate a sentence based on that clause*." *Welch*, 136 S. Ct. at 1265 (quotation marks and citation omitted). *Johnson's* fundamental holding applies to instances where a sentencer engages in an after-the-fact consideration of conduct underlying a prior conviction based on a cold record to determine whether the prior conviction qualifies as a violent felony. *Johnson*, 135 S. Ct. at 2558.

The court below misread the following statement in *Davis*:

> [A] case-specific approach would avoid the vagueness problems that doomed the statutes in *Johnson* and *Dimaya*. In those cases, we recognized that there would be no vagueness problem with asking a jury to decide whether a defendant's "'real-world conduct'" created a substantial risk of physical violence.

Davis, 139 S. Ct. at 2327 (quoting *Dimaya*, 138 S. Ct. 1215).

The state court's conclusion misreads *Davis* to hold that an unconstitutionally-vague statute is cured by the application of "real-world facts." Indeed, a determination of whether a prior conviction will enhance a sentence that involves a case-specific approach by "reconstruct[ing], long after the original conviction, the conduct underlying that conviction" would raise serious constitutional concerns. *Johnson*, 135 S. Ct. at 2562. *Davis* refers to a method of applying the "real world facts" of the current offense, not, as occurred in this case, applying the "real world facts" of an offense long after the date of conviction. *See Nichols*, 2019 WL 5079357, at *5 (Appendix A, Pet. App. 8a).

> By contrast, a § 924(c) prosecution focuses on the conduct with which the defendant is *currently charged*. The government already has to prove to a jury that the defendant committed all the acts necessary to punish him for the underlying crime of violence or drug trafficking crime. So it wouldn't be that difficult to ask the jury to make an additional finding about whether the defendant's conduct also created a substantial risk that force would be used.

Davis, 139 S. Ct. at 2327.

Moreover, *Johnson* recognizes that, even when "real world facts" are examined, they cannot be compared to facts of an "imaginary ideal" of what constitutes a violent crime. *Johnson v. United States*, 135 S. Ct. at 2561. At bottom, allowing the sentencer to make such a determination long after the point in time by which a defendant must be fully apprised of the consequences of his actions implicates the very due process protections this Court has jealously guarded in *Johnson* and its progeny. Vagueness in the death penalty context violates not only

the Fifth and Fourteenth Amendments but also the Eighth Amendment's prohibition against unguided discretion to determine whether a defendant's maximum penalty should be increased. *See Franklin v. Lynaugh*, 487 U.S. 164, 181 (1988); *Maynard v. Cartwright*, 486 U.S. 356, 363-64 (1988).

Review should be granted.

III. Review should be granted to prevent the execution of a man who is innocent of the death penalty

Mr. Nichols is innocent of the death penalty because the sole aggravating circumstance is void for vagueness. *See Johnson*, 135 S. Ct. at 2556, 2562. "In our constitutional order, a vague law is no law at all." *Davis*, 139 S. Ct. at 2323. In other words, the unconstitutional aggravator is, "in legal contemplation, as inoperative as though it had never been passed." *Norton v. Shelby Cty.*, 118 U.S. 425, 442 (1886). This is because when a law is unconstitutional, a court acquires no jurisdiction and there cannot be a legal cause of conviction, or, as in this case, punishment. *Ex parte Siebold*, 100 U.S. 371, 376 (1879); *Montgomery v. Louisiana*, 136 S. Ct. 718, 730-31 (2016) (finding, a conviction or sentence imposed in violation of a substantive rule is not just erroneous but contrary to law and, as a result, void).

The unconstitutionally vague—and therefore void—prior violent felony aggravator cannot sustain the death sentence. Without an aggravating circumstance, constitutional narrowing and eligibility for death are absent making Nichols legally and factually innocent of the death penalty because the State cannot prove the requirements for imposition of a death sentence. *Sawyer v. Whitley*, 505 U.S. 333, 340-47 (1992) (determining that "actual innocence of the death penalty"

must focus on those elements that render a defendant eligible for the death penalty). *See also Allen v. Ives*, 950 F.3d 1184, 1189 (9th Cir. 2020) (finding retroactive change in law rendered the defendant factually innocent of a predicate crime); *United States v. Bowen*, 936 F.3d 1091, 1108 (10th Cir. 2019) ("We conclude that Bowen's witness retaliation convictions do not qualify as crimes of violence under 18 U.S.C. § 924(c)(3)(A), and § 924(c)(3)(B) is void for vagueness, so Bowen is actually innocent of § 924(c)(1)."); *United States v. Adams*, 814 F.3d 178, 183 (4th Cir. 2016) (concluding the defendant has shown "factual innocence" because the government cannot prove one of the required elements of the crime).

Tennessee's death penalty statute utilizes aggravating circumstances to narrow the class of persons convicted of first-degree murder and who are eligible for the punishment of death. Tenn. Code Ann. § 39-13-204(g)(1) (1988); *see also* Tenn. Code Ann. § 39-13-204(f) (1988) (providing, in the absence of a statutory aggravating circumstance, the punishment shall be life imprisonment). "The jury may impose the death penalty only upon finding that one or more aggravating circumstances listed in the statute are present, and further that such circumstance or circumstances are not outweighed by any mitigating circumstance." *State v. Dicks*, 615 S.W.2d 126, 130 (Tenn. 1981).

Here, the only aggravating circumstance—the prior violent felony conviction aggravator—is void for vagueness. Since no aggravating circumstance exists, the death penalty is not an available sentence and Nichols is innocent of the death

penalty. Certiorari review should be granted to avoid the execution of an innocent man.

CONCLUSION

For the foregoing reasons, Petitioners request that this Court grant the Petition for Writ of Certiorari.

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Respectfully submitted,

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