

NO. 19-8742

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
TENNESSEE COURT OF CRIMINAL APPEALS

RESPONDENT'S BRIEF IN OPPOSITION

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EXECUTION SET AUGUST 4, 2020, AT 7:00 P.M. (CDT)

CAPITAL CASE

RESTATEMENT OF THE QUESTIONS PRESENTED

I.

Whether the Eighth Amendment requires a state court to create jurisdiction not provided for by state law in order to override the verdict of a jury and to accept modification of a sentence in violation of state constitutional separation-of-powers provisions.

II.

Whether the holding in *Johnson v. United States*, 135 S. Ct. 2551 (2015)—that using the categorical approach to determine the applicability of the Armed Career Criminal Act’s residual clause made the statute unconstitutionally vague—applies to a state prior-violent-felony aggravating factor that requires consideration of real-world facts.

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The opinion of the Tennessee Court of Criminal Appeals is unreported but is available at *Nichols v. State*, No. E2018-00626-CCA-R3-PD, 2019 WL 5079357 (Tenn. Crim. App. Mar. 26, 2019). (Pet. App. 1a-19a.) The Tennessee Supreme Court’s order denying discretionary review is unreported. (Pet. App. 20a.)

JURISDICTIONAL STATEMENT

The Tennessee Supreme Court denied discretionary review on January 15, 2020. (Pet. App. 20a.) This Court extended the deadline for filing the petition for writ of certiorari to June 15, 2020. Nichols filed his petition on June 15, 2020, and invokes this Court’s jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

The Eighth Amendment to the United States Constitution prohibits the infliction of “cruel and unusual punishments.”

Article II, section 1 of the Tennessee Constitution divides the powers of Tennessee government “into three distinct departments: the Legislative, Executive, and Judicial.”

Article II, section 2 of the Tennessee Constitution prohibits any “person or persons belonging to one of these departments” from “exercis[ing] any of the powers properly belonging to either of the others, except in the cases herein directed or permitted.”

Article III, section 6 of the Tennessee Constitution gives the Governor “power to grant reprieves and pardons, after conviction, except in cases of impeachment.”

Tennessee Code Annotated Section 40-30-111(a) provides, in relevant part:

If the court finds that there was such a denial or infringement of the rights of the prisoner as to render the judgment void or voidable, including a finding that trial counsel was ineffective on direct appeal, the court shall vacate and set aside the judgment or order a delayed appeal as provided in this part and shall enter an appropriate order and any supplementary orders that may be necessary and proper.

STATEMENT OF THE CASE

Over the course of several months in 1988 and 1989, Nichols raped multiple women in Chattanooga, Tennessee. He “roamed the city at night and, when ‘energized,’ relentlessly searched for vulnerable female victims.” *State v. Nichols*, 877 S.W.2d 722, 726 (Tenn. 1994), *cert. denied*, 513 U.S. 1114 (1995). As a result, Nichols “faced forty charges growing out of some fourteen incidents” of rape. *Id.* at 735.

On September 30, 1988, Nichols broke into the home of 21-year-old K.P. *Id.* at 726. “After finding [her] home alone in her upstairs bedroom, [Nichols] tore her undergarments from her and violently raped her.” *Id.* When she resisted, he “forcibly struck her at least twice in the head with a two-by-four he had picked up after entering the house.” *Id.* After raping and struggling with K.P., Nichols struck her several times in the head “with great force.” *Id.* One of K.P.’s roommates discovered her alive the next morning, lying in a pool of blood on the floor next to her bed. *Id.* She died the following day. *Id.*

Three months later, during questioning on unrelated charges, Nichols confessed to raping and murdering K.P. *Id.* Nichols pleaded guilty to charges of first-degree felony murder, aggravated rape, and first-degree burglary. *Id.* at 725. At the sentencing hearing, the State introduced evidence concerning the nature and circumstance of the crime, including Nichols’s videotaped confession, testimony from the medical examiner about K.P.’s injuries and cause of death, and testimony from the detective who questioned Nichols. *Id.* at 726. The State also introduced proof of Nichols’s five prior convictions for aggravated rape. *Id.*

The jury found two aggravating circumstances: (1) Nichols's five previous convictions for aggravated rape involved the use of violence against a person and (2) the murder occurred during the commission of a felony. *Id.* at 725. On appeal, the Tennessee Supreme Court found the application of the second aggravating factor was harmless error and affirmed the jury's sentence of death. *Id.* at 739.

The convicting court denied Nichols's petition for post-conviction relief as to his first-degree murder conviction and death sentence. The Tennessee Supreme Court affirmed. *Nichols v. State*, 90 S.W.3d 576 (Tenn. 2002).

Nichols then filed a petition for writ of habeas corpus under 28 U.S.C. § 2254 in the United States District Court for the Eastern District of Tennessee, which denied the petition but granted a certificate of appealability on certain claims. *Nichols v. Bell*, 440 F. Supp. 2d 730 (E.D. Tenn. 2006); *Nichols v. Bell*, 440 F. Supp. 2d 847 (E.D. Tenn. 2006). The Sixth Circuit Court of Appeals affirmed. *Nichols v. Heidle*, 725 F.3d 516 (6th Cir. 2013), *cert. denied*, 574 U.S. 1025 (2014).

Next, Nichols requested authorization from the Sixth Circuit to file a second or successive habeas corpus petition, claiming that *Johnson v. United States*, 135 S. Ct. 2551 (2015), and *Welch v. United States*, 136 S. Ct. 1257 (2016), announced a new rule of law retroactively applicable to his case that rendered Tennessee's prior-violent-felony aggravating factor unconstitutionally vague. The Sixth Circuit denied the motion. It rejected Nichols's attempt to equate the residual clause of the Armed Career Criminal Act with the elements- and conduct-based prior-violent-felony aggravating factor applied by the jury in his case. *In re Nichols*, No. 16-565 (6th Cir. Aug. 15, 2016). The Sixth Circuit held that "[b]ecause there's no 'fair-minded argument' that *Johnson* dictates a result it explicitly disavowed, Nichols's challenge never even gets off the ground." *In re Nichols*, No. 16-565, slip op. at 3.

Relying again on *Johnson* and *Welch*, Nichols also moved the convicting court to reopen his state-court post-conviction petition pursuant to Tenn. Code Ann. § 40-30-117. (Pet. App. 3a.) The post-conviction court granted the motion to reopen but ultimately denied relief without a hearing. (Pet. App. 4a-5a.) Between the granting of the motion and the denial of relief, Nichols and the District Attorney discussed “settling” the claims raised in the petition in exchange for a life sentence. (Pet. App. 5a.) The post-conviction court found it necessary to establish a valid basis for post-conviction relief before it could consider any modification of Nichols’s sentence and asked the parties to submit additional authority concerning the propriety of the settlement. (Pet. App. 5a.) Shortly thereafter, the Court of Criminal Appeals ruled in another case¹ that *Johnson v. United States* was inapplicable to Tennessee’s prior-violent-felony aggravating factor. (Pet. App. 5a.) Accordingly, the post-conviction court found Nichols’s petition was “appropriate for disposition without a hearing” and that it was “not appropriate to accept . . . [the] proposed settlement agreement . . . where there is no claim for post-conviction relief before this Court which should survive this Court’s statutorily required preliminary order.” (Pet. App. 5a.)

The Tennessee Court of Criminal Appeals affirmed, holding that the post-conviction court lacked jurisdiction to modify Nichols’s sentence because *Johnson* and *Welch* have no impact on Tennessee’s prior-violent-felony aggravator. (Pet. App. 10a, 16a-19a.) Under Tennessee’s Post-Conviction Procedure Act, a post-conviction court’s authority to vacate a judgment “is contingent upon the court’s finding that the judgment is void or voidable due to an infringement of the petitioner’s constitutional rights.” (Pet. App. 17a.) Thus, to allow a post-conviction court to modify a judgment without first finding a constitutional violation sufficient to warrant post-

¹ *Johnson v. State*, No. W2017-00848-CCA-R28-PD, Order (Tenn. Crim. App. Sept. 11, 2017), *perm. app. denied* (Tenn. Jan. 19, 2018), *cert. denied*, 139 S. Ct. 67 (Oct. 1, 2018).

conviction relief “would effectively allow the trial court to exercise the pardoning and commutation power, which is vested solely in the Governor.” (Pet. App. 18a.) The Tennessee Supreme Court denied Nichols’s application for permission to appeal on January 15, 2020. (Pet. App. 20a.)

Nichols then returned to the Sixth Circuit to again request authorization to file a second or successive habeas corpus petition predicated on *Johnson* and *Welch*. The Sixth Circuit again denied authorization. *In re Nichols*, No. 19-6460 (6th Cir. Feb. 13, 2020).

After the Tennessee Supreme Court set Nichols’s execution date, Nichols filed an original petition for writ of habeas corpus in which he claimed Tennessee’s prior-violent-felony aggravator violated *Johnson* and asked this Court to review the Sixth Circuit’s denial of his successive habeas petition. This Court denied the petition. *In re Harold Wayne Nichols*, __ S. Ct. __, 2020 WL 3038413, at *1 (June 8, 2020).

On June 30, 2020, after filing his petition in this Court, Nichols filed a 42 U.S.C. § 1983 action against the Justices of the Tennessee Supreme Court and Tennessee Department of Correction officials seeking a stay of execution from the District Court for the Middle District of Tennessee. *Nichols v. Parker*, No. 3:20-cv-0566 (M.D. Tenn.).

Nichols now asks this Court to review the decision of the Tennessee Court of Criminal Appeals affirming the denial of relief on his reopened post-conviction petition.

REASONS FOR DENYING THE PETITION

Nichols asks this Court to review a Tennessee state court’s interpretation of Tennessee state law and to find state court jurisdiction where the state court found none. Additionally, he asks the Court to disregard Tennessee’s longstanding interpretation of its own statutory prior-violent-felony aggravating factor in order to declare Tennessee’s law unconstitutionally vague. Because Nichols seeks review of a state court’s interpretation of state law, his petition should be denied.

The power to interpret a state statute lies squarely in the province of the state courts. “The [s]tate courts are the appropriate tribunals . . . for the decision of questions arising under their local law, whether statutory or otherwise.” *Murdock v. City of Memphis*, 87 U.S. 590, 626 (1875). “[C]omity and respect for federalism compel [this Court] to defer to the decisions of state courts on issues of state law.” *Bush v. Gore*, 531 U.S. 98, 112 (2009) (Rhenquist, C.J., concurring). Accordingly, this Court may only review the decision of a state court to resolve a federal question presented to or decided by the state court. 28 U.S.C. § 1257(a). This Court is not a supervisor of state courts and will only review a state court’s decision to correct wrongs of a constitutional dimension. *Smith v. Phillips*, 455 U.S. 209, 221 (1982).

I. The Jurisdictional Issue Raised by the Petition Is Purely an Issue of State Law.

The fundamental question presented by the petition—whether the post-conviction court had jurisdiction under Tennessee’s Post-Conviction Procedure Act to commute Nichols’s death sentence to a life sentence—is one purely of state law. That state law question, which has been decided by the state appellate court, affords no basis for Nichols’s petition since “the construction that a state court gives a state statute is not a matter subject to [this Court’s] review” *New York v. Ferber*, 458 U.S. 747, 767 (1982).

The Tennessee Constitution vests the power of clemency exclusively in the Governor. Tenn. Const. art. III, §. 6. Absent a judicial finding that a judgment is infirm, Tennessee courts have no jurisdiction to modify a death sentence imposed by a jury. Tenn. Code Ann. § 40-30-111(a). Indeed, it would be a violation of Tennessee’s constitutional separation-of-powers doctrine, Tenn. Const. art. II, §§ 1-2, for the judiciary to grant clemency. These principles are firmly established in Tennessee law, and the Tennessee Court of Criminal Appeals applied them to this case to hold that the post-conviction court was “without jurisdiction to modify” Nichols’s sentence and that “[t]o hold otherwise would effectively allow the trial court to exercise the pardoning and commutation power”—a power reserved to the Governor under the Tennessee Constitution. (Pet. App. 18a.)

Under Tennessee’s Post-Conviction Procedure Act, a post-conviction court may only set aside a judgment of conviction if it finds the judgment was rendered void or voidable by the infringement of the constitutional rights of the prisoner. Tenn. Code Ann. § 40-30-111(a). Thus, since Nichols’s constitutional rights were not infringed, the post-conviction court had no jurisdiction or authority to override the jury’s verdict or to modify the judgment.

Nichols does not address this jurisdictional issue at all. (Pet. at 8-14.) He cites no Tennessee authority on the issue; he merely points to other capital cases in Tennessee that were purportedly resolved by agreement. But, as the Court of Criminal Appeals correctly noted, those un-appealed trial court orders have no precedential value and are not binding on other Tennessee courts. (Pet. App. 17a.) In Tennessee, a court’s jurisdiction must come from the constitution, a statute, or a rule—not from un-appealed trial court orders in unrelated cases. *See Osborn v. Marr*, 127 S.W.3d 737, 739 (Tenn. 2004); *State v. Moore*, 814 S.W.2d 381, 383 (Tenn. Crim. App. 1991).

The Court of Criminal Appeals’s interpretation of state law is definitive and controlling in this case and in this Court. *See Hicks on Behalf of Feiock v. Feiock*, 485 U.S. 624, 629-30 & n.3 (1988) (holding that this Court was “not at liberty to depart from the state appellate court’s resolution of these issues of state law” where the state supreme court denied review); *see also Ferber*, 458 U.S. at 767 (“[T]he construction that a state court gives a state statute is not a matter subject to our review . . .”).

The state law issues at stake—the jurisdiction of state courts and the state constitutional separation of powers—are fundamental to Tennessee’s ability to structure its own sovereign government. The Court should not interfere with that prerogative.

To disguise the fact that his quarrel is with the jurisdictional provisions of Tennessee’s Post-Conviction Procedure Act and the separation-of-powers doctrine of the Tennessee Constitution, Nichols tries to federalize these state law questions by making some unavailing due process and equal protection arguments. Even when a federal question lurks in a petition, the petition should be denied if it first requires this Court “to resolve issues that may turn on the correct interpretation of antecedent questions under state law.” *NCP Mktg. Grp. v. Star*, 129 S. Ct. 1577, 1578 (2009) (Kennedy, J., concurring); *see* Justice Brennan, *State Court Decisions and the Supreme Court*, 31 Pa. B. Ass’n Q. 393, 399-400 (1960). And because that is what would be required here, Nichols’s petition should be denied.

II. Nichols’s Eighth Amendment Claim Is Not Reviewable by this Court Because It Was Not Presented to the State Courts.

Nichols also asks this Court to decide whether “the judicial override of a life sentence settlement agreement result[s] in an arbitrary and capricious death sentence in violation of the Eighth and Fourteenth Amendments.” (Pet. at ii.) But because this Eighth Amendment claim was neither addressed nor adequately presented below, it is not subject to review by this Court.

Congress has given this Court authority to review final judgments of state courts where a right “is specially set up or claimed under the Constitution or the treaties or statutes of . . . the United States.” 28 U.S.C. § 1257(a). “[T]his Court has almost unfailingly refused to consider any federal-law challenge to a state-court decision unless the federal claim ‘was either addressed by or properly presented to the state court that rendered the decision we have been asked to review.’” *Howell v. Mississippi*, 543 U.S. 440, 443 (2005) (quoting *Adams v. Robertson*, 520 U.S. 83, 86 (1997)). The restraint exercised by this Court reflects both the general reluctance of courts to set aside the decision of a lower court on grounds not presented to that court and the specific “regard for the appropriate relationship of this Court to state courts.” *McGoldrick v. Compagnie Generale*, 309 U.S. 430, 435-36 (1940).

Nichols did not adequately present his would-be Eighth Amendment claim to the state courts. He did not cite specifically to the Eighth Amendment nor did he brief any Eighth Amendment argument. In his principal brief to the Court of Criminal Appeals, he merely mentioned “cruel and unusual punishment” once while addressing the rejection of his proposed settlement agreement. (Resp. App. 67a.) And citing to *Furman v. Georgia*, 408 U.S. 238 (1972), he suggested in passing that the rejection of his settlement proposal was a “lottery” that “violates due process.” (Resp. App. 69a-70a.) Nowhere in his argument about the rejected settlement does Nichols cite the Eighth Amendment. (Resp. App. 61a-71a.) And his conclusory, passing mention of the phrase “cruel and unusual punishment” is not accompanied by any analysis of Eighth Amendment principles. (Resp. App. 67a.) All he did was ask the Court of Criminal Appeals to “find the post-conviction court abused its discretion and violated the principles of equal protection and due process.” (Resp. App. 71a.) And although he filed two more briefs in the Court of Criminal Appeals, neither brief mentioned the Eighth Amendment or the federal Constitution. He

did not mention the Eighth Amendment or “cruel and unusual punishment” in his reply brief. (Resp. App. 94a-97a.) His supplemental brief addressed jurisdictional issues of state law and did not cite the federal constitution. (Resp. App. 106a.)

Nor did Nichols present his purported Eighth Amendment claim in his application for permission to appeal the judgment of the Court of Criminal Appeals to the Tennessee Supreme Court. In fact, he abandoned his arguments concerning the proposed settlement altogether, focusing instead on his *Johnson* claim. (Resp. App. 142a, 144a, 146a.)

It is no surprise, then, that the Court of Criminal Appeals did not address the Eighth Amendment in deciding whether the post-conviction court had jurisdiction to enter the proposed settlement agreement. The court’s analysis focused on the terms of the Post-Conviction Procedure Act and the state constitutional separation of powers. (Pet. App. 16a-19a.) None of that analysis touched the Eighth Amendment issue Nichols presents to this Court. *Id.*

This Court’s jurisdiction to review state court decisions is limited to federal questions first presented to the state courts. 28 U.S.C. § 1257(a). The one or two passing references to “cruel and unusual punishment” that appear without elaboration or discussion in Nichols’s principal brief cannot be said, as is required, to have clearly presented an Eighth Amendment claim to the state courts. *See Adams v. Robertson*, 520 U.S. 83, 89 n.3 (1997). Out of “regard for the appropriate relationship of this Court to state courts,” this Court should deny certiorari on that newly manufactured claim. *McGoldrick*, 309 U.S. at 435-36. In any event, the Eighth Amendment claim that Nichols raises for the first time in this petition is, on its face, patently without merit.

III. Johnson Is Inapplicable to Nichols’s Aggravating Factor as a Matter of State Law.

Nichols also asks this Court—and not for the first time—to invalidate Tennessee’s statutory prior-violent-felony aggravating factor. His theory is that the Tennessee statutory

provision is “unconstitutionally vague” just as *Johnson v. United States*, 135 S. Ct. 2551 (2015), held the residual clause of the federal Armed Career Criminal Act to be. But what led the Court to find the residual clause of the federal statute vague—namely that it had been applied using the “categorical” approach—is not a feature of the Tennessee statute, which has been consistently interpreted to require consideration of real-world facts—not categorical suppositions or abstractions—in determining the applicability of the state prior-violent-felony aggravating factor. That important distinction undermines Nichols’s “vagueness” theory, and this Court should deny review, as it has already done recently. See *In re Harold Wayne Nichols*, No. 19-8179, ___ S. Ct. ___, 2020 WL 3038413, at *1 (June 8, 2020); see also *Sutton v. Tennessee*, No. 19-7689, 140 S. Ct. 991 (Feb. 20, 2020); *Johnson v. Tennessee*, No. 17-8576, 139 S. Ct. 67 (Oct. 1, 2018); *Suttles v. Tennessee*, No. 17-5622, 138 S. Ct. 383 (Oct. 30, 2017).

Since 1990, the categorical approach had governed the applicability of the Armed Career Criminal Act’s residual clause, which provided enhanced penalties for a violator with three or more earlier convictions that “involve[d] conduct that presents a serious potential risk of physical injury to another.” *Johnson*, 135 S. Ct. at 2555-56, 2557. Under that approach, “a court assesses whether a crime qualifies as a violent felony ‘in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion.’” *Id.* (quoting *Begay v. United States*, 553 U.S. 137, 141 (2008)). Because the categorical approach governed the Act’s residual clause, the clause “require[d] a court to picture the kind of conduct that the crime involves in ‘the ordinary case,’ and to judge whether that abstraction presents a serious potential risk of physical injury.” *Id.* (quoting *James v. United States*, 550 U.S. 192, 208 (2007)). Two features of that requirement to imagine “the ordinary case” combined to make the residual clause unconstitutionally vague. *Id.* First, the categorical approach—as applied to the

residual clause—tied judicial assessment of risk to an imagined case, “not to real-world facts or statutory elements.” *Id.* Second, it left uncertainty about how much risk was “serious potential risk” when the standard was divorced from real-world facts. *Id.* at 2558.

Those two features are absent from Tennessee’s statutory prior-violent-felony aggravating factor, which is tied directly to real-world facts. Since 1981, Tennessee courts have consistently held that, in order to prove the prior-violent-felony aggravator, the State must “show that there was in fact either violence to another or the threat thereof” for prior felonies that did not “by their very definition involve the use or threat of violence to a person.” *State v. Moore*, 614 S.W.2d 348, 351 (Tenn. 1981); *see State v. Sims*, 45 S.W.3d 1, 12 (Tenn. 2001).² Thus, when a Tennessee jury sentenced Nichols to death, Tennessee law “ha[d] never required the use of a judicially imagined ordinary case” like that required by the categorial approach. (Pet. App. 9a.)

The difference between this Court’s holding in *Johnson* and the decision of the Court of Criminal Appeals is a simple one: the federal statute was vague because it required imagining an “ordinary case”; the Tennessee statute is not vague since it requires an evaluation of real-world facts of the particular case. The Court of Criminal Appeals understood this distinction between the state and federal statutes. (Pet. App. 9a.) As both this Court and the Court of Criminal Appeals recognized, the holding in *Johnson* mandated by the categorial approach did not call into “doubt the constitutionality of laws that call for the application of a qualitative standard . . . to real-world conduct.” *Johnson*, 135 S. Ct. at 2562; (Pet. App. 8a); *see also United States v. Davis*, 139 S. Ct.

² At the time of Nichols’s offense in 1988, the prior-violent-felony aggravating circumstance applied when “[t]he defendant was previously convicted of one or more felonies, other than the present charge, which involved the use or threat of violence to the person.” Tenn. Code Ann. § 39-13-204(i)(2) (1988). In 1989, the Tennessee General Assembly modified the last phrase of this provision to read “whose statutory elements involve the use of violence to the person.” Tenn. Code Ann. § 39-13-204(i)(2) (Supp. 1990). Nichols’s jury was instructed on the post-1989 aggravating circumstance, an instruction he has not challenged as error. (Pet. App. 4a, 9a.)

2319, 2327 (2019) (“[A] case-specific approach would avoid the vagueness problems that doomed the statutes in *Johnson* and *Dimaya*.”).

In short, the holding in *Johnson* was mandated by the categorical approach; that holding does not apply to laws, like Tennessee’s prior-violent-felony-aggravating-factor statute, “that call for the application of a qualitative standard . . . to real-world conduct.” The flaws that led this Court to strike down the residual clause in *Johnson* have simply never been a part of Tennessee’s prior-violent-felony aggravating factor. *Johnson* is patently inapposite and does not require Tennessee’s law to be invalidated as unconstitutionally vague. The Court should deny certiorari.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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