

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

APPENDIX TO RESPONDENT'S BRIEF IN OPPOSITION

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

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IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

HAROLD WAYNE NICHOLS)	
Appellant,)	Criminal Court for Hamilton County
)	Post-Conviction No. 205863
v.)	
)	CCA No. E2018-00626-CCA-R3-PD
STATE OF TENNESSEE,)	
Appellee.)	CAPITAL CASE APPEAL
)	

BRIEF OF APPELLANT

Submitted by:

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ORAL ARGUMENT REQUESTED

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STATE ATTORNEY GENERAL

OCT 04 2018

CRIMINAL APPEALS
DIVISION

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STATEMENT OF ISSUES

1. Whether, in light of *Johnson v. United States*, a new substantive rule of constitutional law applicable to cases on collateral review, Mr. Nichols's death sentence is invalid because it is based on an unconstitutionally vague aggravating circumstance.
2. Whether, in light of *Hurst v. Florida*, a new substantive rule of constitutional law applicable to cases on collateral review, Mr. Nichols's death sentence is invalid because a judge—not a jury—made factual findings necessary to impose the sentence of death.
3. Whether the State committed prejudicial prosecutorial misconduct which tainted the jury's death verdict.
4. Whether the post-conviction court erred in denying the agreed proposal by the State and Mr. Nichols to vacate the death sentence and sentence Mr. Nichols to life in prison with the possibility of parole.
5. Whether the post-conviction court erred in vacating scheduled evidentiary hearing, thereby denying Mr. Nichols an opportunity to be heard and present evidence and authorities, and, without notice, denying all pending post-conviction claims.
6. Whether Mr. Nichols's death sentence is invalid because of the prejudicial effect of cumulative constitutional error.

PROCEDURAL INTRODUCTION

Designations to the materials in this case shall be as follows:

Trial:	Transcript of the evidence:	Tr. [pg #]
Post-Conviction	Transcript of the evidence:	PC Tr. at [pg #: line #]
	Technical Record:	PC vol. [#] at [pg #]

The Appellant, Harold Wayne Nichols, will be referred to as: "The Appellant;" "Harold Nichols;" "Mr. Nichols;" and "Petitioner." The Appellee will be referred to as the "State."

STATEMENT OF THE CASE

Howard Wayne Nichols, TDOC No. 146457, is in custody under a sentence of death at Riverbend Maximum Security Institution, 7475 Cockrill Bend Industrial Road, Nashville, Tennessee, 37209-1048.

In 1990, Mr. Nichols pled guilty to first degree felony murder and a jury sentenced him to death for the 1988 killing of Karen Pulley. The jury had been instructed on two statutory aggravating factors: 1) felony murder; and 2) prior violent felony conviction. Tenn. Code Ann. § 39-2-204(i)(2). After the jury returned a verdict which listed both statutory aggravating factors, the trial court, with additional convictions of aggravated rape, imposed sentences of 60 years and 15 years to run consecutive to the 60 years. PC vol. I at 6. At his non-capital sentencing hearing in 1991, Mr. Nichols was sentenced on several convictions for a total of 647 years. *State v. Nichols*, No. 03C01-9108-CR-00236, 1995 WL 755957 *1 (Tenn. Crim. App. Dec. 19, 1995).

The convictions pertaining to the crimes against Ms. Pulley and the death sentence were upheld on direct appeal. *State v. Nichols*, 877 S.W.2d 722 (Tenn. 1994), cert. denied, 513 U.S. 1114 (1995). Post-conviction relief was denied by the state courts. *Nichols v. State*, No. E1998-00562-CCA-R3-PD, 2001 WL 55747 (Tenn. Crim. App. Jan 19, 2001); *Nichols v. State*, 90 S.W.3d 576 (Tenn. 2002). Mr. Nichols's timely filed petition for writ of habeas corpus was denied by the United States District court for the Eastern District of Tennessee. *Nichols v. Bell*, 440 F.Supp.2d 730 (Tenn. 2006). The Sixth Circuit Court of Appeals affirmed. *Nichols v. Heidle*, 725 F.3d 516 (6th Cir. 2013), cert. denied, 135 S.Ct. 704 (2014). In 2007, some of Mr. Nichols's non-capital sentences were modified. Based on those modifications, he is currently serving 220 years concurrent to his death sentence. (*See infra* at page iv fn 1, unsigned Agreed Order Resolving Post-Conviction Proceedings.)

On June 24, 2016, Mr. Nichols filed a Motion to Reopen Post-Conviction Proceedings asserting the prior violent felony aggravator which supports his death sentence is void for vagueness in light of new substantive Supreme Court law, as decided in *Johnson v. United States*, 135 S.Ct. 2551 (2015), and held to be retroactive in *Welch v. United States*, 136 S.Ct. 1257 (2016). On October 4, 2016, the post-conviction court found that Mr. Nichols had raised a colorable claim and granted his motion. PC vol. I at 62. The court directed Mr. Nichols's counsel to file an amended petition for post-conviction relief on the *Johnson* claim and to investigate and raise all other meritorious claims. *Id.* Mr. Nichols filed his amended petition on January 17, 2017. PC vol. II at 80. Mr. Nichols raised claims pursuant to *Johnson v. United States* and *Hurst v. Florida*, as well as a prosecutorial misconduct claim based on new evidence. PC vol II at 80.

The State at first moved to dismiss the amended petition, but then engaged in settlement negotiations with Mr. Nichols's counsel and agreed to settle the post-conviction claims for a sentence of life with the possibility of parole. At a December 8, 2017 status conference, 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. PC Tr. at 3 (December 8, 2017).

At the January 31, 2018 disposition, the post-conviction court rejected the agreed upon disposition of the case but set the case for a March 14th hearing on the amended petition. PC Tr. at 14:7-8 (January 31, 2018). However, the court issued an Order Dismissing the Amended Petition and Rejecting the Settlement two days before the scheduled hearing. PC vol. VI at 615. In doing so, the court prevented Mr. Nichols from presenting additional evidence and authorities in support of his claims.

Mr. Nichols now appeals dismissal of his post-conviction petition and the rejection of the

joint settlement.¹

STATEMENT OF THE FACTS

A. Mr. Nichols's Guilty Plea and Sentencing Hearing.

On January 5, 1989, Harold Wayne Nichols was arrested based on suspicion that he was involved in a series of rapes that had occurred around Chattanooga, Tennessee. PC vol. I at 6. Mr. Nichols made statements to police that also implicated him in the death of Karen Pulley. *Id.* Following his statements, the State charged Mr. Nichols with the rape and murder of Karen Pulley. *Id.*

In 1990, while the capital case was pending, and before any mental or psychiatric evaluation, Mr. Nichols's attorneys advised him to plead guilty to two separate rape claims and to proceed to trial on two others where he was convicted. PC vol. I at 7, 16. Two of these convictions were then used as prior violent felony aggravating circumstances Mr. Nichols's capital sentencing hearing. *Id.* at 16; Tenn. Code. Ann. §39-2-203(i)(2).

During the capital sentencing hearing, the defense presented the expert testimony of Dr. Eric Engum. PC vol. I at 8. Dr. Engum made several diagnoses of Mr. Nichols which were significantly more aggravating than mitigating. PC vol. I at 8. Mr. Nichols's trial team presented limited evidence that Mr. Nichols had suffered an "abusive environment" during his childhood and had a "harsh, hostile father" and was placed in an orphanage after his mother's death. *Id.* However, significant evidence regarding the extent of the abuse and trauma suffered by Mr.

¹ On October 3, 2018, Mr. Nichols filed a Motion to Supplement the Record on Appeal which requested the Court of Criminal Appeals include five items for clarification and completion of the record. Mr. Nichols requested that this Court supplement the appellate record with: 1) the unsigned Agreed Order Resolving Post-Conviction Proceedings (hereinafter "Agreed Order"); 2) an audio recording of the settlement hearing in *Joel Richard Schmeiderer v. State of Tennessee*, Case No. 14488; 3) signed Order disposing of *State of Tennessee v. Devin Earl Banks*, Case No. 03-01956 (Shelby County); 4) signed Order disposing of *H.R. Hester v. State of Tennessee*, Case No. 11-CR-276 (McMinn County); 5) Affidavit of Assistant Post-Conviction Defender Kelly Gleason, signed September 28, 2018.

Nichols and the psychological effects it had on his development was never fully presented to the jury.

In the sentencing closing argument, the State improperly told the jury that unless they sentenced Mr. Nichols to death, he may one day receive parole, and then continue to commit violent crimes. The prosecutor urged the jury that “*Ladies and gentlemen, justice is doing what you have to do to make sure that Harold Wayne Nichols never rapes again and that he never murders again, whatever it takes.*” *State v. Nichols*, 877 S.W.2d at 732–733. And “. . . if he [Mr. Nichols] wasn’t in jail right now he’d be doing it again.” *Id.* The State made these statements despite knowing the minimum expected sentence Mr. Nichols would be facing considering all pending sentencing hearings on five counts of aggravated rape would require, at the bare minimum, a sentence of 60 years before parole eligibility would even be possible. *See State v. Nichols*, 1995 WL 755957 *1; *see also infra* section III.

After the hearing concluded, the jury was instructed on two statutory aggravating factors: 1) felony murder; and 2) prior violent felony conviction. Tenn. Code Ann. § 39–2–204(i)(2).² The jury found that both were present in Mr. Nichols case and recommended the sentence of death.

One of Mr. Nichols’s aggravating circumstances, the felony murder aggravator, was later invalidated as unconstitutional on direct appeal based on *Middlebrooks* error. *State v. Nichols*, 877 S.W.2d at 738; *State v. Middlebrooks*, 840 S.W.2d 317, 346 (Tenn. 1992). PC vol. II at 98. His death sentence now rests entirely on the prior violent felony aggravating circumstance.

² Mr. Nichols’s jury was erroneously instructed with the wrong version of the prior violent felony aggravator. The jury was instructed with the statute as it was in effect at the time of his trial, however, this language differed from the version which was in effect at the time of Mr. Nichols’s capital crime. *See* PC Vol. II at 90 (Amended Petition).

B. Reopening of Mr. Nichols’s Post-Conviction Proceedings and Settlement Agreement with the State.

Mr. Nichols challenged the prior violent felony aggravator pursuant to *Johnson v. United States* as well as a claim alleging the constitutionality of Tennessee’s sentencing procedure pursuant to *Hurst v. Florida*, a prosecutorial misconduct claim, and a claim alleging cumulative error in the proceedings. PC vol. II at 80–154. While the post-conviction proceeding was pending, Mr. Nichols and the Hamilton County District Attorney General’s office discussed a settlement for a sentence less than death.

C. Mr. Nichols’s Settlement Agreement is Rejected by the Post-Conviction Court.

The post-conviction court was informed that the State and Mr. Nichols had reached an agreed disposition of his case at a December status conference. PC Tr. at 3:16–23 (December 8, 2017). Assistant District Attorney General Carrion informed the post-conviction court that the parties “have been in constant contact this last month or so, and I believe at this point that we’ve come to an agreement that we will need another date to solidify, but not another date to make any arguments of sorts.” PC Tr. at 3:5–10. Attorney Drew confirmed the likely parameters of the settlement with the court and requested the court set a date for a disposition. PC Tr. at 3:16–25, 4:1–8. The court responded by setting the case for disposition on January 31st. *Id.* at 4:9–10. The court raised no concerns with either party regarding the settlement and proposed orders for disposition and did not request any information from the parties before January 31st. *Id.*

The post-conviction court’s apparent receptivity to settlement abruptly changed. At the opening of the disposition hearing in January, District Attorney General Pinkston informed the court that he had prepared several proposed orders to resolve the matter on an agreed settlement. PC Tr. 2:19–25, 3:1–3 (January 31, 2018). This was the same procedure which was identified for

the court in the December status conference. PC Tr. at 3–4. General Pinkston proposed “that we modify the sentence, and then at the end of that he withdraws his petition.” *Id.* at 3:6–7. However, despite being informed that the settlement could be handled at the January disposition, the court questioned the parties present regarding the basis for modification of Mr. Nichols’s sentence. *Id.* at 3:8–9.

The court probed both defense counsel and the State regarding its power to settle a pending post-conviction case for a sentence less than death. The court also questioned the State and Mr. Nichols’s attorneys regarding the viability of his now re-opened post-conviction claims. Attorneys for Mr. Nichols assured the court that the State can concede relief on pending claims as they choose and can then agree to a modification of sentence. *Id.* at 4:12–13. General Pinkston agreed and conceded relief on the *Johnson* claim and the *Hurst* claim raised in Mr. Nichols’s Amended Petition. *Id.* at 9:21–24, 11:10–17. The Court did not agree:

You’re telling me that after the jury finds someone guilty, sentences them to death, and it goes through all the appellate processes, the state and federal, and then the DA, district attorney, on their own, can say, “You know what, we just want to modify the sentence?”

Attorneys for Mr. Nichols, as well as General Pinkston assured the court that yes this was possible on pending post-conviction claims and had been done in other Tennessee case. *Id.* at 5:4–5. Attorneys for Mr. Nichols informed the court that it was within the State’s power to concede relief. *Id.* at 6:5–7. The post-conviction court rejected that the *Johnson* claim could be the basis for the settlement agreement because the Court of Criminal appeals had recently dealt with a claim based on *Johnson* and had denied it. *Id.* at 5.

The court informed the parties that it understood it had to find the defendant could prevail on a claim before accepting the settlement of a capital post-conviction case for a sentence less than death. The court discussed a previous case he had settled for an agreed sentence of less than death:

[The attorneys] [f]ound a problem where there was not a—a mitigating factor was left out that should have been included. They got up and told me—in fact it’s in my hand—I brought the order I did. They told me, Judge, here’s what we found, this is the basis for the modification of sentence.

Id. at 9:3–8. The court continued “And I did it [settled the case], but I’m asking you if y’all have anything like that.” PC Tr. at 9:10–11. The parties continued to inform the court that both General Pinkston and the court had the power to settle Mr. Nichols’s case.

The court also inquired from General Pinkston what the victim’s family’s position was on the joint settlement. *Id.* at 7:1–2. “Have you talked to the victim’s family about this?” General Pinkston informed the court that efforts to reach the victim’s family had been unsuccessful. *Id.* at 7:3–4.

During the hearing, attorneys for Mr. Nichols requested the opportunity to brief the issue of settlement in a capital case for the court. *Id.* at 15:14–18. Mr. Nichols submitted the Motion to Approve Settlement Agreement. PC vol. III at 165. The motion contained analysis of the court’s power to accept a settlement in this case, and substantial information regarding Mr. Nichols’s background and stellar conduct records, detailed below. *Id.* However, the court rejected the joint settlement agreement.

(1) Mr. Nichols’s Childhood Was Fraught with Trauma, Abuse, and Abandonment

The horrific details of Mr. Nichols’s childhood were never fully presented to his jury. Nichols’s trial attorneys never presented the significant evidence which was available that Mr. Nichols’s traumatic and abusive childhood directly affected the development of his young brain and was directly related to his crimes. However, this information was provided to both the State and the post-conviction court in support of Mr. Nichols’s post-conviction claims and for a settlement of his case.

During the current post-conviction investigation one juror observed:

. . . I don't remember the defense presenting anything to let me know about Mr. Nichols' life, mental health, or intellectual abilities. . . If the defense had presented evidence of abuse[,] neglect, mental illness, and/or intellectual disabilities, it would have had a significant impact on my decision on sentencing and I would have considered an alternative sentence.

PC vol. III at 208. It is true that the defense expert at trial, Eric Engum, Ph.D., interviewed five witnesses and unearthed some mitigating facts, but trial counsel failed to place those facts before the jury. However, his defense team did present Dr. Engum's testimony that Mr. Nichols suffered from intermittent explosive disorder and would continue violent sexual behavior if released. *Nichols v. Heidle*, 725 F.3d 516, 532 (2013). Additionally, at the support of Dr. Engum, the defense team also presented the testimony of Reverend Butler that Mr. Nichols was possessed by a demon or evil spirit when he raped and murdered Ms. Pulley. *Id.* at 533. This testimony was clearly aggravating, not mitigating evidence.

But 14 years after his trial, Mr. Nichols's full history—finally compiled Dr. David Lisak, a preeminent psychological expert on interpersonal violence—is the most complete and accurate picture of the horror which Mr. Nichols and his sister experienced throughout their childhoods. PC vol. III at 230–243. Dr. Lisak reviewed a significant number of records, conducted interviews, and assessed Mr. Nichols to prepare his report. Even 14 years after the jury trial, Dr. Lisak painted a vivid picture of Mr. Nichols's childhood. Dr. Lisak described the string of significant trauma Mr. Nichols experienced throughout his young life:

Mr. Nichols' mother died of cancer in 1971 when Mr. Nichols was 10 years old. The death of a mother is, for any child, a profoundly traumatic experience. For Mr. Nichols, it was made much more so because his father was a physically, sexually and emotionally abusive man.

PC vol. III at 235 (Report of Dr. Lisak). Without the protection of his mother, Mr. Nichols was subjected to the sadistic whims and abuse of his father. *Id.* Descriptions of Mr. Nichols's father

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“Mack” are chilling. “Mr. Nichols’s father Mack, was by many accounts an angry, abusive, hypocritical and possibly sadistic man who subjected his children to constant psychological and physical abuse, and who incestuously abused his daughter.” *Id.* At 237. Dr. Lisak further explained Mr. Nichols’s father frequently “harangued and yelled at his children, talking to them like “dogs,” and frequently whipped them severely enough to draw blood. *Id.* Mr. Nichols was seen with his “eyes swollen shut and his face black and blue from beatings at the hands of his father . . .” *Id.* Numerous interviews revealed “Mr. Nichols’ father sexually abused his daughter, Deborah, repeatedly” and that Mr. Nichols was aware of and witnessed such abuse. *Id.* Mr. Nichols also witnessed his father’s vicious and unrelenting physical abuse of his sister. *Id.* Dr. Lisak opined that for Mr. Nichols “watching the abuse [of his sister] create[d] unbearable feelings of helpless rage and guilt that are typically overwhelming to a child, and that leave **permanent scars.**” *Id.* (emphasis added).

Evidence supports that Mr. Nichols also experienced severe sexual abuse perpetrated by his own father. *Id.* at 239. Mr. Nichols exhibits symptoms which are associated with having experienced severe sexual abuse and was reported to have been abused by his father. *Id.* Dr. Lisak discovered that Mr. Nichols’s father had abused other children and that Mr. Nichols’s own sister Deborah revealed that their father was sexually abusing Mr. Nichols throughout his childhood. *Id.* Mr. Nichols also demonstrates severe amnesia and can recall very few memories before age ten. Dr. Lisak opined that this amnesia is consistent with a child that has suffered extreme sexual and physical abuse. *Id.* Truly, Mr. Nichols’s father was “sadistic.” *Id.* at 237.

Such significant trauma “scars children in multiple ways, and its effects very frequently are life long,” PC vol. III at 240 (Dr. Lisak’s Report). The processes in the brain which allow children to control and channel impulses were severely damaged by the abuse and abandonment

Mr. Nichols experienced. *Id.* His ability to regulate his reactivity to stress and his ability to accurately respond to threats was damaged as a child through no fault of his own. *Id.* Though this horrific abuse and its lasting impact on Mr. Nichols defined who he was at the time of his crime and at the time the jury weighed his fate, this information was not presented to Mr. Nichols's jury and was not considered when he was condemned to die. *Id.*

(2) Mr. Nichols Has a Stellar Conduct Record and Trust from Riverbend Staff

Despite his horrific childhood, Mr. Nichols has exhibited consistent stellar behavior while housed on death row for almost 30 years and has gained the trust and respect of corrections staff during his time there. Dozens of staff members at Riverbend Maximum Security Institution (RMSI), including security staff and counselors, have had frequent contact with Mr. Nichols over his twenty-eight years of incarceration. During this time, the staff kept records of Mr. Nichols's attitude and behavior, work performance, and adherence to the prison's policies and procedures. The following is only a small sample of how RMSI staff have described Mr. Nichols: "Always willing to help others, Very respectful, Disciplinary-free, Pleasant to deal with, Non-aggressive, Courteous, A positive influence, Helpful to staff." PC vol. III at 175; *see also* "weekly behavior logs" at PC vol. III-V at 445-612.

These records and subsequent statements by corrections staff describe in detail the respect and admiration Mr. Nichols has earned while incarcerated, and further describes that Mr. Nichols has maintained an impeccable behavioral record while being housed on death row. PC vol. IV at 445. A former member of the Tennessee Department of Correction (TDOC) security staff, who worked as a Correctional Officer, Corporal, and Sergeant for thirty years, shared the following about Mr. Nichols:

. . . I came to know Harold well and watched him grow and mature throughout the years. Harold was never a disciplinary problem and I never heard anything negative

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about him or from him. Harold was always cordial, polite and respectful to staff and other inmates. Throughout my years on Unit 2, he consistently displayed a positive attitude and behavior. He was always willing to be helpful to both staff and inmates, even helping other inmates with their reading and writing.

Unlike many inmates who become jaded and disruptive once their freedom is taken from them, Harold is a model inmate who has made the most of his time in prison. He regularly participated in group programs and activities, including group meals, yard time, and arts and crafts. Harold also studied art and became a talented illustrator and painter who taught art classes in prison.

PC vol. III at 218.

This same corrections officer described how significant it is that Mr. Nichols is trusted to work as the maintenance worker for “Unit 2” (i.e., death row). PC vol. III at 222–24. This position is “offered only to model inmates who are well regarded and trusted by the Unit Manager and senior prison staff” because it requires access to tools which could be easily used as weapons. *Id.* TDOC staff confirm that such a position would never have been offered to Mr. Nichols if he posed any possibility of risk to prison staff or inmates. *Id.* Even the slightest disciplinary infraction would cost Mr. Nichols this position. *Id.* Mr. Nichols’s records contain many such statements attesting to his dedication, work ethic, and trustworthiness. PC vol. III at 208–228.

Mr. Nichols has maintained model behavior for nearly three decades despite his significant childhood trauma and the limitations it has caused him, which make impulse control and response to stress extremely difficult. PC vol. III at 240 (Report of Dr. Lisak). Despite these limitations, Mr. Nichols is truly remorseful and accepts responsibility for his crimes.

(3) Mr. Nichols Demonstrates Rehabilitation and Remorse.

Mr. Nichols has undergone significant transformation and rehabilitation. He truly is “not the same man who committed those offenses and he [is] not the same man that I first met almost 30 years ago.” PC vol. III at 219–20. The same corrections officer stated: “I can confidently state

that Harold is one of the warmest and kindest inmates that I encountered in my 30 years with the TDOC. He is a trustworthy individual who cares deeply about others and possesses more integrity and decency than many of the people that I have met outside of prison.” PC vol. III at 219. Mr. Nichols is “a gentle man and a model inmate who always conducted himself properly.” PC vol. III at 222, 223.

Mr. Nichols has demonstrated clear and consistent remorse for his crimes and has attempted to better himself at every turn while awaiting his sentence at Riverbend. Those charged with supervising inmates at Riverbend note his remorse and contrition: “Harold is extremely remorseful and genuinely regrets the horrible choices that he made when he was a young man . . . His continued personal growth was an inspiration to the entire prison population.” PC vol. III at 219. Mr. Nichols has demonstrated that he is committed to becoming a “better man” even while housed on death row. *Id.*

Despite the circumstances of his crime and his childhood, which was saturated with trauma, violence, and sexual abuse, Mr. Nichols has demonstrated a commitment to reform and compassion while awaiting a sentence of death. Mr. Nichols’s conduct records meticulously maintained by Riverbend staff and presented to the post-conviction judge in this case, indicate Mr. Nichols has had only two write-ups in the entirety of his time on death row. PC vol. III at 245–56. Mr. Nichols is consistently described as “extremely remorseful,” a “positive influence” on other inmates, and a “model inmate” among many other positive characterizations. PC vol. III at 219, 223, 227. Mr. Nichols has worked hard to better himself and the lives of others while serving time at Riverbend. Despite his horrifying childhood, Mr. Nichols has demonstrated remorse, dedication, and a commitment to mentoring other inmates. *Id.*

D. The Post-Conviction Court's Order Dismissing the Case and Rejecting the Joint Settlement.

Despite the court's scheduled hearing which had been set for March 14, 2018, the court issued an order dismissing the entirety of the post-conviction proceedings and rejecting the pending settlement. *Id.* at 13:4–7, 14:3; PC vol. VI at 615. The court held that Mr. Nichols's *Johnson* and *Hurst* claims were not available as a matter of Tennessee law, and that all other claims had been previously determined and/or waived. *Id.* at 635–636. The court wrote in its Order Rejecting the Settlement and Dismissing Post-Conviction proceedings that:

Petitioner asserts this Court, in its discretion, may accept a proposed agreed disposition of a post-conviction case prior to an evidentiary hearing, and should accept the agreement here. However, this Court, in its discretion, finds it is not appropriate to accept such a proposed agreement under the circumstances of this case where there is no claim for post-conviction relief before this Court which should survive this Court's statutorily required preliminary order.

PC vol. VI at 636 (Order Dismissing).

ARGUMENT

I. Mr. Nichols's Death Sentence Is Invalid Because It Is Based on an Unconstitutionally Vague Aggravating Circumstance, in Light of *Johnson v. United States*, a New Substantive Rule of Constitutional Law Applicable to Cases on Collateral Review.

Mr. Nichols's death sentence is invalid because the sole aggravating circumstance, the prior violent felony conviction aggravator, is unconstitutionally vague. *Johnson v. United States*, 135 S.Ct. 2551 (2015); *Welch v. United States*, 136 S.Ct. 1257 (2016) (holding that *Johnson* is retroactive). The statutory language of the prior violent felony aggravator in effect at the time of Mr. Nichols's crime (Tenn. Code Ann. § 39-2-203(i)(2)) and as amended at the time of his trial (Tenn. Code Ann. § 39-2-204(i)(2)), is materially the same as the language of the sentencing statute in *Johnson* that the Supreme Court found to be unconstitutionally vague. *See Johnson*, 135 S.Ct. at 2555-57. Accordingly, the *Johnson* Court's vagueness analysis applies with equal force to the sentencing factor in Mr. Nichols's case and invalidates it as the basis for his death sentence.

A death sentence which rests, in whole or in part, upon an unconstitutionally vague aggravating factor is inherently invalid. *Godfrey v. Georgia*, 446 U.S. 420, 427-28 (1980). Mr. Nichols's death sentence, therefore, stands in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and Article I, §§ 6, 8, 9, 10, 16, 17, and 32 and Article XI, § 16 of the Tennessee Constitution. The Fifth Amendment guarantees that no person shall be deprived of life, liberty, or property without due process of law. It follows that the Constitution prohibits vague laws. *Johnson v. United States*, 135 S. Ct. 2551 (2015). A statute so vague that it fails to give ordinary people fair notice of punishment, or so standardless that it invites arbitrary enforcement, violates the fundamental principles of justice enshrined under due process of law. *Johnson*, 135 S.Ct. at 2556-57; *Kolender v. Lawson*, 461 U.S. 352, 357-358 (1983). The void-for-vagueness doctrine applies to sentencing statutes. *Johnson*, 135 S. Ct. 2557 (citing *United*

States v. Batchelder, 442 U.S. 114, 123 (1979)).

Vagueness, in the death penalty context, violates not only the Fifth and Fourteenth Amendments but also the Eighth Amendment and Article I, §§ 8 and 16 of the Tennessee Constitution. *See Maynard v. Cartwright*, 486 U.S. 356, 363–64 (1988). The United States Supreme Court has consistently held that, because the death penalty is uniquely different than all other punishments, the Eighth Amendment’s prohibition on cruel and unusual punishment requires heightened procedural safeguards. This heightened due process includes fair notice and a fair and reliable decision-making process, and commands that death sentences be free from arbitrariness and capriciousness. *See, California v. Ramos*, 463 U.S. 992, 998–999 (1983); *Gardner v. Florida*, 430 U.S. 349, 357–358 (1997); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976); *Maynard v. Cartwright*, 486 U.S. 356 (1988); *Lankford v. Idaho*, 500 U.S. 110 (1991); *Van Tran v. State*, 66 S.W.3d 790, 807 (Tenn. 2001); and *Howell v. State*, 151 S.W.3d 450, 462–463 (Tenn. 2004). It is therefore required that a sentence of death which rests, in whole or in part, upon an unconstitutionally vague aggravating factor must be invalidated. *Godfrey v. Georgia*, 446 U.S. 420, 427–28 (1980).

A. *Johnson v. United States* is a New Rule of Substantive Law which Applies Retroactively Under both Federal and Tennessee Law.

(1) Standard of Review.

Whether a case announcing a new rule of constitutional law requires retroactive application is a question of law that warrants no deference on appellate review. *State v. Bush*, 428 S.W.3d 1, 16 (Tenn. 2014). Retroactivity is properly a threshold question, and therefore will be addressed before continuing to the merits of Mr. Nichols’s claims. *See Teague v. Lane*, 489 U.S. 288, 300 (1989) (retroactivity is properly treated as a threshold question).

Johnson v. United States announced a new substantive rule of constitutional law which must be applied retroactively to cases on collateral review. *Welch v. United States*, 136 S. Ct. 1257, at 1264 (2016) (“[i]t is undisputed that *Johnson* announced a new rule”). *Welch* held *Johnson* was substantive because it narrows “the scope of a criminal statute by interpreting its terms . . .” *Id.* at 1265. And that *Johnson*'s holding changed the “substantive reach of the Armed Career Criminal Act, altering the range of conduct or class of persons the [Act] punishes.” *Id.* at 1265. The Sixth Circuit held “*Johnson* was no doubt a sea-change, with far-reaching precedential effects.” *Shuti v. Lynch*, 828 F.3d 440, 444 (6th Cir. 2016) (cert. denied. May 14, 2018).

The determination that *Johnson* announced a new substantive rule of constitutional law is binding upon state courts and, therefore, any finding that *Johnson* does not apply retroactively to cases on collateral review in state court is an error of law. *See Montgomery v. Louisiana*, 136 S. Ct. 718, 729 (2016) (“When a new substantive rule of constitutional law controls the outcome of a case, *the Constitution requires* state collateral review courts to give retroactive effect to that rule.”) (emphasis added). The post-conviction court’s Order stating that *Johnson* did not announce a new rule of law and did not apply retroactively was in error. PC vol. VI at 615.

Here, the post-conviction court’s order erroneously held that *Johnson v. United States* did not apply retroactively in Tennessee post-conviction proceedings. PC vol. VI at 621. The court also stated that *Johnson* did not announce a new rule of constitutional law. *Id.* at 620 (“The ruling of the *Welch* court reinforces the idea that no new constitutional right was created.”). The court held this despite citing *Welch v. United States* (cited above) which conclusively states that *Johnson* announced a new substantive rule which must be applied retroactively to cases on collateral review. *Id.* at 619–20. This order is even more troubling because the post-conviction court had cited *Montgomery v. Louisiana* (cited above) in its order granting the motion to reopen for the

proposition that new substantive rules of constitutional law must be applied retroactively by state post-conviction court. PC vol. I at 65.

B. A Sentencing Statute Must Be Written and Applied in a Way which Provides Fair Notice to Defendants and Prevents Arbitrary Enforcement by Judges.

(1) Standard of Review.

Whether a statute is void for vagueness is a question of constitutional law and statutory construction. Such questions are questions of law. *State v. Lowe*, 552 S.W.3d 842 (Tenn. 2018). The Tennessee “Supreme Court reviews questions of law de novo, with no presumption of correctness accorded to the rulings below.” *State v. Daniel*, 552 S.W.3d 832 (Tenn. 2018).

(2) *Johnson v. United States* Forbids Vagueness in Both the Text and the Application of a Sentence Enhancement Statute.

In *Johnson*, the United States Supreme Court held that when a statute permits increasing a sentence due to a defendant’s prior convictions but the requirements for determining what prior convictions justify such an enhancement are vague, the enforcement of that statute violates due process because the statute fails to give a defendant proper notice and invites “arbitrary enforcement” by judges. *Johnson*, 135 S.Ct. at 2557.

The *Johnson* Court considered the Armed Career Criminal Act (“ACCA”) and concluded that the language of the residual clause of the ACCA was unconstitutionally vague. *Id.* at 2563. The ACCA provided for a sentencing enhancement if a defendant had certain prior “violent felony” convictions. *Id.* at 2555. The language of the ACCA in question reads:

Any crime punishable by imprisonment for a term exceeding one year ... that—

- (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
- (ii) is burglary, arson, or extortion, involves use of explosives, *or otherwise*

involves conduct that presents a serious potential risk of physical injury to another.” § 924(e)(2)(B) (2015)

(emphasis added). *Johnson*, 135 S.Ct. at 2556–57. The Court found this language unconstitutional because it “denies fair notice to defendants and invites arbitrary enforcement by judges.” *Id.* at 2557.

Johnson’s core holding is that when a sentence enhancement is based on a prior conviction, an after-the-fact inquiry into whether the conduct involved in that conviction qualifies as a violent felony—as opposed to limiting the inquiry to the statutory elements of the prior conviction—is unconstitutional. *Id.* at 2563. The act of looking beyond the elements of the prior conviction and basing the sentencing enhancement on what the prior offense “involved” leads to arbitrary results and fails to give ordinary people fair notice of the conduct the sentencing enhancement punishes. *Id.* at 2556–59; *see also Mathis v. United States*, 136 S.C. 2243, 2251 (2016) (“It is impermissible for ‘a particular crime [to] sometimes count towards enhancement and sometimes not, depending on the facts of the case.’” (quoting *Taylor v. United States*, 495 U.S. 575, 601 (1990))).

C. The Prior Violent Felony Aggravator in Effect at the Time of Mr. Nichols’s Crime Was Unconstitutionally Vague for Failing to Provide Fair Notice.

The prior violent felony aggravator in effect at the time Mr. Nichols committed the capital offense in this case read: 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. 39–13–203(i)(2) (repealed and replaced 1989). Per *Johnson*, the prior violent felony conviction aggravating circumstance is unconstitutionally vague.

A sentencing statute is void for vagueness if it fails to give ordinary people fair notice of the conduct it punishes. *Johnson*, 135 S.Ct. at 2556–57. The clause “involves the use or threat of violence” in Tenn. Code Ann. 39–13–203(i)(2) (repealed) operates in the same way that the

residual clause in the ACCA operated: “or otherwise involves conduct that presents a serious potential risk of physical injury to another.” The language of the prior violent felony conviction aggravator statute in effect at the time of Mr. Nichols’s crime—specifically the “involves” clause—was vague in that it failed to give proper notice to the ordinary person as to what crime or crimes could be considered as prior violent felony convictions for the purpose of enhancing a first-degree murder sentence to death. Mr. Nichols’s death sentence violates due process of law and the prohibition on cruel and unusual punishment because at the time of the homicide, the statute failed to give the ordinary citizen fair notice as to what felony convictions qualified as violent.³

D. The Prior Violent Felony Conviction Aggravator on which the Jury Was Instructed Was Unconstitutionally Vague, which Invited Arbitrary Application by the Courts.

Mr. Nichols’s jury was erroneously instructed with the newly amended prior violent felony aggravator, which read: 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*[.] Tenn. Code. Ann. § 39–2–204(i)(2) (emphasis added). This amended language used in the instruction is irrelevant to the fair notice prong of the vagueness analysis because it was not in effect at the time of the offense. Regardless of what the jury was instructed at trial, there was no fair notice to Mr. Nichols based on the statute in effect at the time of the offense as constitutionally required. However, as explained below, the addition of the word “elements” to the statute did not significantly alter the meaning of the statute. Tenn. Code. Ann. § 39–2–204(i)(2) (1989). Therefore, if the amended statutory aggravator had been in effect at the time of his offense, it too would have failed to provide the constitutionally mandated fair notice. Like the residual clause in

³ As discussed in section I, subsections D and E herein, this analysis is not altered by the judge instructing the jury with the language of the aggravator as amended in 1989.

Johnson, the language of the amended statute with which Mr. Nichols’s jury was charged is vague.⁴ “A statute is void for vagueness if it is so vague, indefinite, and uncertain that persons must speculate as to its meaning.” *State v. James Stacey Carroll*, No. W2001–01464–CCA–R3–CD, 2002 WL 1841627, at *4 (Tenn. Crim. App. Aug. 9, 2002). By this definition, the language of the prior violent felony aggravator violates the principle articulated in *Johnson*. Moreover, the amended prior violent felony conviction aggravator—specifically its “elements involve” clause—is impermissibly vague because it invites arbitrariness by the courts. *See Johnson* at 2556–57.

E. Introduction of the Word Elements Did Not Cure the Unconstitutional Vagueness of the Prior Violent Felony Aggravator.

Despite the introduction of the term “elements” into the prior violent felony aggravator, in application, it still produces the exact same vague and arbitrary result which is prohibited under *Johnson*. In *Johnson* the Court upheld the portion of the ACCA’s prior violent felony aggravator identified as the “force clause” which reads “*any crime. . . that (i) has an element the use, attempted use, or threatened use of physical force against the person of another.*” *Johnson*, 135 S.Ct. at 2555. The Court upheld the force clause because it *clearly defined* all crimes which would fall into that category. *Id.* at 2557. By containing the crimes just to those which have the use or attempted use of force against another as a statutory element, the force clause properly provided notice to defendants and removed the arbitrariness of the “searching inquiry” required by the residual clause. *Id.* Under the force clause, a sentencing court only need review the statutory elements of the prior conviction in order to enforce this statute.

This Court analyzed the addition of the word “elements” to the Tennessee prior violent felony aggravator in two prior cases: *Dennis Wayne Suttles v. State*, No. E2016–02162–CCA–

⁴ Black’s Law Dictionary defines “vague” as follows: “Imprecise or unclear by reason of abstractness; not sharply outlined; indistinct; uncertain.” Black’s Law Dictionary (10th ed. 2014).

R28–PD (Tenn. Crim. App. Feb. 13, 2017) and *Gary W. Sutton v. State*, No. E2016–02112–CCA–R28–PD (Tenn. Crim. App. Jan. 23, 2017). In those cases, this Court found that the elements language of the amended prior violent felony aggravator was more like the language in the “force clause” of the ACCA and was therefore constitutional under *Johnson*. *Suttles*, Slip. Op. at 3 (citing *Sutton* Slip. Op. at 3). While it may be true that if the prior violent felony aggravator was indeed written and therefore applied as the ACCA’s “force clause” is applied, it may be sufficiently definite to survive scrutiny under *Johnson*. However, this is not the case. The amended prior violent felony aggravator is neither written nor applied in the same manner as the “force clause” of the ACCA. Two factors conspire to render the Tennessee statute void for vagueness in violation of *Johnson*.

First, the language of the Tennessee statute maintains the problematic phrasing “whose statutory elements *involve the use of violence to the person*[.]” Tenn. Code. Ann. § 39–2–204(i)(2) (1989). This language broadens the inquiry beyond the statutory elements of the conviction into analysis of what conduct was or may have been involved in the crime, thereby triggering the analysis which applied in *Johnson*. Committing a crime whose elements is the use of violence to the person is not the same as committing a crime “whose statutory elements *involve the use of violence to the person*.” The constitutionally permissible limiting language of the force clause (directly limiting the sentencing court to examining only the statutory elements of the crime) is not present in the Tennessee statute.

Comparing the hypothetical effect of these two different phrases clarifies this point. For example, consider a defendant that has been convicted of the prior felony of robbery as defined in Tenn. Code Ann. § 39–13–401. In Tennessee, a robbery “*is the intentional or knowing theft of property from the person of another by violence or putting the person in fear*.”

” *Id.* Based on the statutory definition, how would a sentencing court under the prior violent felony aggravator determine whether a robbery was committed with violence or with fear? The clear dilemma faced by applying the prior violent felony aggravator would not be present under the “force clause” of the ACCA, which does not ask what the elements of the crime “involve” but what the elements of the crime are under the statute.

Second, instead of reading the “elements involve” clause in the way that the federal courts have read the ACCA’s “force clause,” the Tennessee Supreme Court directed the lower courts to go beyond the statutory elements of a prior violent felony conviction and review the facts of the underlying crime, *see State v. Sims*, 45 S.W.3d, 1 (Tenn. 2001), but which is the type of analysis prohibited as both arbitrary and in conflict with the plain language of the statute. When a statute focuses on elements, the sole focus must be on the elements of the crime, and particular facts of the case cannot be considered. *Mathis*, 136 S.Ct. at 248. Additionally, by the use of the term “previous conviction” of a crime, the legislature indicates that a sentencer should consider only whether the defendant has been convicted of crimes falling within certain categories not the underlying facts upon which that conviction is based. *Mathis*, at 2252; *Taylor*, 495 U.S. at 600. Legislative bodies understand that if they want to direct sentencers to underlying facts, they craft laws that use the phrase “offense committed” instead of “convicted.” *Mathis*, 136 S.Ct. at 2252. The statutes’ “elements” and “conviction” language tell the court that the legislature did not intend any examination of the underlying facts of the specific case. *Mathis* at 2251 (citing *Taylor v. United States*, 495 U.S. 575, 600); *see also Sessions v. Dimaya*, 138 S Ct. 1204, 1218 (2018) (a court cannot properly substitute its own judgement for that of the legislature). As the Supreme Court held “[i]f Congress had wanted judges to look into a felon’s actual conduct, “it presumably would have said so. . .” *Descamps v. United States*, 570 U.S. 254, 267 (2013). *See accord, Sykes v. United*

States, 564 U.S. 1, 7 (2011) (quoting *James*, 550 U.S. at 202 (“[W]e consider [only] the elements of the offense [,] without inquiring into the specific conduct of this particular offender.”); *see also Descamps*, 570 U.S. at 261 (“The key, as we emphasized, is elements, not facts.”). Accordingly, the language of the statute controls the analysis.

The *Sims* decision makes clear that the reach of the amended prior violent felony aggravator with which Mr. Nichols’s jury was charged (like the residual clause invalidated in *Johnson*) is not limited to an examination of the statutory elements of the felony without regard for the facts of the prior conduct. *State v. Sims*, 45 S.W.3d at 11. In *Sims*, the defendant had been convicted of aggravated assault, and the prosecution wished to rely on the amended prior violent felony aggravator to enhance the defendant’s sentence. *Id.* at 10 (quoting Tenn. Code Ann. § 39–13–204(i)(2)). However, the indictments against the defendant for his prior convictions of aggravated assault charged him solely with putting others in fear of imminent bodily harm, not with violence to the person. *Sims*, 45 S.W.3d at 11. Thus, when the defendant pled guilty to the crimes charged in the indictment, he pled guilty to crimes whose statutory elements involved putting others in fear, not violence to the person. *Id.* A plain reading of the statute meant the defendant’s prior crime was not a prior violent felony.⁵ *Id.* However, the trial court disregarded the language and conducted an examination of the defendant’s conduct in the proposed felony to determine whether the defendant’s conduct might have involved the use of violence to the person and found his conduct did involve “violence to the person.” *Id.*

⁵ It is important to note, that under the “force clause” of the ACCA which was held to be constitutional and not vague, the sentencing court’s analysis would have stopped here and no further examination of the underlying felony would be conducted. *See Johnson v. United States*, 135 S.Ct. 2551, 2557 (2015). Tennessee prior violent felony aggravator is therefore more akin to the ACCA’s residual clause than the “force clause” because “[t]he court’s task goes beyond deciding whether creation of risk is an element of the crime. That is so because, unlike the part of the definition of a violent felony that asks whether the crime “has as an element the use ... of physical force,” the residual clause asks whether the crime “involves conduct” that presents too much risk of physical injury.” *Id.*

On direct appeal, “Sims assert[ed] that the statutory definition of the prior violent felony aggravator only permit[] an examination of the statutory elements of the felony without regard for the facts in a particular case.” *Id.* at 11. Instead, the Tennessee Supreme Court held that if the statutory elements of a generic prior conviction may be satisfied with or without proof of violence, then the trial judge “must necessarily examine the facts underlying the prior felony” to determine whether the prior conviction satisfies the prior violent felony aggravating circumstance. *Id.*

The Court reached this conclusion despite the amendments to the prior violent felony aggravating circumstance, ostensibly requiring that the statutory *elements* of the prior felony involve the use of violence to the person. *Id.* As a result, even though the statutory elements of the prior violent felony purportedly supporting the application of the aggravating circumstances to the defendant in *Sims* specifically did not involve the use of violence to the person, the Court held that the conduct of the offense nonetheless supported the application of the aggravating circumstance. *Id.* at 12. The Court reasoned:

In determining whether the statutory elements of a prior felony conviction involve the use of violence against the person for purposes of § 39-13-204(i)(2), we hold that the trial judge must necessarily examine the facts underlying the prior felony if the statutory elements of that felony may be satisfied either with or without proof of violence. **To hold otherwise would yield an absurd⁶ result**, the particular facts of this case being an ideal example.

Id. at 11–12 (emphasis added). The *Sims* Court effectively annulled the introduction of the word elements into the statute as amended and continued to maintain the prior analysis of underlying facts. Through *Sims*, the constitutional error of the prior statute was incorporated into the amended version. Indeed, the *Sims* Court specifically rejected the notion that the new statute (including the

⁶ While the absurdity doctrine is used in Tennessee’s canons of construction, it is to be used sparingly. *Seals v. H & F, Inc.*, 301 S.W.3d 237, 250–51 (Tenn. 2010). There the court explained: “[T]he “absurdity doctrine” remains a part of our state’s law of statutory construction, albeit one that should be applied sparingly—only when a result is manifestly absurd, and not simply unpleasant or peculiar.” *Id.*

word “elements”) should alter the analysis Tennessee courts already employed under the prior version of the statute and endorsed continued use of an underlying fact analysis. 45 S.W.3d at 11.

Johnson prohibits the *Sims* procedure. Using the *Sims*'s procedure, depending on the particular inquiry conducted by a court in a particular case, a defendant could be faced with a death sentence or not. Under the *Sims* procedure the court can find a prior violent felony is indeed violent based on its own inquiry of the underlying facts even if the statutory elements of that offense charged did not involve the use of violence to the person. *Sims*, 45 S.W.3d. at 12. This procedure clearly fails to provide notice of what prior felonies may be used to sentence a person to death. “It is impermissible for ‘a particular crime [to] sometimes count towards enhancement and sometimes not, depending on the facts of the case.’” *Mathis*, 136 S.Ct. at 2251 (quoting *Taylor*, 495 U.S. at 601).⁷

A law increasing a sentence based on vague requirements violates due process because it fails to give ordinary people fair notice of the conduct to which it applies and invites arbitrary enforcement. *Johnson*, 135 S.Ct. at 2556–63. The Tennessee courts’ application of the prior violent felony aggravator is arbitrary and violates due process. *Johnson* prohibits an after-the-fact inquiry into whether the conduct involved in that conviction qualifies as a violent felony—as opposed to limiting the inquiry to the statutory elements of the prior conviction—when the language of the statute clearly calls for such limited inquiry. *Johnson*, 135 S. Ct. at 2557, 2562; *See also Mathis*, 136 S.Ct. at 2255 and *Dimaya*, 138 S.Ct. 1216–17.

Ultimately, the introduction of the word “elements” into the Tennessee sentencing statute

⁷ Again, the act of a sentencing court analyzing facts of the underlying conviction and the defendant’s conduct in a given case raises serious concerns regarding the defendant’s Sixth Amendment right to have a jury determine all facts which can be used to determine the maximum penalty faced by a defendant. *See Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000).

failed to *reign in* the sentencing courts' examination of the underlying facts which results in a lack of notice and arbitrary enforcement against a capital defendant. By combining the language signaling the categorical approach and then expanding the proper inquiry beyond the language of the statute and into the underlying facts of a given case, the Tennessee's prior violent felony aggravator is so vague that it runs afoul of Mr. Nichols's right to Due Process of Law.

F. The Post-Conviction Court Committed Error in Its Denial of Mr. Nichols's *Johnson* Claim.

The post-conviction court in Mr. Nichols's case found Mr. Nichols's *Johnson* claim had no merit. The court's dismissal relied entirely on this Court's order denying a motion to reopen in *Donnie Johnson v. State*, No. W2017-00848-CCA-R28—PD (Tenn. Crim. App. Sept. 11, 2017), perm. app. denied, (Tenn. Jan. 19, 2018). PC vol. VI at 619–21. Donnie Johnson's motion involved a challenge to the “involves” clause which was in effect at the time of Mr. Nichols's offense but not the version on which Mr. Nichols's jury was instructed. In *Donnie Johnson*, this Court held that the examination of the underlying facts as was required by the language of the statute and as interpreted by the Tennessee Supreme Court through *State v. Moore* was proper. *Id.* at 5. However, the essential interpretive guidelines of constitutionally sound statutory interpretation were not applied and the Court determined that the “involves” clause only required a court to examine the underlying facts of that specific felony conduct. *Id.* This analysis was erroneous under the guidance of *Johnson v. United States*.

G. A Statute That Is Unconstitutionally Vague Is Void Regardless of Whether It Is Vague in Every Instance.

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. The fact that some crimes would necessarily require the type of conduct required to satisfy the

statutory requirements does not make it less vague when applied to other crimes. “[O]ur holdings squarely contradict the theory that a vague provision is constitutional because there is some conduct that clearly falls within the provision’s grasp.” *Id.* at 2561 (citing *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 89 (1921) (holding that a law prohibiting groceries from charging unjust or unreasonable rates was void for vagueness) and *Coates v. Cincinnati*, 402 U.S. 611 (1971) (holding that a law prohibiting persons on sidewalks from conducting themselves in a “manner annoying to persons passing by” was void for vagueness)). The *Johnson* Court held “[i]nvolving so shapeless a provision to condemn someone to prison for 15 years to life does not comport with the Constitution’s guarantee of due process.” *Johnson*, 135 S.Ct. at 2560. The fact that in application a statute could clearly encompass some conduct is not enough to cure unconstitutional vagueness.

Just as was the case in *Johnson*, here the application of Tennessee’s prior violent felony aggravator to Mr. Nichols’s case “does not comport with the Constitution’s guarantee of due process.” *Johnson*, 135 S. Ct. at 2560. The fact that Mr. Nichols’s prior violent felony aggravator was a “rape” conviction is not enough to provide definiteness to a statute which on its face is vague. Indeed, if a sentence enhancement of 15 years to life under the ACCA’s now unconstitutional residual clause violates due process of law then in a capital case which enjoys the protection of heightened due process produces an invalid sentence of death. *Johnson*, at 2555–56; *see also Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) and *Lockett v. Ohio*, 438 U.S. 586, 597–98 (1978) (both finding heightened due process protections in the context of capital case).

H. Harmless Error Analysis Is Not Properly Applicable in Mr. Nichols’s Case.

It cannot be harmless error for a jury to weigh and apply an unconstitutional aggravating factor in a capital case. In a weighing state—one whose capital sentencing scheme requires the

sentencer to weigh aggravating and mitigating factors—such as Tennessee, it is constitutional error for the jury to give weight to an unconstitutionally vague aggravating factor, even if that jury also weighed other, valid aggravating factors. *Richmond v. Lewis*, 506 U.S. 40, 46–47 (1992); *see also Stringer v. Black*, 503 U.S. 222, 229–232 (1992), Tenn. Code Ann. § 39–13–204(e)(1). A vague aggravating factor used in the weighing process creates the possibility of arbitrariness and the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying upon the existence of an illusory circumstance. *Stringer*, at 235–236.

Mr. Nichols’s jury gave weight to an unconstitutionally vague aggravator—the prior violent felony conviction aggravating circumstance. PC vol. II at 90. The jury was instructed on just one other aggravator—the felony murder aggravating factor—which was invalidated as unconstitutional on direct appeal based on *Middlebrooks* error. *State v. Nichols*, 877 S.W.2d at 738; *State v. Middlebrooks*, 840 S.W.2d 317, 346 (Tenn. 1992); PC Vol. II at 97–98. Because there is no other aggravating factor supporting the verdict of death, conducting a harmless error analysis is not possible here because that analysis requires the existence of at least one remaining valid aggravator. Because there is no remaining valid aggravating factor, this analysis cannot apply to Mr. Nichols’s case.

II. Under *Hurst v. Florida*, a New Substantive Rule of Constitutional Law Applicable to Cases on Collateral Review, Mr. Nichols’s Death Sentence Is Invalid Because a Judge—Not a Jury—Made Factual Findings Necessary to Impose the Sentence of Death.

The post-conviction court’s ruling that Tennessee courts need not apply the *Hurst* rule retroactively is erroneous. *See Hurst v. Florida*, 136 S.Ct. 616 (2016). Although, the post-conviction court recognized that Tennessee courts must apply new substantive rules of law retroactively, it concluded that *Hurst* did not announce a new rule of constitutional law and thus, Tennessee courts need not apply it retroactively. PC vol. VI at 624–26. In so doing, the lower

court failed to recognize authority establishing that when prior decisions do not dictate the outcome of a later decision, that later decision is new. *Teague v. Lane*, 489 U.S. 288, 301 (1989) (explaining that “a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant’s conviction became final”) (emphasis original); *Welch v. United States*, 136 S. Ct. 1257, 1264 (2016) (quoting *Teague*, 489 U.S. at 301); *Chaidez v. United States*, 568 U.S. 342, 347 (2013) (same); *Butler v. McKellar*, 494 U.S. 407, 412–15 (1990) (concluding that “where the new decision is reached by an extension of the reasoning of previous cases[,]” it may still establish a new rule of law if its outcome was “susceptible to debate among reasonable minds”). Furthermore, the post-conviction court overlooked authority establishing that when a decision explicitly overrules prior precedent, the later decision creates a new rule. *Saffle v. Parks*, 494 U.S. 484, 488 (1990) (“The explicit overruling of an earlier holding no doubt creates a new rule”). Consideration of this authority establishes that the *Hurst* rule is new. Thus, the post-conviction court’s conclusion to the contrary is incorrect.

A. Standard of Review.

Whether a case announcing a new rule of constitutional law requires retroactive application is a question of law that warrants no deference on appellate review. *State v. Bush*, 428 S.W.3d 1, 16 (Tenn. 2014). Whether *Hurst* applies to Mr. Nichols’s case and was violated in Mr. Nichols’s case is a question of constitutional law and statutory construction which are questions of law reviewed de novo. *State v. Lowe*, 552 S.W.3d 842 (Tenn. 2018); *State v. Daniel*, 552 S.W.3d 832 (Tenn. 2018).

B. *Hurst* Holds that the United States Constitution Requires that a Jury Must Find All Facts Necessary to Impose a Sentence of Death.

In *Hurst*, the United States Supreme Court held that Florida’s death penalty statute was

unconstitutional because, under the statute, the sentencing judge—not the jury—made independent factual findings required for the imposition of the death penalty.⁸ *Hurst*, 136 S. Ct. at 624. Specifically, a defendant was not eligible for death under Florida’s statute until the trial judge made findings regarding the sufficiency of aggravating circumstances, mitigating circumstances, and the relative weight of each. *Id.* at 622. *Hurst* declared that “any fact that ‘expose[s] the defendant to a greater punishment than that authorized by the jury’s guilty verdict is an ‘element’ that must be submitted to a jury.” *Id.* at 621. In other words, a jury—not a judge—must “find each fact necessary to impose a sentence of death.” *Id.* at 619.

Prior to *Hurst*, courts had ruled that the Sixth Amendment did not require specific factual findings authorizing the imposition of a death sentence to be made by the jury. *Spaziano v. Florida*, 468 U.S. 447, 460–63 (1984); *Hildwin v. Florida*, 490 U.S. 638, 640–41 (1989). However, *Hurst* expressly overruled this prior precedent:

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. 640–641, 109 S.Ct. 2055. Their conclusion was wrong, and irreconcilable with *Apprendi v. New Jersey*, 530 U.S. 466, 494 (2000)]. . .

Time and subsequent cases have washed away the logic of *Spaziano* and *Hildwin*. The decisions are overruled to the extent they allow a sentencing judge to find an aggravating circumstance, independent of a jury’s factfinding, that is necessary for imposition of the death penalty.

Hurst, 136 S. Ct. at 623–24.

Hurst now requires that a jury, and not the court, find *all* facts necessary to enhance a defendant’s sentence from life to death beyond a reasonable doubt. *Id.* at 621. Accordingly, in

⁸ Florida law required the trial judge to make two factual findings for the imposition of a death sentence: (1) that sufficient aggravating circumstances exist, and (2) that there are insufficient mitigating circumstances to outweigh the aggravating circumstances. *Hurst*, 136 S. Ct. at 622.

Tennessee cases, the jury—and not the court—must solely find each element of every aggravating factor used to enhance a capital defendant’s sentence, *id.*, and conduct any requisite weighing analysis. *Id.* at 622 (explaining that the weighing of aggravation and mitigation is among the factual determinations that cannot be performed by a judge).

C. The *Hurst* Rule Is Retroactive and Must Be Applied to Cases on Collateral Review.

Hurst announced a new substantive rule of constitutional law that must be retroactively applied. It is a new rule of law because its holding was not dictated by precedent existing at the time Mr. Nichols’s conviction became final. *Teague*, 489 U.S. at 301; *Welch*, 136 S. Ct. at 1264; *Butler*, 494 U.S. at 412–15; *see also* Tenn. Code Ann. § 40–30–122 (prescribing that “a new rule of constitutional criminal law is announced if the result is not dictated by precedent existing at the time the petitioner’s conviction became final and application of the rule was susceptible to debate among reasonable minds”). Accordingly, a decision explicitly overruling a prior decision undoubtedly creates a new rule. *Saffle*, 494 U.S. at 488.

Furthermore, a rule is also new if the decision elucidating the rule answers questions left undecided by prior cases. *See Butler*, 494 U.S. at 412–15. Again, in this situation, prior precedent does not dictate the outcome of the new decision. Thus, even when courts decide a case by extending the reasoning of a previous case, the decision is new so long as prior precedent did not dictate the outcome of the decision and the outcome of the decision was susceptible to reasonable debate. *Id.*; *see also Montgomery v. Louisiana*, 136 S. Ct. 718, 732–34 (2016) (finding that the rule established in *Miller v. Alabama*, 567 U.S. 460 (2012) extending the prohibition against the imposition of a life without parole sentence for some juvenile homicide offenders was a new substantive rule, even though the Court previously had ruled that life without parole sentences could not be imposed on juveniles in non-homicide cases).

Under these authorities, *Hurst* announced a new rule. *Hurst*'s holding was not "dictated by precedent existing at the time" Mr. Nichols's conviction became final. *Teague*, 489 U.S. at 301. On the contrary, at the time of Mr. Nichols's trial, decisions of the United States Supreme Court evaluating the protections of the Sixth Amendment had reached a result contrary to *Hurst*. See, e.g., *Spaziano*, 468 U.S. 447; *Hildwin*, 490 U.S. 638. These cases permitted a sentencing judge, independent of a jury's fact-finding, to find an aggravating circumstance or otherwise make specific factual findings necessary for the imposition of the death penalty. *Hurst*, 136 S. Ct. at 623–24. *Hurst* explicitly overruled these earlier holdings. *Id.* at 623–24. "The explicit overruling of an earlier holding no doubt creates a new rule." *Saffle*, 494 U.S. at 488. Thus, *Hurst* has created a new rule of law. *Whorton v. Bockting*, 549 U.S. 406, 416 (2007).

New substantive rules of constitutional law apply retroactively. *Montgomery*, 136 S. Ct. at 728. Substantive rules include "decisions that narrow the scope of a criminal statute by interpreting its terms, as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish." *Welch*, 136 S. Ct. at 1265 (quoting *Schriro v. Summerlin*, 542 U.S. 348, 351–52 (2004) (internal citations omitted)). *Hurst* is a substantive rule for two reasons. First, by overturning *Spaziano* and *Hildwin*, it established that jury sentencing is a substantive right mandated by the Sixth and Eighth Amendments that must be applied retroactively. See *Montgomery*, 136 S. Ct. at 732–33 ("Protection against disproportionate punishment is the central substantive guarantee of the Eighth Amendment and goes far beyond the manner of determining a defendant's sentence"). Second, Tennessee narrows the reach of the death penalty statute though the determination of the existence of the aggravating circumstances and the weighing process. *State v. Middlebrooks*, 840 S.W.2d 317, 343–44 (Tenn. 1992). The rule of *Hurst*, requiring a jury—not a judge—to make all requisite findings for the imposition of a death

sentence thus “narrow[s] the scope” of that determination. *See Welch*, 136 S. Ct. at 1265. As such, the *Hurst* rule is a substantive rule that courts must apply retroactively. *Id.*

Moreover, the United States Supreme Court also has repeatedly found that new rules implicating the right to have facts determined beyond a reasonable doubt are substantive and therefore retroactive. *See, e.g., Hankerson v. North Carolina*, 432 U.S. 233, 243–44 (1977); *Ivan V. v. City of New York*, 407 U.S. 203, 203–04 (1972) Similarly, rules that relate to the constitutional requirements for proportionate punishment are substantive and retroactive. *Montgomery*, 136 S. Ct. at 732–33 (“Protection against disproportionate punishment is the central substantive guarantee of the Eighth Amendment and goes far beyond the manner of determining a defendant’s sentence.”). These authorities further establish that the *Hurst* rule is a substantive rule.

Despite the fact that *Hurst* overruled prior precedent, the post-conviction court determined that *Hurst* does not announce a new rule. PC vol. VI at 626. The court reasoned that *Hurst* was merely an extension of *Ring v. Arizona*, 536 U.S. 584 (2002), and as such, it could not have announced a new rule. *Id.* But if that were true, *Hurst* could not have overruled any prior precedent; such precedent already would have been overruled by *Ring*. *See Rauf v. State*, 145 A.3d 430, 486 (Del. 2016) (Holland, J., concurring) (finding that the sentencing-judge weighing provision in the state’s death penalty statute, which the court previously held to be constitutional under *Ring*, was now unconstitutional under *Hurst*). In other words, prior to *Hurst*, *Ring* did not dictate the outcome in *Hurst*. Thus, even if *Hurst* is appropriately classified as an extension of *Ring*, this characteristic does not render it not new or non-substantive. *Butler*, 494 U.S. at 412–15; *see also Montgomery*, 136 S. Ct. at 732–34.

Regardless of whether *Hurst* extended *Ring*, *Hurst* encompasses additional Sixth and Eighth Amendment protections the Supreme Court had not previously recognized in *Ring*. The

Ring Court issued a discrete holding: that a sentencing judge, sitting without a jury, cannot find an aggravating circumstance necessary for the imposition of the death penalty because the Sixth Amendment requires aggravators to be found by a jury. *Ring*, 536 U.S. at 609. This holding addressed only the petitioner’s “tightly delineated” claim that did not, for example, raise any challenge with respect to mitigating circumstances nor any contention arguing that the Sixth Amendment required the jury to make the ultimate determination of whether to impose the death penalty. *Ring*, 536 U.S. at 597 n.4.

The Court’s holding in *Hurst*, on the other hand, is much broader. The *Hurst* opinion identified constitutional infirmities that extend beyond the judicial determination (without the aid of jury) of a single aggravating factor: under *Hurst*, if *any* finding of fact in a capital sentencing scheme is necessary as a pre-condition to a death sentence, the Sixth, Eighth, and Fourteenth Amendments require that finding of fact to be made solely and definitively by a unanimous jury pursuant to the beyond a reasonable doubt standard of proof. *Hurst*, 136 S. Ct. at 621; *Id.* at 624 (Breyer, J., concurring). The *Hurst* rule was not dictated by precedent; instead, *Hurst* addressed questions not raised in *Ring* and specifically overruled earlier decisions that permitted sentencing-judge fact-finding in the imposition of a death sentence. *Hurst*, 136 S. Ct. at 622–23. Because the *Hurst* rule was not dictated by prior precedent, it is a new substantive rule of law.

However, even if the *Hurst* rule should be considered procedural, as opposed to substantive, its “beyond a reasonable doubt” component renders it a watershed procedural rule that courts must apply retroactively. *Teague*, 489 U.S. at 311–13; *Ivan V.*, 407 U.S. at 204–05. Watershed rules are those that implicate “the fundamental fairness and accuracy of the criminal proceeding.” *Saffle*, 494 U.S. at 495; see *In re Winship*, 397 U.S. 358, 363–64 (1970) (reasonable doubt standard vital to criminal procedure). The Constitution requires states to give retroactive

effect to either kind of rule. *Montgomery*, 136 S. Ct. at 729 (“States are required as a constitutional matter to give retroactive effect to new substantive or watershed procedural rules.”). Similarly, Tennessee’s post-conviction procedure statutes require Tennessee courts to apply retroactively either kind of rule. Tenn. Code Ann. § 40–30–122 (prescribing that courts shall apply retroactively a new rule that “places primary, private individual conduct beyond the power of the criminal law-making authority to proscribe or requires the observance of fairness safeguards that are implicit in the concept of ordered liberty.”).

Regardless of whether the *Hurst* rule is best described as substantive or procedural, the operation of the *Hurst* rule “places primary, private individual conduct beyond the power of the criminal law-making authority to proscribe or requires the observance of fairness safeguards that are implicit in the concept of ordered liberty.” Tenn. Code Ann. § 40–30–122. Thus, Tennessee courts must apply it retroactively. *Montgomery*, 136 S. Ct. at 729; Tenn. Code Ann. § 40–30–122.

In fact, high courts in at least two other states have already recognized *Hurst's* retroactive nature. In *State v. Kirkland*, 49 N.E.3d 318 (Ohio 2016) (table), the Ohio Supreme Court determined that *Hurst* must be applied retroactively. On direct appeal in 2014, the Ohio Court found substantially prejudicial prosecutorial misconduct occurred at the penalty phase of the defendant’s trial. PC vol. II at 142 (*Kirkland* pleadings). Instead of remanding the case for a new sentencing proceeding, the Court conducted its own evaluation and determined the defendant nonetheless deserved a death sentence. *Id.* After *Hurst*, the Ohio Court then ordered a new jury sentencing. *Id.* The *Kirkland* decision, in conjunction with the rule of *Montgomery*, establishes that retrospective application of *Hurst* is required.

The Florida Supreme Court also determined that *Hurst* must apply retroactively to cases announced since *Ring*. *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016). In so doing, the Court

acknowledged the impact on the administration of justice resulting from its holding but found that the special concerns for fairness in capital cases nonetheless compelled retroactive application of *Hurst*:

Thus, we must decide whether interests of fundamental fairness justify the impact on the administration of justice that would result from holding *Hurst* retroactive. As we have stated, capital punishment “connotes special concern for individual fairness because of the possible imposition of a penalty as unredeeming as death.” *Witt*, 387 So. 2d at 926. In this case, where the rule announced is of such fundamental importance, the interests of fairness and “cur[ing] individual injustice” compel retroactive application of *Hurst* despite the impact it will have on the administration of justice. *State v. Glenn*, 558 So. 2d 4, 8 (Fla. 1990).

Mosley, 209 So. 3d at 1282.

As in Florida and Ohio, Tennessee courts must apply *Hurst* retroactively. The *Hurst* rule is new, and it satisfies the criteria for both substantive and watershed procedural rules. Thus, the Constitution requires Tennessee courts to give it retroactive effect. *Montgomery*, 136 S. Ct. at 729. Accordingly, the post-conviction court erred in denying this claim, and this Court should remand this case for further proceedings.

D. Mr. Nichols’s Sentencing Judge, Independently from the Jury, Rendered Critical Factual Findings Necessary for the Imposition of the Death Sentence. These Findings Violate the Rule of *Hurst*.

In this case, the trial judge made independent factual findings regarding the existence of the prior violent felony aggravating circumstance necessary for the imposition of the death penalty. Without these finding of the trial court, Mr. Nichols would not have been eligible for and could not have received a death sentence. These findings violated the rule of *Hurst*, and the post-conviction court abused its discretion by dismissing Mr. Nichols’s claim.

At the time of Mr. Nichols’s crime and trial, the Tennessee death penalty statute provided for capital punishment upon a conviction for first-degree murder only if the jury unanimously determines that at least one statutory aggravating circumstance had been proven by the state

beyond a reasonable doubt and such circumstance or circumstances were not outweighed by any mitigating circumstances. Tenn. Code Ann. § 39–2–203(g) (1982) (repealed). One of the aggravating circumstances that supported, and the only aggravating circumstance that currently supports, Mr. Nichols’s death sentence is the prior violent felony aggravator, Tenn. Code Ann. § 39–2–203(i)(2) (repealed). To rely on this aggravating circumstance, the State had to establish that “[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[.]”⁹

At sentencing, the State relied on Mr. Nichols’s prior convictions for aggravated rape in support of the application of the aggravating circumstance. The trial judge did not instruct the jury on the statutory elements and definition of rape, nor did the judge instruct the jury regarding any explanation of the phrase “involving the use or threat of violence” or definition of the term “violence.” Such instruction would have been necessary for the jury to determine whether the aggravating circumstance had been established. *See State v. Williams*, 690 S.W.2d 517, 532 (Tenn. 1985) (“It is of the utmost importance that trial judges in death penalty cases instruct the jury regarding relevant statutory definitions of felonies and the legal significance of other legal terms which are necessary for the jury to understand in determining whether or not aggravating circumstances defined in the statute have been established.”) (citing *Godfrey v. Georgia*, 446 U.S. 420 (1980)). Instead, the trial judge determined—and then informed the jury—that the rape convictions satisfied the prior violent felony aggravator. The court instructed as follows:

Tennessee Code Annotated 39–2–203(i) provides that no death penalty shall be

⁹ The prior violent felony aggravating circumstance in effect at the time of the 1988 homicide was T.C.A. § 39–2–203(i)(2) (repealed). During Mr. Nichols’s sentencing trial, the court erroneously instructed the jury based on the 1989 amended prior felony aggravating circumstance, which read in part, “one or more felonies, other than the present charge, the statutory elements of which involved the use or threat of violence to the person.” T.C.A. § 39–2–204(i)(2). PC Vol. II at 80, 102 n.7.

imposed but upon a unanimous finding that the State has proven beyond a reasonable doubt the existence of one or more aggravating circumstances, which shall be limited to the following:

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 on the crimes of Aggravated Rape which are felonies *involving the use of threat or violence to the person*.

Tr. 578–579 (emphasis added). In so doing, the judge independently found the existence of the aggravating circumstance.

In denying Mr. Nichols’s claim, the post-conviction court acknowledged that the trial court, and not Mr. Nichols’s jury, found that his prior convictions involved the use or threat of violence. PC vol. VI 626. The post-conviction court concluded, however, that this finding did not violate the rule of *Hurst* because it was not a factual finding but a “legal determination.” *Id.* But in making this ruling, the post-conviction court failed to acknowledge authority of the Tennessee Supreme Court existing at the time of Mr. Nichols’s trial establishing that the determination of whether the commission of the prior offense involved violence—and therefore satisfied the violence requirement of the prior violent felony aggravating circumstance—is a question of fact, not a question of law. *State v. Moore*, 614 S.W.2d 348, 351 (Tenn. 1981) (finding the determination of whether a prior conviction involved violence is a question of fact).

Thus, the trial court could not have been making a purely legal determination when it concluded that each of these convictions satisfied the requirements of the prior violent felony aggravating circumstance. *Id.* at 351. Such a judge-made determination of fact is not permitted under *Hurst*. The Supreme Court has made clear that the findings necessary to support an aggravating circumstance in a capital case *must be made by the jury*. *Hurst*, 136 S. Ct. at 623–24.

By independently determining that the prior convictions satisfied the aggravating

circumstance and then instructing the jury that the court so found, the trial judge removed from the jury the factual determination of whether the State proved the aggravating circumstance beyond a reasonable doubt. When the trial court found that the prior offenses involved violence to the person and then informed the jury of this finding, the judge—not the jury—determined the existence of the aggravating circumstance. As in *Hurst*, this procedure violated the Sixth and Eighth Amendments to the United States Constitution because a jury, not a judge, must make the factual determinations required to impose a death sentence. *Id.* at 624 (majority opinion); *Id.* at 624 (Breyer, J., concurring) (concluding that the Eighth Amendment requires the jury to make the necessary findings before the death penalty may be imposed).

Because the trial court increased Mr. Nichols’s punishment based on its own fact-finding, his death sentence violates the Sixth, Eighth, and Fourteenth Amendments. *Hurst*, 136 S. Ct. at 622, 624. Mr. Nichols established a colorable claim asserting that the trial judge’s actions in this case violated the rule of *Hurst*. Because the post-conviction court erroneously overlooked authority establishing that the trial court’s determinations regarding the existence of the aggravating circumstance necessarily involved a question of fact, the post-conviction court erred in denying the claim. This Court should remand this case for further proceedings.

E. Mr. Nichols’s Death Sentence Is Unconstitutional Because the Appellate Court—Not a Jury—Made Findings Necessary to Impose the Sentence of Death.

Hurst also applies to Mr. Nichols’s case because on direct appeal, after the Tennessee Supreme Court struck one of the two aggravating factors for violating the Tennessee Constitution, the appellate court—not the jury—subsequently rendered findings required for imposition of the death sentence. The appellate court determined that the state constitutional error did not constitute reversible error because a reweighing of the remaining aggravating factor and the mitigation

evidence presented at the penalty phase would have resulted in the same sentence of death. *State v. Nichols*, 877 S.W.2d 722, 737–39 (Tenn. 1994). *Hurst* declares that this is a determination only a jury can make.

At the time of the crime in this case, the Tennessee death penalty statute provided for capital punishment upon a conviction for first-degree murder only if: (1) the jury unanimously determined that at least one statutory aggravating circumstance was proven by the state beyond a reasonable doubt; and, (2) such circumstance or circumstances were not outweighed by any mitigating circumstances. Tenn. Code Ann. § 39–2–203(g) (1982) (repealed).¹⁰ If the jury unanimously determined that no statutory aggravator was proved beyond a reasonable doubt, or that the aggravating circumstances were not outweighed by mitigating circumstances, the sentence is life imprisonment. Tenn. Code Ann. § 39–2–203(f) (1982) (repealed).¹¹ Mr. Nichols was convicted of felony first-degree murder and the jury sentenced him to death based on two aggravating circumstances: 1) prior violent felony convictions; and 2) felony murder. On direct appeal, the Tennessee Supreme Court invalidated the felony murder aggravator based on *Middlebrooks* error and conducted a harmless error analysis by reweighing the only remaining aggravating factor against the mitigation and finding the jury’s consideration of the invalid aggravator to have been harmless. *Nichols*, 877 S.W.2d at 737–39. This reweighing usurped the jury’s function and denied Mr. Nichols his right to a jury determination as to whether death is the

¹⁰ Tenn. Code Ann. § 39–2–203(g) provides: “If the jury unanimously determines that at least one statutory aggravating circumstance or several statutory aggravating circumstances have been proved by the state beyond a reasonable doubt, and said circumstance or circumstances are not outweighed by any mitigating circumstances, the sentence shall be death.” (repealed).

¹¹ Tenn. Code Ann. § 39–2–203(f) provides: “If the jury unanimously determines that no statutory aggravating circumstances have been proved by the state beyond a reasonable doubt, or if the jury unanimously determines that a statutory aggravating circumstance or circumstances have been proved by the state beyond a reasonable doubt but that said circumstance or circumstances are outweighed by one or more mitigating circumstances, the sentence shall be life imprisonment.”

appropriate punishment.

Regarding the reweighing of aggravation and mitigation on appeal, the post-conviction court determined that Mr. Nichols became eligible for the death penalty when his jury unanimously found the existence of at least one statutory aggravating circumstance. PC vol. VI at 632. The post-conviction court further reasoned that Mr. Nichols is guaranteed fact-finding by a jury only during the death penalty eligibility phase, and the court considered the eligibility phase to have concluded once the jury found at least one of the aggravating factors alleged by the State. *Id.* at 18–19. The post-conviction court concluded that the weighing of the aggravating factors and mitigating factors is not a fact-finding process and is conducted after a defendant has already been found to be death eligible. *Id.*

Hurst makes clear, however, that findings which are required to elevate the maximum sentence for first-degree murder from life in prison to death must be made by the jury. *Hurst*, 136 S. Ct. at 621 (“any fact that ‘expose[s] the defendant to a greater punishment than that authorized by the jury’s guilty verdict’ is an ‘element’ that must be submitted to a jury.”). In particular, the weighing process is a factual finding that must be made by a unanimous jury, beyond a reasonable doubt. *Hurst*, 136 S. Ct. at 622. In Mr. Nichols’s case, only a jury could find the existence of an aggravating circumstance (proven beyond a reasonable doubt). And, only a jury—not the appellate court—could find that the aggravating circumstance or circumstances outweighed the mitigating circumstances. The *Hurst* rule is a new, substantive departure from Supreme Court precedent that permitted a judicial weighing determination of aggravation and mitigation.

The concept of appellate reweighing was approved in *Clemons*, where the Supreme Court held it was constitutionally permissible, under the Sixth, Eighth, and Fourteenth Amendments. *Clemons v. Mississippi*, 494 U.S. 738 (1990); In applying the harmless error analysis to the

weighing of aggravating and mitigating factors, the *Clemons* Court held that a reviewing court's reweighing remaining aggravators against mitigation after invalidating one or more aggravators did not violate the Sixth Amendment. In so holding, the *Clemons* Court relied on rulings in *Spaziano v. Florida*, 468 U.S. 447 (1984) and *Hildwin v. Florida*, 490 U.S. 638 (1989), that the Sixth Amendment does not give a defendant the right to have a jury determine the appropriateness of a capital sentence or require the jury to specify the aggravating factors supporting the death verdict, or even require a jury sentence a capital defendant. *Clemons*, 494 U.S. at 745–46.

As discussed in section II subsection A, *supra*, the Supreme Court in *Hurst* explicitly overruled *Spaziano* and *Hildwin*, the critical cases on which *Clemons* relies. The *Hurst* Court found that *Spaziano* and *Hildwin* are “irreconcilable with *Apprendi*” and that “[t]ime and subsequent cases have washed away [their] logic.” *Hurst*, 136 S. Ct. at 624. *Spaziano* and *Hildwin* are the underpinnings of the appellate reweighing doctrine in *Clemons* and they can no longer support the constitutionality of appellate reweighing in capital cases.

On direct appeal, the Tennessee Supreme Court invalidated the felony murder aggravator and instead of remanding the case for a new jury sentencing, the appellate court employed a hybrid harmless-error procedure that incorporated the reweighing principles of *Clemons*. The appellate court held, after conducting an “independent review of the record,” *Nichols*, 877 S.W.2d at 738, “that the sentence would have been the same had the jury given no weight to the invalid felony-murder aggravating circumstance.” *Id.* at 739. When the appellate court conducted the weighing analysis, the court made a factual finding necessary to support the death sentence. This practice is unconstitutional under *Hurst*. See *State v. Kirkland*, 49 N.E.3d 318 (Ohio 2016) (table) (ordering a new jury sentencing where, on direct appeal, the court had found substantially prejudicial prosecutorial misconduct at the penalty phase and—instead of remanding the case for a new

sentencing proceeding—conducted its own evaluation and determined the defendant deserved a death sentence); *see also* PC vol. II at 142 (*Kirkland* pleadings). Accordingly, Mr. Nichols’s death sentence is unconstitutional because a jury, not a court, must make the factual determinations required to impose a death sentence. *Hurst*, 136 S. Ct. at 624. Therefore, the post-conviction court erred in denying this claim, and this Court should remand this case for further proceedings.

III. The State Committed Prejudicial Prosecutorial Misconduct which Tainted the Jury’s Death Verdict.

A. Standard of Review.

The post-conviction court held that Mr. Nichols’s prosecutorial misconduct claim was previously determined or waived. Whether an issue is previously determined is a question of law which an appellate court reviews *de novo*. *State v. Burnett*, 92 S.W.3d 403, 405–06 (Tenn. 2002). Whether an issue is waived is also a question of law reviewed *de novo*. *Cauthern v. State*, 145 S.W.3d 571, 599 (Tenn. 2004). Additionally, whether Mr. Nichols’s attorneys rendered ineffective assistance of counsel is a mixed question of law and fact which this Court reviews *de novo*. *Kendrick v. State*, 454 S.W.3d 450 (Tenn. 2015).

B. The Prosecutor Improperly Commented on Mr. Nichols’s Possibility of Parole and Future Dangerousness.

During closing argument, the State improperly commented on the possibility of Mr. Nichols’s parole and the likelihood that if he were released, he would continue to commit violent crimes. The State’s misconduct prejudiced Mr. Nichols by tainting the jury’s death verdict, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution as well as Article 1, §§ 8, 9, 17, 19, and Article XI § 8, of the Tennessee Constitution. Because Mr. Nichols’s death sentence is rendered unconstitutional as the product of state misconduct, his sentence must be vacated.

The prosecutor argued:

But what do you, what do you do with a man who's perpetrated that kind of crime? What do you do with a man who's committed senseless murder, and after he does it, instead of being remorseful, he rapes other women? What do you do with him? He's been in the penitentiary. He got a five year sentence in '84 and he served eighteen months. What do you do with him? What's left . . . And you heard the psychologist say that if he's out he'll do it again. He even admitted, "Mr. Nichols, if you hadn't been arrested January 5, 1989, you would still be out there committing rapes," and he said yes.

Ladies and gentlemen, justice is doing what you have to do to make sure that Harold Wayne Nichols never rapes again and that he never murders again, whatever it takes.

Nichols, 877 S.W.2d at 732-733. Counsel for Mr. Nichols failed to object to the State's improper argument. *Id.* at 733. The State again commented on the possibility of Mr. Nichols's parole during its rebuttal argument:

Mr. Moore says, "Prison is hell. Send him there." Yeah, '84 they sent him there on a five year sentence and he served eighteen months and got out and raped again. Sure, send him there.

If the death penalty, ladies and gentlemen, isn't applied in a case like this, when does it apply? A man who's shown even in being in prison that he's not going to change, he rapes and murders, and he goes out and does it again and again and again, and if he wasn't in jail right now he'd be doing it again.

Nichols at 733. After the prosecutor argued that one of the punishment's purposes was to remove Mr. Nichols from society so that another woman would not be raped or murdered, defense counsel objected. *Id.* At the time of the capital crime, the only available sentences for capital murder were death and life in prison with the possibility of parole after 25 years.

On direct appeal, the Tennessee Supreme Court denied Mr. Nichols's claim of prosecutorial misconduct noting that the prosecutor's closing argument, "to whatever degree improper . . . did not constitute error which prejudicially affected the jury's sentencing determination." *Nichols*, 877 S.W.2d at 733. In his dissenting opinion, Chief Justice Reid argued:

Even though parole is not specifically mentioned in the prosecutor's argument, the

import of the argument is dramatically clear—unless the defendant is sentenced to death he will be released from prison and rape again. . . . Moreover, the prosecutor’s mention of the defendant’s previous parole in response to defense counsel’s ‘prison is hell’ argument certainly suggests that death would be the only appropriate sentence given the possibility of parole.

Nichols, 877 S.W.2d at 741 (Reid, C.J. dissenting).

The *Nichols* majority was wrong. In fact, to heed the prosecutor’s warning and prevent Mr. Nichols’s parole, the jurors voted for death, though they discussed and agreed that the State of Tennessee would never actually execute anyone sentenced to death. For the jurors, a death sentence served as a de facto life in prison without the possibility of parole (LWOP) sentence. PC vol. II at 208, 211, 215 (Juror Affidavits). The juror statements confirm the pinpoint accuracy of Chief Justice Reid’s dissent. Clearly the driving force behind Mr. Nichols’s death sentence was not either statutory aggravator but the improper consideration of parole. *See McGautha v. California*, 402 U.S. 183, 208 (1971) (it is essential that jurors recognize the truly awesome responsibility of a death verdict so that they will act with due regard for the consequences of their decision).

In *Caldwell v. Mississippi*, 472 U.S. 320 (1985), the Supreme Court held that it is constitutionally impermissible to rest a death sentence on a jury’s death verdict when the jury has been led to believe that the responsibility for determining the appropriateness of the defendant’s death rests elsewhere. *Caldwell*, 472 U.S. at 328–329. *Caldwell* applies to any diminishing of a jury’s responsibility in its decision on life or death. *State v. West*, 767 S.W.2d 387, 398–399 (Tenn. 1989). Here, the prosecution’s improper warnings to the jury that if they voted for life, they would be permitting Mr. Nichols’s release back into society so that he may continue raping and killing women diminished the jurors’ responsibility to find the statutory aggravators beyond a reasonable doubt, weigh those statutory aggravators against any mitigation they found and, after that weighing, determine whether Mr. Nichols deserved to live or die. Instead of upholding those

responsibilities, the jurors instead returned a verdict of death in the hopes of preventing his parole but also not expecting that the execution would ever take place.

Further troubling is that in improperly commenting on the possibility of parole, the State misled the jurors to believe that Mr. Nichols not only would be paroled but that he would be released from prison while he was still physically capable of a violent crime spree. Mr. Nichols was 29 years old at the time of his capital sentencing hearing. *Nichols v. State*, 90 S.W.3d 576, 584 (2002). The prosecutor was aware that, prior to the capital sentencing hearing, Mr. Nichols had been convicted of five aggravated rapes. *State v. Nichols*, 877 S.W.2d at 726. Although at the time of his capital sentencing hearing Mr. Nichols had not yet been sentenced on the aggravated rapes, the State had filed several notices of its intent to seek enhanced punishment for Mr. Nichols as a career criminal. *State v. Nichols*, No. 03C01-9108-CR-00236, 1995 WL 755957 at *6 (Tenn. Crim. App. 1995). The statutory guidance as to possible sentencing outcomes on the five aggravated rapes were instructive on the realistic timing of Mr. Nichols's parole eligibility.

Aggravated rape was defined as a Class A felony. Tenn. Code Ann. § 39-13-502; Acts 1989, ch. 591, §1. Given Mr. Nichols's full criminal history, the State easily could have shown that Mr. Nichols satisfied the requirements for a career offender, pursuant to Tenn. Code Ann. § 40-35-108; Acts 1989, ch. 591, §6, subjecting him to the maximum sentence within the applicable Range III. Tenn. Code Ann. § 40-35-108(c). The maximum Range III sentence for a Class A felony was sixty years. Tenn. Code Ann. § 40-35-112 (c)(1); Acts 1989, ch. 591, §6. Thus, even if Mr. Nichols's sentences for the five counts of aggravated rape ran concurrently, which was unlikely, he would still have been subject to at least sixty years of incarceration before he was eligible for parole. The prosecution knew that Mr. Nichols would be approximately 89 years old at his *earliest eligibility* for parole. A more likely scenario that the prosecution would have

expected was consecutive sentences for a total of 300 years. In fact, the trial court sentenced Mr. Nichols to 647 years in prison. *Nichols*, 1995 WL 755957 *1.

A citizen on trial for his life is entitled, under the constitutional provisions set out above, to fundamental fairness, a reliable determination of guilt and sentence, and to an individualized determination of the appropriate sentence guided by clear, objective, and evenly applied standards. *See, e.g., Woodson v. North Carolina*, 428 U.S. 280 (1976); *Gregg v. Georgia*, 428 U.S. 153 (1976). A prosecutor is required to act as a minister of justice and not merely as an advocate. As the Tennessee Supreme Court has explained, “it has long been recognized that the office has the inherent responsibility and duty to seek justice rather than to be just an advocate for the State’s victory at any cost.” *State v. Superior Oil*, 875 S.W.2d 658, 661 (Tenn. 1994); *see also* Commentary to Tenn. R. Sup. Ct. 8, R.P.C. 3.8 (The prosecutor “has the responsibility of a minister of justice whose duty is to seek justice rather than merely to advocate for the State’s victory at any given cost.”). In this instance, the prosecution’s improper argument that the jury’s only real sentencing option was death, while knowing that Mr. Nichols would not be eligible for parole until around his 90th birthday, renders Mr. Nichols’s death sentence unconstitutional.

Trial counsel for Mr. Nichols rendered ineffective assistance of counsel by both failing to object to the State’s prejudicial misconduct and also by failing to interview jury members about the State’s closing argument prior to litigating the motion for a new trial. *See Strickland v. Washington*, 466 U.S. 668, 688 (1984); *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975). Had counsel interviewed jurors, they would have verified that the State’s misconduct directly led to their verdict of death. Counsel also would have discovered that jurors voted for death as a de facto life in prison without possibility of parole (LWOP) sentence, and never intended for Mr. Nichols to be executed. Counsel should have discovered this evidence prior to the motion for a new trial

in order to supplement the record with this critical evidence. Had they done so, the Tennessee Supreme Court would have granted Mr. Nichols's prosecutorial misconduct claim and remanded his case to the trial court for a new sentencing hearing.

The post-conviction court ruled that this claim is previously determined and thus does not entitle Mr. Nichols to relief. PC vol. VI at 634. Due process concerns, however, can overcome the Post-Conviction Procedure Act's bar on previously determined issues. *Allen v. State*, No. M2009-02151-CCA-R3-PC, 2011 WL 1601587, at *7 (Tenn. Crim. App. Apr. 26, 2011) (citations omitted). Although the general rule is that the "law of the case" doctrine precludes reconsideration of issues already decided in prior appeals of the same case, courts may reconsider issues that have been previously determined when the evidence offered at the subsequent proceeding was substantially different from the evidence at the initial proceeding. *Memphis Publishing v. Tennessee Petroleum*, 975 S.W.2d 303, 306 (Tenn. 1998); *State v. Williams*, 52 S.W.3d 109, 124 (Tenn. Crim. App. 2001). Indeed, courts may, in their discretion, review an issue even though an exception to the "law of the case" does not apply. *State v. Hall*, 461 S.W.3d 469, 500 (Tenn. 2015) (reviewing sufficiency of the evidence despite inapplicability of any exception to the law of the case doctrine).

Thus, although the prosecutor's closing argument regarding Mr. Nichols's parole eligibility was previously raised, the post-conviction court should have reviewed the issue anew because the evidence now offered is substantially different than what was presented in the earlier proceedings. Prior counsel raised this issue as a bare bones record-based claim asserting that any references to parole possibility during closing argument were improper. Undersigned counsel, however, has now interviewed several members of Mr. Nichols's jury and proffered affidavits/declarations from three jurors which state that the jury gave consideration to the prosecutor's improper comments

about parole eligibility and that argument diminished the jury's responsibility in making the sentencing decision in this case. Accordingly, the analysis is substantially different now than in the prior proceedings. Mr. Nichols has now demonstrated that his right to be free from cruel and unusual punishment was violated because his death sentence rests on prejudicial prosecutorial misconduct and "a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Caldwell*, 472 U.S. at 328–29.

The post-conviction court also concluded that this claim is not newly discovered and therefore time-barred. PC vol. VI at 634. While our justice system may have some legitimate interests in enforcing procedural bars, it is unseemly to stringently apply these rules in death penalty cases. Capital case litigation should not be reduced to some kind of arcane game, where the omissions of prior counsel seal the fate of the condemned. The State should not execute people before our courts can review all errors on their merits. *See, e.g., Rogers v. Commonwealth*, 992 S.W.2d 183, 187 (Ky. 1999) ("[U]npreserved errors are reviewable in a case where the death penalty has been imposed. . . . The rationale for this rule is fairly straightforward. Death is unlike all other sanctions the [State] is permitted to visit upon wrongdoers. . . . Accordingly, the invocation of the death penalty requires greater caution than is normally necessary in the criminal justice process."). Thus, the interests of justice and the heightened due process concerns inherent in capital cases warrant the consideration of this claim.

For these reasons, this Court should remand this case for further proceedings.

IV. The Post-Conviction Court Erred in Denying the Agreed Proposal by the State and Mr. Nichols to Vacate the Death Sentence and Sentence Mr. Nichols to Life in Prison with the Possibility of Parole.

Settlement is central to our judicial process. *Missouri v. Frye*, 566 U.S. 134 (2012) (“Plea bargains have become central to the administration of the criminal justice system[.]”). The trial court has the discretion to accept a settlement agreement. *State v. Williams*, 851 S.W.2d 828, 830 (Tenn. Crim. App. 1992). Settlement “is not some adjunct to the criminal justice system, it is the criminal justice system.” *Id*; see also, *Lafler v. Cooper*, 566 U.S. 156, 164–65 (2012). Settlement and plea agreements serve a vital function in our justice system.

A. The Post-Conviction Court Erred as a Matter of Law in Finding that it Could Not Accept a Settlement During the Pendency of a Post-Conviction Proceeding.

(1) Standard of Review.

Whether a judge has the power to accept a settlement in Mr. Nichols’s post-conviction proceeding is a question of law. Questions of law and statutory construction are afforded de novo review. *State v. Smith*, 495 S.W. 3d 271, 273 (Tenn. Crim. App. 2016); see also *State v. Hogg*, 448 S.W. 3d 877, 887 (Tenn. 2014).

(2) The Post-Conviction Court Has the Power to Accept a Settlement at Any Stage of the Proceeding.

The post-conviction court’s power to accept a settlement at any stage of the proceedings is supported by both the language of the Post-Conviction Procedure Act and judicial practice in the state of Tennessee. Post-conviction courts have the power to accept a settlement to which the State and defendant agree. The Tennessee Post-Conviction Procedure statute is instructive on how broad a court’s power over the proceedings truly is. The Post-Conviction Procedure statute provides, in relevant part, that:

[i]f 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.*

Tenn. Code Ann. § 40–30–111(a) (emphasis added). Notably absent from the statutory language is a requirement that a court remand for a new sentencing hearing or other specific relief upon vacating a death sentence; the statute simply requires that the court enter any “appropriate order[s] . . . that may be necessary and proper.” *Id.* If a post-conviction court were precluded from accepting a settlement agreement reached by the parties, it would render this plain language of the statute somewhat superfluous, in contravention of well-recognized canons of statutory construction. *See, e.g., Larsen-Ball v. Ball*, 301 S.W.3d 228, 232 (Tenn. 2010) (“[W]e presume that every word in the statute has meaning and purpose and should be given full effect. . . .”).

Several capital post-conviction cases have been settled in Tennessee demonstrating the court’s power to accept a settlement at this stage without proof that the claim is meritorious. For example, in *John Freeland, Jr. v. State of Tennessee*, Case No. C–15–217, a Madison County post-conviction court approved of a settlement between the State and the petitioner and reduced his sentence from death to life. The court in that case did not reach the merits of any of the underlying claims for post-conviction relief and approved the settlement prior to an evidentiary hearing. No specific discussion of the propriety of accepting a settlement appears in the court’s order. PC vol. III at 204.

Also, in *Joel Richard Schmeiderer v. State of Tennessee*, Case No. 14488, a Maury County post-conviction court vacated the petitioner’s death sentence and imposed a life without parole sentence upon agreement by the parties. Notably, the same post-conviction court presided over Mr. Nichols’s post-conviction proceeding. There, the State conceded that the petitioner had

received ineffective assistance of counsel and the court granted relief voiding his original death sentence. The State agreed to the lesser sentence of life without parole. The court approved the settlement and granted relief without holding an evidentiary hearing or requesting any evidence that Mr. Schneiderer's claim might prevail. PC vol. III at 190.¹²

Several other post-conviction courts have also settled capital cases for sentences less than death. *Michael Angelo Coleman v. State of Tennessee*, Case No. P-11326 (Shelby County); PC vol. III at 193; *State of Tennessee v. Devin Earl Banks*, Case No. 03-01956 (Shelby County); *H.R. Hester v. State of Tennessee*, Case No. 11-CR-276 (McMinn County); *Roy Keogh v. State of Tennessee*, Case No. P24323 (Shelby County); PC vol. III at 200.

As these cases demonstrate, there is a consistent practice in Tennessee of settling capital cases for sentences less than death at the post-conviction stage. Further, there is precedent for courts approving settlement without making findings as to the merits of any of the specific claims raised in the post-conviction petition. *See, e.g., Keogh*, Case No. P24323; *Freeland*, Case No. C-15-217; PC vol. III at 200, 204. Clearly, post-conviction courts are empowered to settle a case for less than death without determining a likelihood of prevailing on a specific claim.

Despite the court's indication that it could not accept a settlement without finding evidence or holding a claim would be meritorious, the above authorities demonstrate the post-conviction court clearly has this power. *See* PC Tr. at 4. The court stated in the Order Denying Settlement that "*it is not appropriate to accept such a proposed agreement under the circumstances of this case where there is no claim for post-conviction relief before this Court which should survive this*

¹² The same Court never requested evidence or argument from either Mr. Schneiderer or the State regarding the merits of his ineffective assistance of counsel claim. Attorney Gleason simply informed the court that a post-conviction mental health evaluation had been done which should have been done at the time of trial. Neither Ms. Gleason or the State provided evidence alleging prejudice or the likelihood of prevailing on that claim. *Schneiderer* Hearing.

Court's statutorily required preliminary order." PC vol. VI at 636 (emphasis added). However, no court is required to determine the merits of the claims in a given case before accepting an agreed settlement. As described above, the post-conviction court is empowered to enter "*any supplementary orders that may be necessary and proper*" in a case. Tenn. Code. Ann. Sec. 40-30-111(a).

B. The Post-Conviction Court Abused its Discretion When it Denied the Agreed Proposal by the State and Mr. Nichols to Settle His Case by Agreeing to a Sentence of Life.

(1) Standard of Review.

A trial court has the discretion and inherent power to accept a settlement agreement in a criminal case. *State v. Williams*, 851 S.W.2d 828, 830 (Tenn. Crim. App. 1992). The decision to accept or reject a settlement is reviewed under an abuse of discretion standard. *Id.* A trial court's discretion will not be upheld if the rejection of the settlement is "capricious, arbitrary, or palpably abusive of the court's discretion." *State v. Ford*, 643 S.W. 2d 913, 916 (Tenn. Crim. App. 1982).

(2) The Post-Conviction Court Required Arbitrary Conditions of Mr. Nichols as a Basis for Settlement which are Not Required by Law.

Sound legal principles and judgment must guide a court's decision to accept or reject a settlement for that decision to survive appellate review. "[D]iscretionary choices are not left to a court's inclination, but to its judgment; and its judgment is to be guided by sound legal principles." *State v. Lewis*, 235 S.W.3d 136, 141 (Tenn. 2007) (quoting Martha S. Davis, *Standards of Review: Judicial Review of Discretionary Decisionmaking*, 2 J. App. Prac. & Process 47, 58 (2000)).

Presiding over the post-conviction case, the post-conviction court wrote in the order dismissing the post-conviction proceedings and rejecting the settlement that "it is not appropriate to accept such a proposed agreement under the circumstances of this case where there is no claim

for post-conviction relief before this Court which should survive this Court's statutorily required preliminary order." PC vol. VI at 636. However, the court's application of this principle is arbitrary and unreasonable considering its authority to accept a plea agreement as the post-conviction judge and prior decision to do so in another case and was not "guided by sound legal principles."

The court abused its discretion when it denied the joint settlement. During the January disposition hearing, the court questioned the State and the defense for the basis for the settlement. (PC Tr. 7:7-8). The court stated it had "done this before" and referred to the disposition hearing (and case) cited above (*see infra Joel Richard Schmeiderer v. State of Tennessee*, Case No. 14488); PC vol. III at 185. This case involved the same counsel representing Mr. Nichols (Deputy Post-Conviction Defender Deborah Drew). Assistant Post-Conviction Defender Gleason, co-counsel for Mr. Schmeiderer, was present during those proceedings. PC vol III at 189. Although the court referenced the settlement proceedings in the *Schmeiderer* case during that January disposition, its recollection does not comport with the proceedings as they occurred. PC vol. III at 185.

The court misstated the procedure in the *Schmeiderer* case in which it accepted a settlement agreement without an evidentiary hearing and failed to correct such statements in the order. PC vol. III at 185, 189. During the January disposition the court spoke about the *Schmeiderer* case that it had settled. PC Tr. at 7: 7-12. The court described the procedure in that case's settlement hearing. PC Tr. 7:7-12. However, it did not cite any law or guidelines which required such a procedure. *Id.* The court stated that in the *Schmeiderer* case the lawyers "put on proof of what the basis is for the PCR, and I found that in the order." PC Tr. at 7:8-10); PC vol. III at 185-86.

Despite this assertion, the court at no point heard evidence in support of Mr. Schmeiderer's claim for post-conviction relief based on the ineffective assistance of trial counsel claim upon which the court based its acceptance of the settlement. PC vol. III at 185-86; 190 (*See also*

Schmeiderer Hearing) There, the same court accepted the purported basis for the settlement as asserted by the defense and the State on the face of the pleadings alone. PC vol III at 186 (the court held “[t]he parties agree, and this court finds, that counsel’s failure to timely investigate and present evidence of cognitive impairments as mitigating evidence constitutes deficient performance. . .”) (*Id.* at 186).

Here, the court requested what the “basis” for the modification of sentence in Mr. Nichols’s case might be. PC Tr. at 9:3–8. He told Mr. Nichols and the State that in the *Schmeiderer* case he had been told there was missing mitigation which was the basis for relief in that case which was conceded by the State. *Id.* The court asked: “I’m asking you if y’all have anything like that.” PC Tr. at 9:10–11. Arguably, by informing the parties that there needed to be a “basis for the modification of sentence” the court was seeking some concession by General Pinkston as to one of Mr. Nichols’s claims.

It is not necessary for a judge to secure a concession on a claim for relief from the State to accept a joint settlement agreement. As recently as 2017 a Circuit Court judge accepted a settlement agreement modifying a death sentence without requiring a concession of relief by the State. PC vol. III at 204 (Order, *John T. Freeland, Jr. v. State of Tennessee* (Circuit Court, Madison County, Case No. C–15–2017)). There, the State did not concede any pending claim for post-conviction relief, as there is no requirement to do so.

Although it is not necessary that the State concede relief on specific claims for a court to accept a joint settlement, it is important to note that the District Attorney General did so at the January disposition hearing in Mr. Nichols’s case. PC Tr. at 9:21–24; 10:3–5. The District Attorney conceded relief on Mr. Nichols’s *Hurst* claim PC Tr. at 10:3–5 and again on Mr. Nichols’s claim that the jury charge was defective and violated Mr. Nichols’s due process rights

under *Johnson*. PC Tr. at 11:16–17. Such a concession is binding upon the State and should be rigidly enforced. *Bearman v. Camatsos*, 385 S.W.2d 91, 93 (Tenn. 1964) (An “open court concession by attorneys in the case constitutes a binding stipulation in this State” that “will be rigidly enforced by the courts of this State.”) Despite accepting the facts and basis for the claim, without any proof in the *Schmeiderer* case described above, the same court ultimately refused to do so in Mr. Nichols’s case. PC vol III at 185–86.

In the Order Denying Settlement, the court found that it was “not appropriate to accept such a proposed agreement under the circumstances of this case where there is no claim for post-conviction relief before this Court which should survive this court’s statutorily required preliminary order.” PC vol. VI at 636. However, neither Mr. Nichols nor the State was required to prove that Mr. Nichols will prevail on a claim in his post-conviction proceedings in order to settle the case. Requiring some showing that Mr. Nichols would prevail on the merits of his case or that the State must concede relief when there is no legal requirement to do so is wholly arbitrary as applied to Mr. Nichols, is not supported by any legal authority, and violates Mr. Nichols’s rights to due process of law and freedom from cruel and unusual punishment. Indeed, here the court cites no legal authority for finding it was “inappropriate under the circumstances” to accept the joint settlement. PC vol. VI at 636.

The court inquired of the State and counsel for Mr. Nichols about one additional important factor; however, this did not appear in his order, but raises significant concerns about arbitrariness. The court inquired of the State at the disposition hearing: “Have you spoken to the victim’s family about this?” PC Tr. at 7:1–2. The State admitted efforts to reach the victim’s family had been unsuccessful. *Id.* at 3–4. The court responded: “So that’s no?” *Id.* at 7:5.

During the *Schmeiderer* disposition hearing, the State informed the same post-conviction

court (in response to its previous inquiry on the matter) that efforts to reach to victim had been unsuccessful. (*Schmeiderer* Hearing). This was the same response provided to the court by General Pinkston in Mr. Nichols's January disposition hearing. PC Tr. at 7:3–4 (“Your honor, we’ve attempted to reach out, but were unsuccessful.”) *Id.* Even if the court conducts this procedure routinely in its cases, it is clear that this same response from the State in the *Schmeiderer* case was no impediment to the same post-conviction court entering the settlement order in that case, and it should have not been an impediment in Mr. Nichols's case.

Although the Victims' Bill of Rights declares that victims have certain rights in the State of Tennessee, there is no requirement that members of a victim's family authorize a sentence negotiated by the parties. *See* Tenn. Code Ann. §40–38–101 et seq. A victim's position on a given case may be proper consideration for a trial-level judge; however, when introduced into the proceedings as an arbitrary barrier to settlement, it denies the due process and fundamental fairness guaranteed to the defendant. The inconsistency in the court's treatment of these two cases on this issue belies arbitrariness and inclination rather than sound legal principles.¹³

This question about the victim's family might have prompted a communication sent to the court from a prior victim of Mr. Nichols's. On February 19, 2018 a woman claiming to be a prior rape victim of Mr. Nichols sent a letter stating she had seen television coverage of the disposition on January 31st. PC vol. VI at 613 (Letter from Ms. Gore dated February 19, 2018). This letter informed the court that General Pinkston had not informed her about the proceedings and possible settlement with Mr. Nichols and that he had not returned the calls she had made to him to discuss Mr. Nichols's case. *Id.* Ms. Gore expressed frustration and anger that she had only heard of the

¹³ It is important to note, the post-conviction court's order did not cite the Victim's Rights statutes nor did it even address the court's questions regarding the victim's family in Mr. Nichols's case.

settlement on the news. *Id.* Ms. Gore wrote the court: **This is disgraceful! I suspect a plea deal has already been made and I've been told nothing about it.** *Id.* (emphasis added). The court responded to Ms. Gore's letter on March 6, 2018, letting her know he cannot discuss any matters with her. *Id.* at 614. This response was dated just six days before the order dismissing Mr. Nichols's pending amended petition and rejecting the joint settlement was issued and just eight days before the scheduled hearing on the merits of Mr. Nichols's pending post-conviction claims. *Id.* Depending on when the court received the letter, up to two weeks passed without the court informing the parties that he had received a prejudicial communication regarding the settlement.

Ultimately, the post-conviction court abused its discretion by deciding it would not accept the settlement in Mr. Nichols's case and based such a ruling not on established law, sound legal principles, or his own prior practice but on an arbitrary assessment of Mr. Nichols's case, which is not supported or required by existing precedent. Indeed, "[b]y 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." *United States v. Moore*, 916 F.2d 1131, 1136 (6th Cir. 1990) (internal citations omitted). As noted by the Sixth Circuit Court of Appeals "[t]he authority to exercise judicial discretion implies the responsibility to consider all relevant factors and rationally construct a decision." *Moore*, 916 F.2d 1131, 1136 (6th Cir. 1990). The court's decision was not "rationally construct[ed]" but was arbitrary and not based on legal authority.

(3) Finding that Settling Mr. Nichols's Capital Case Was Not Proper "Under the Circumstances" Denied his Right to Due Process and Equal Protection.

Denying settlement to Mr. Nichols while such procedure is afforded (without question) to many other capital post-conviction petitioners is arbitrary and unsupported by precedent or tradition in Tennessee. Such a lottery violates due process and is not acceptable in a capital case.

See Furman v. Georgia, 408 U.S. 238 (1972).

Though it is conceded that no defendant has an absolute right to settle a case, the Supreme 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.

It is settled law that the 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).¹⁴ Indeed, due process protections even extend to financial welfare programs. *See also Goldberg v. Kelly*, 397 U.S. 254, 262 (1970).

Equal Protection and Due Process may be implicated when state action fails to ensure fairness between the State and the individual or when the State unfairly distinguishes between individuals. *See Evitts*, 469 U.S. at 405 (“‘Due Process’ emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated. ‘Equal Protection,’ on the other hand, emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable.”) The denial of

¹⁴ It is well-settled law that a state cannot shield itself from the constitutional protection of due process simply by arguing that a particular state action is not required by the Constitution itself. *See Morrissey v. Brewer*, 408 U.S. 471, 481–484 (1972) (finding that though states have significant latitude on decisions of parole such decisions must comport with Due Process); *see accord Graham v. Richardson*, 403 U.S. 365, 374 (1971); *Bell v. Burson*, 402 U.S. 535, 539 (1971); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963).

Mr. Nichols's settlement implicates both. 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.

For these reasons, Mr. Nichols requests this Court find the post-conviction court abused its discretion and violated the principles of equal protection and due process by rejecting the joint settlement agreed to by the State and Mr. Nichols and remand the case directing the post-conviction court to accept the settlement or, in the alternative, to appoint a different judge to hear Mr. Nichols's post-conviction proceedings and consider the joint settlement.

V. The Post-Conviction Court Erred When it Vacated the Scheduled Hearing and Denied Mr. Nichols's Pending Claims Without Notice and Fair Opportunity to Be Heard.

A. Standard of Review.

The post-conviction court determined that no relief was available to Mr. Nichols based on the text of the Tennessee Post-Conviction Statute and analysis of the availability of relief under that statute based on a new rule of constitutional law. "Because issues of constitutional and statutory construction are questions of law, the [appellate court] reviews them de novo with no presumption of correctness accorded to the legal conclusions of the courts below. *State v. Lowe*, 552 S.W.3d 842, 851 (Tenn. 2018).

B. The Post-Conviction Court Violated Mr. Nichols's Right to Due Process by Vacating the Scheduled Hearing.

"Notice and opportunity to be heard are the minimal requirements of due process." *In re Rigs*, 612 S.W.2d 461 (1980); *see also Matthews 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). A capital defendant's proceedings are analyzed under a heightened due process standard. *See Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (opinion of Stewart,

J.); *Lockett v. Ohio*, 438 U.S., at 604; *Gardner v. Florida*, 430 U.S., at 359.

Not all procedures call for the same notice and opportunity to be heard, however certain factors guide a court's analysis: (1) the private interest affected by the official action; (2) the risk of erroneous deprivation of the interest through the procedures used and the probable value, if any, of additional safeguards; and, (3) the government's interest. *State v. Pearson*, 858 S.W.2d 879, 884 (Tenn. 1993) (citing *Mathews v. Eldridge*, 424 U.S. 313, 335 (1976)).

These three factors weigh heavily in favor of affording Mr. Nichols a full and fair opportunity to be heard on his post-conviction claims. On the first factor, Mr. Nichols's interest affected by the Court's vacation of the scheduled hearing to argue the merits of his *Johnson* claim is the most fundamental liberty interest: an interest in preserving his life by challenging his sentence to death. This legal argument was the determinative factor between Mr. Nichols and his death sentence. Such a right tips the scales far in favor of providing notice and opportunity to be heard before dismissal.

The second factor is important here in light of the *Donnie Johnson Denial of Permission to Appeal* upon which the court based its decision to dismiss Mr. Nichols's claims. (Indeed, the court cites no other authority as the basis for his determination that Mr. Nichols's *Johnson* claim no longer has merit.). The court held in its order "[a]s previously stated, the appellate courts have now addressed this issue [*Johnson's* applicability] and determined Petitioner is not entitled to relief on this issue." PC vol. VI at 621. While the court is certainly free to base his orders in persuasive authority such as the denial of an application for permission to appeal the denial of a motion to reopen post-conviction proceedings, a fundamental point in that opinion could have drastically altered the availability of relief to Mr. Nichols's. That opinion solely analyzed the "involves" clause and not the "elements involve" clause of the prior violent felony aggravator. PC vol. I at

38; *see infra* section I, C and D. Because that decision did not address all statutes implicated in Mr. Nichols's case, there is now the very real possibility that the "risk of erroneous deprivation of the interest through the procedures used" by dismissing Mr. Nichols's case without the opportunity to argue his claims might deprive Mr. Nichols of his right to due process and to be sentenced according to the principles of notice and lack of arbitrariness announced in *Johnson*.

Finally, the third factor is the government's interest at stake. To be sure, the Government has a myriad of interests at play in a capital post-conviction proceeding. *State v. Pearson*, 858 S.W.2d 885 (noting the State's interests in efficiency, judicial economy, and finality). However, "[t]he qualitative difference between death and all other sentences" rises above the interests of the post-conviction court's possible interest in efficiency and judicial economy. *See California v. Ramos*, 463 U.S. 992, 998 (citing *Lockett v. Ohio*, 438 U.S. 586, 604 (1978)). Holding a previously scheduled evidentiary hearing hardly belabors the State interest in "judicial economy" or "efficiency" when a man's life hangs in the balance, and when the State has conceded error on more than one pending claim for relief.

VI. Cumulative Error.

Mr. Nichols hereby incorporates into this claim for relief, by reference, all other paragraphs contained in this Brief on Appeal. Mr. Nichols asserts that all claims of error coalesced into a unitary abridgment of Mr. Nichols's constitutional rights, and this Court should consider the scope of the alleged errors in their entirety when assessing prejudice. *State v. McKinney*, No. W2006-02132-CCA-R3-PD (Tenn. Crim. App. Mar. 9, 2010), 2010 WL 796939, at *37. But even if this Court considers each claim of error individually and finds that none of the individual errors at trial or on appeal violated his rights, Mr. Nichols nevertheless submits that the cumulative effect of all such errors violated his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the

United States Constitution and Article I, §§ 6, 7, 8, 9, 16, 17, 19, and 32 and Article XI, §§ 8 and 16, of the Tennessee Constitution. *United States v. Hernandez*, 227 F.3d 686, 697 (6th Cir. 2000); *Groseclose v. Bell*, 895 F. Supp. 935, 960 (M.D. Tenn. 1995).

CONCLUSION

For these reasons Mr. Nichols respectfully requests that this Court grant sentencing relief and impose a sentence of life with the possibility of parole. In the alternative, Mr. Nichols asks for this Court to remand his case to the post-conviction court and either 1) direct the post-conviction court to accept the joint settlement agreement, or 2) allow Mr. Nichols to argue the merits and basis of his post-conviction claims through a hearing.

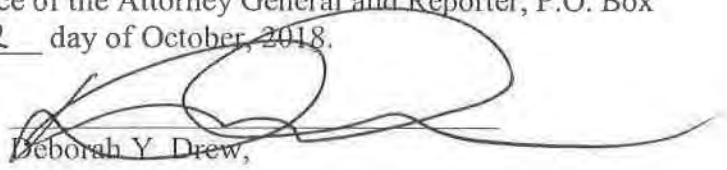
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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy the foregoing was provided via hand-delivery or first-class mail to James E. Gaylord, Office of the Attorney General and Reporter, P.O. Box 20207, Nashville, TN 37202-0207 on this 2 day of October, 2018.


Deborah Y. Drew,

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

HAROLD WAYNE NICHOLS)	
Appellant,)	Hamilton County
)	Post-Conviction No. 205863
v.)	
)	No. E2018-00626-CCA-R3-PD
STATE OF TENNESSEE,)	
Appellee.)	CAPITAL CASE APPEAL
)	

REPLY BRIEF OF APPELLANT

Submitted by:

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PROCEDURAL INTRODUCTION

This is an appeal by Appellant from the lower court’s order dismissing his post-conviction claims and rejecting the joint settlement for disposition of the case. The *Brief of Appellant* was filed on October 3, 2018. The State filed a responsive brief on November 1, 2018. Appellant now responds to those arguments raised by the State necessitating a reply, and in all other respects, rests upon the arguments made in the *Brief of Appellant*.

Designations to the materials in this case shall be as follows:

Post-Conviction	Technical Record:	PC vol. [#] at [pg #]
	Transcript of the evidence:	PC Tr. at [pg #]

The Appellant, Harold Wayne Nichols, will be referred to as: “The Appellant;” “Mr. Nichols;” and “Petitioner.” The Appellee will be referred to as the “State.” The *Brief of Appellant* is cited herein as “AB.” The State’s responsive brief is cited herein as “SB.”

All emphasis is supplied unless otherwise indicated. Parallel citations are omitted.

REPLY ARGUMENTS

I. Mr. Nichols’s Death Sentence Is Invalid Because It Is Based on an Unconstitutionally Vague Aggravating Circumstance, in Light of *Johnson v. United States*, a New Substantive Rule of Constitutional Law Applicable to Cases on Collateral Review.

The State asserts that *Johnson v. United States*—a new rule of constitutional law—simply does not apply to Mr. Nichols’s case. (*SB* at 12-13). The State is wrong and in making its argument fails to rebut Mr. Nichols’s claim that a law which increases a sentence based on vague requirements violates due process because it fails to give fair notice of the conduct to which it applies and invites arbitrary enforcement by the courts. *Johnson*, 135 S.Ct. 2551, 2563 (2015).

A. The State’s Interpretation of *Johnson v. United States* Is Too Narrow.

The State urges this Court that the rule announced in *Johnson* is “a law is unconstitutionally vague if it requires 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 some result.” (*SB* at 13, citing *Johnson*, 135 S.Ct. at 2557). The State contends that this rule has “nothing to do” with Mr. Nichols’s sentence under the “prior violent felony aggravator.” (*SB* at 13); Tenn. Code. Ann. § 39-13-204(i)(2). However, under a plain reading of *Johnson*, this cannot be the case.

Johnson’s application to Mr. Nichols’s death sentence, which rests on the prior violent felony aggravator, is clear: *Johnson*’s core holding is that when a sentence enhancement is based on a prior conviction, an after-the-fact inquiry into whether the conduct involved in that

conviction qualifies as a violent felony—as opposed to limiting the inquiry to the statutory elements of the prior conviction—is unconstitutional. *Johnson*, 135 S.Ct. at 2563. The act of looking beyond the elements of the prior conviction and basing the sentencing enhancement on what the prior offense “involved” leads to arbitrary results and fails to give ordinary people fair notice of the conduct the sentencing enhancement punishes. *Id.* at 2551, 2556-59. Because the *Johnson* holding invalidates the Tennessee prior violent felony conviction aggravating factor in effect at the time of Mr. Nichols’s conviction as void for vagueness, and because no other aggravating factor supports his sentence, this Court must vacate Mr. Nichols’s sentence of death.¹

Johnson did not simply articulate a two-pronged “test” for establishing a sentencing statute was void for vagueness (categorical approach plus assessment of risk) as the State argues, but it announced a new substantive constitutional rule that a sentencing aggravator which both fails to provide notice and allows arbitrary application by the court violates the due process prohibition against vague criminal statutes. *Johnson*, 135 S.Ct. at 2556-57. The *Johnson* Court held “[w]e are convinced that the indeterminacy of the *wide-ranging inquiry* required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges.” *Id.* at 2557. This is the very

¹ State courts have repeatedly applied *Johnson* when examining the constitutionality of state sentencing statutes. See, e.g., *State v. Davis*, I.D. No. 1212002650, 2016 WL 1735459, at *3 (Del. Super. 2016); *Com. v. Guess*, No. 3092 EDA 2015, 2016 WL 1533520, at *6 (Pa. Super. Ct. Apr. 14, 2016); *Com. v. Beal*, 52 N.E.3d 998, 1006-07 (Mass. 2016) (invalidating a residual clause in a Massachusetts sentencing statute).

constitutional infirmity of the prior violent felony aggravator under which Mr. Nichols was sentenced to death. (*AB* at 6-13).

The trial court's application of the prior violent felony aggravator in this case was arbitrary and, as a result of the procedure required of Tennessee's sentencing judges, violated Mr. Nichols's due process rights. *State v. Sims* 45 S.W.3d 1 (Tenn. 2001) (requiring the trial court to conduct an indeterminate factual analysis of the underlying crime in order to determine application of the prior violent felony aggravator). *Sims* was decided 18 years ago, and *Johnson* now prohibits a trial court from determining whether any conviction involved conduct justifying an enhanced punishment, without limiting that inquiry to the previously-defined statutory elements of the conviction because doing so leads to arbitrary results. *Johnson*, 135 S.Ct. at 2559. The Supreme Court found this to be true even where "common sense" might dictate what type of conduct is involved in committing certain offense. *Id.* Moreover, the fact that some offense might satisfy the statute does not cure the vagueness of the statute in question. *Id.* at 2561.

The State's articulation of the holding in *Johnson* is technically correct; however, its application of that ruling to the facts here fails to account for the "sea-change" with "far reaching precedential effects" of the *Johnson* ruling. *Shuti v. Lynch*, 828 F.3d 440 (6th Cir. 2016).²

² During the current 2018-2019 term, the Supreme Court heard argument in cases seeking to extend *Johnson's* analysis to the "elements clause" of the Armed Career Criminal Act ("ACCA"). See *Stokeling v. United States*, 139 S.Ct. 544 (2019) (arguing that the application of the ACCA's required sentencing analysis to a defendant's existing state convictions is unconstitutionally vague under *Johnson*); *United States v.*

B. The Tennessee Courts Have Never Addressed the Application of *Johnson v. United States* in a Published Opinion.

Tennessee has no published case on this new substantive constitutional rule. Although the State cites three recent Orders from this Court denying permission to appeal *Johnson*-based claims in support of its assertion that “[t]his Court has repeatedly considered post-conviction claims, like petitioner’s,³ that were premised on *Johnson*” (*SB* at 14), no Tennessee court has issued a published opinion constituting controlling law on this issue.⁴ Such a decision fully-addressing the merits of Mr. Nichols’s claim pursuant to *Johnson v. United States* is necessary

Stitt, 139 S. Ct. 399 (2018) (same). This continued litigation makes clear that the application and extension of *Johnson* is far from settled law.

³ The procedural posture of the cases cited by the State are important to distinguish here. (*SB* at 14). In the cited cases, the post-conviction court denied the motion to reopen the post-conviction proceedings. Such denials require a permissive appeal under Tennessee Supreme Court Rule 28 which only affords the defendant an “abuse of discretion” standard of review. *See* Sup. Ct. R. 28.

⁴ Although this Court analyzed *Johnson*’s applicability to a Tennessee state law in *Russell v. State*, 2016 WL 4472861 (Tenn. Crim. App. Aug. 22, 2016) (unpublished), that decision upholding the challenged law is clearly distinguishable and not applicable to this case. In *Russell*, the appellant argued that his conviction should be vacated because the criminal statute at issue, involving “risk of death or injury,” was void for vagueness. *Russell*, 2016 WL 4472861, at *2. The clear distinction is that the statute at issue in *Russell* is an offense statute that applies to currently charged crimes, which by definition must be applied to the specific facts of the case. Mr. Nichols’s case, like *Johnson*, involves a sentencing statute, which was to be applied in the abstract and not in consideration of the facts of a specific case. The *Johnson* Court clearly rejected treating offense statutes and sentencing statutes the same. *Johnson*, 135 S.Ct. at 2562.

to determine *Johnson's* application to the “prior violent felony” aggravator in Tennessee. Clarification is especially warranted considering the erroneous determinations regarding retroactivity made in *Donnie Johnson's* Order denying permission to appeal and the stark inconsistencies between the unpublished denial Orders issued by the Court of Criminal Appeals in the cases of Gary Sutton and Dennis Wayne Suttles.⁵

The post-conviction court’s dismissal of Mr. Nichols’s *Johnson* claim was based entirely on the analysis contained in the *Donnie Johnson* Order. PC vol. VI at 618. There, the post-conviction court had denied the motion to reopen pursuant to Tenn. Code Ann. § 40–30–117. *Id.* Then in a denial of the resulting permissive appeal, this Court determined that the post-conviction court had not abused its discretion finding that Donnie Johnson had not presented a colorable claim that the prior violent felony aggravator was void for vagueness under the new rule announced in *Johnson v. United States*. *Donnie Johnson v. State*, No. W2017-00848-CCA-R28-PD (Tenn. Crim. App. Sept. 11, 2017).

⁵ The three cases cited by the State for the proposition that this Court has “repeatedly considered” the very issue raised by Mr. Nichols are inherently problematic. These orders reach conflicting positions about the application of *Johnson v. United States* under Tennessee law, even reaching contrasting opinions regarding retroactivity of newly announced substantive rules of constitutional law to state post-conviction proceedings. See *Gary Sutton v. State*, No. E2016-2112-CCA-R28-PD (Tenn. Crim. App. Jan. 23, 2017); *Donnie Johnson v. State*, No. W2017-00848-CCA-R28-PD (Tenn. Crim. App. Sept. 11, 2017); *Dennis Wayne Suttles v. State*, No. E2016-2162-CCA-R28-PD (Tenn. Crim. App. Feb. 13, 2017).

In Mr. Nichols’s case, relying only on the *Donnie Johnson* unpublished Order denying permission to appeal, the post-conviction court determined that no relief was available to Mr. Nichols on his *Johnson* claim because that case did not announce a *new rule* which required retroactive application under Tenn. Code Ann. § 40–30–122. PC vol. VI at 618–21. The post-conviction court determined that the *Donnie Johnson* Order, which carries no controlling or persuasive authority, was entirely dispositive of Mr. Nichols’ *Johnson* claim, “. . . the appellate courts have now addressed this issue and determined Petitioner is not entitled to relief on this issue.” PC vol. VI at 621.

The *Donnie Johnson* Order’s legal analysis adopted by the post-conviction court in Mr. Nichols’s case is directly contrary to settled law that *Johnson v. United States* announced a new substantive rule of constitutional law which must be applied retroactively by state post-conviction courts.⁶ (*AB* at 2-3). The post-conviction court’s conclusion on both retroactivity and state court application of new substantive rules of constitutional law is directly contrary to United States Supreme Court precedent.

An unpublished and unauthoritative Order that contains significant errors of law is currently the foundation upon which Mr. Nichols’s death sentence rests. However, “[t]here is little societal interest

⁶ The State clearly concedes the error in the post-conviction court’s dismissal order that *Johnson* did indeed announce a new rule of constitutional law which applies retroactively, and that “federal retroactivity principles do indeed govern state post-conviction courts.” (*SB* at 12) (citing *Montgomery v. Louisiana*, 136 S. Ct. 718, 731-32 (2016)).

in permitting the criminal process to rest at a point where it ought properly never to repose.” *Mackey v. United States*, 401 U.S. 667, 693 (1971) (Harlan, J., concurring in part and dissenting in part). Mr. Nichols’s death sentence is invalid because the sole aggravating circumstance on which it rests is unconstitutionally vague in violation of Mr. Nichols’s right to due process of law under the new rule announced in *Johnson v. United States*. Mr. Nichols respectfully requests this Court vacate his death sentence and remand his case for resentencing on these grounds.

II. Under *Hurst v. Florida*, a New Substantive Rule of Constitutional Law Applicable to Cases on Collateral Review, Mr. Nichols’s Death Sentence Is Invalid Because a Judge—Not a Jury—Made Factual Findings Necessary to Impose the Sentence of Death.

Mr. Nichols has argued that the United States Supreme Court’s ruling in *Hurst v. Florida* makes clear that his death sentence violates his constitutional rights to due process and to a jury determination of his death eligibility. 136 S.Ct. 616 (2016). *Hurst* declares that “any fact that ‘expose[s] the defendant to a greater punishment than that authorized by the jury’s guilty verdict’ is an ‘element’ that must be submitted to a jury.” *Id.* at 621. In Mr. Nichols’s case, the judge—in two separate instances—found facts necessary for the imposition of Mr. Nichols’s death sentence. Additionally, on direct appeal, the appellate court found facts necessary for the imposition of Mr. Nichols’s death sentence, further violating his Sixth Amendment rights.

The State asserts this claim falls outside the scope of the trial court’s order reopening the post-conviction proceedings. (*SB* at 15). When

granting the *Motion to Reopen*, the trial court directed undersigned counsel to file an amended petition on the *Johnson* claim and to investigate and raise all other meritorious claims. PC vol. II at 80. Accordingly, since the state post-conviction proceedings have been reopened, this claim is part of the initial post-conviction proceedings and is properly before this Court. Furthermore, the trial court addressed this claim on the merits. PC vol. VI at 622-34.

Moreover, our Supreme Court has held that “before a state may terminate a claim for failure to comply with procedural requirements . . . due process requires that potential litigants be provided an opportunity for the presentation of claims at a meaningful time and in a meaningful manner.” *Burford v. State*, 845 S.W.2d 204, 208 (Tenn. 1992). Because *Hurst* is a new substantive rule of constitutional law, the *Amended Petition* was Mr. Nichols’s first opportunity to raise this claim. Raising this claim was necessary as *Hurst* makes clear that Mr. Nichols’s death sentence is based on violations of his constitutional rights.

The State also contends this claim fails because it does not meet any exception to the “one-petition rule.” (*SB* at 15). Specifically, the State asserts that *Hurst* does not establish a new constitutional rule of law requiring retroactive application. *Id.* First, as mentioned above, since the state post-conviction proceedings have been reopened, this claim is part of the initial post-conviction proceedings. Thus, Mr. Nichols has not completed the standard three-tier appeals process and this claim is properly before this Court. The *Amended Petition* is not a second or successive petition. Second, as discussed in detail in the *Brief of*

Appellant, the *Hurst* rule is retroactive and must be applied to cases on collateral review. (*AB* at 18-23).

The State seems to imply that *Hurst* does not warrant relief in this case because “the Supreme Court excluded its holding in *Ring* from the 29 states, one of which is Tennessee, who capital sentence schemes ‘commit sentencing decisions to juries.’” (*SB* at 16). First, the constitutional principles set forth in *Ring v. Arizona*, 536 U.S. 584 (2002), are applicable to Tennessee. Second, *Hurst* is not merely an extension of *Ring*. (*AB* at 20). Third, regardless of whether *Hurst* extended *Ring*, *Hurst* encompasses additional Sixth and Eighth Amendment protections the Supreme Court had not previously recognized in *Ring*. (*AB* at 20-21). Fourth, in this case, the trial judge made independent factual findings regarding the existence of the prior violent felony aggravating circumstance necessary for the imposition of the death penalty. Thus, Mr. Nichols’s jury did not make all requisite findings required for the imposition of the sentence in this case. Without these findings of the trial court, Mr. Nichols would not have been eligible for and could not have received a death sentence. These findings violated the rule of *Hurst*, and the post-conviction court abused its discretion by dismissing Mr. Nichols’s claim.

The State avers that any finding by the trial court that Mr. Nichols’s prior convictions involved the use or threat of violence does not violate the rule of *Hurst* because it was not a factual finding but a “legal determination.” (*SB* at 16-17). The State is wrong. Tennessee Supreme Court authority in existence at the time of Mr. Nichols’s trial establishing

that the determination of whether the commission of the prior offense involved violence—and therefore satisfied the violence requirement of the prior violent felony aggravating circumstance—is a question of fact, not a question of law. *State v. Moore*, 614 S.W.2d 348, 351 (Tenn. 1981) (finding the determination of whether a prior conviction involved violence is a question of fact).

Accordingly, Mr. Nichols's death sentence is unconstitutional because a jury, not a court, must make the factual determinations required to impose a death sentence. *Hurst*, 136 S.Ct. at 624. Therefore, the post-conviction court erred in denying this claim, and at a minimum, this Court should remand this case for further proceedings.

III. The State Committed Prejudicial Prosecutorial Misconduct Which Tainted the Jury's Death Verdict.

During closing argument, the State improperly commented on the possibility of Mr. Nichols's parole and the likelihood that if he were released, he would continue to commit violent crimes. The State's misconduct prejudiced Mr. Nichols by tainting the jury's death verdict. Trial counsel was ineffective for failing to object to the State's prejudicial statements and also by failing to interview jury members about the State's closing argument prior to litigating the motion for a new trial.

The State asserts this claim falls outside the scope of the trial court's order reopening the post-conviction proceedings and does not meet any exception to the "one-petition rule." (SB at 18). As discussed in Claim II, *supra*, when granting the Motion to Reopen, the trial court directed undersigned counsel to file an amended petition on the *Johnson* claim and to investigate and raise all other meritorious claims. PC vol. II at 80.

Accordingly, since the state post-conviction proceedings have been reopened, this claim is part of the initial post-conviction proceedings and is properly before this Court. Furthermore, since the state post-conviction proceedings have been reopened, this claim is part of the initial post-conviction proceedings. Thus, Mr. Nichols has not completed the standard three-tier appeals process and this claim is properly before this Court. The Amended Petition is not a second or successive petition.

The State also contends that this claim fails because Mr. Nichols makes no argument that he was not denied the opportunity to present these issues in “a meaningful time and in a meaningful manner.” (SB at 19). As discussed in the *Brief of Appellant*, this prosecutorial misconduct claim was not presented “at a meaningful time and in a meaningful manner” due to prior counsel’s ineffectiveness. (AB at 34-35). Moreover, the previous determination bar is inapplicable to this claim because on direct appeal, the Tennessee Supreme Court did not consider the same ground for relief. *See Cone v. Bell*, 556 U.S. 449, 466 (2009) (finding that the petitioner’s *Brady* claim was not previously determined because the petitioner had not presented the ground for relief in earlier proceedings). Thus, although the prosecutor’s closing argument regarding Mr. Nichols’s parole eligibility was previously raised, this Court should review the issue anew because the evidence now offered—the affidavits/declarations from three jurors which state that the jury gave consideration to the prosecutor’s improper comments about parole eligibility and that argument diminished the jury’s responsibility in making the sentencing decision in this case—is substantially different than the bare bones record-based claim which was presented in the

earlier proceedings.

The State also avers that Mr. Nichols's claim that trial counsel was ineffective for failing to object to the State's improper closing argument and for failing to interview jury members is waived because it was not raised "during [Mr. Nichols's] initial round of post-conviction review." (SB at 20). As previously explained, since the state post-conviction proceedings have been reopened, this claim is part of the initial post-conviction proceedings. It is not a second or successor claim. Moreover, assuming *arguendo* the Court has concerns about the timeliness of this claim, the interests of justice and the heightened due process concerns inherent in capital cases warrant the consideration of this issue. The shortcomings of prior counsel in this capital case warrant review of this issue due to the recognition of "heightened regard for the imperatives of fundamental fairness and substantial justice" in capital cases. *State v. Hall*, 461 S.W.3d 469, 500 (Tenn. 2015) (citation omitted). It would be a manifest injustice to execute Mr. Nichols without reviewing this error on the merits.

IV. The Post-Conviction Court Erred in Denying the Agreed Proposal by the State and Mr. Nichols to Vacate the Death Sentence and Sentence Mr. Nichols to Life in Prison with the Possibility of Parole.

The State's argument that the post-conviction court did not abuse its discretion when it denied the proposed settlement fails to address the troubling facts surrounding the January dispositional hearing discussed in detail in the *Brief of Appellant*. (AB at 40-44). The decision of the post-conviction court was arbitrary and lacking in sound legal justification when it rejected the proposed joint settlement and summarily dismissed

the pending post-conviction hearing in a capital case. Discretion requires a “rational decision based on all relevant factors.” *United States v. Cota-Luna*, 891 F.3d 639, 648 (6th Cir. 2018) (citation omitted). This did not occur in Mr. Nichols’s case.

The State argues that the post-conviction court could not have properly accepted the proposed joint settlement because that same court found that Mr. Nichols’s post-conviction claims had no merit. (*SB* at 20-21). The State fails to address, however, that General Pinkston had conceded relief on both the *Hurst* and *Johnson* claims when questioned by the post-conviction court. (*AB* at 42-43). General Pinkston’s concession on the *Johnson* claim is all the more notable in light of the State’s own concession, in this appeal, that *Johnson* announced a new rule of law that is retroactive and that federal retroactivity principles govern state post-conviction procedure. (*SB* at 12). This legal error formed the basis for the post-conviction court’s dismissal of Mr. Nichols’s *Johnson* claim.

The post-conviction court clearly is not bound by the legal determinations of a District Attorney General, however, the post-conviction court’s overt rejection of General Pinkston’s determination that Mr. Nichols had presented two viable post-conviction claims sufficient to demonstrate a violation of his constitutional rights stands in stark contrast to the procedure in several other cases. *PC* vol. III at 166-69. Indeed, such a treatment conflicts with that very same post-conviction court’s previous procedures. (*AB* at 43).

The State makes no mention of the post-conviction court’s disparate treatment in these two similarly situated cases. (*AB* at 41-42). The State

attempts to side-step these troubling facts by relying on the argument that no basis for modification of Mr. Nichols's sentence was found by the post-conviction court. However, that is precisely the problem. The post-conviction court's procedure and expectations for a finding which would render the settlement "appropriate" in Mr. Nichols's case clearly deviated from the expectations in the *Schmeiderer* settlement over which the same post-conviction court presided. (AB at 40-42); PC vol. III at 185-87. The State fails to rebut this disparity nor make any attempt to redress it.

Though procedurally different, Mr. Nichols again asserts that plea bargaining is an appropriate legal analog for post-conviction settlement negotiations. A recent Sixth Circuit case dealing with abuse of discretion during an agreed disposition of a criminal case is instructive. *United States v. Cota-Luna*, 891 F.3d 639 (6th Cir. 2018). There, the United States Court of Appeals 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. *Id.* at 648. In *Cota-Luna*, the sentencing court abused its discretion by rejecting a proposed sentence offered by the prosecution and the defendant on two occasions. *Id.* at 647. 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. The appellate court also ordered that case be reassigned to different judge due, in part, to the fact that "this type of

conduct indicates that the [trial court] had made up his mind that the Defendants deserved a harsh sentence, without having received any evidence to that effect.” *Id.* at 651.

In *Cota-Luna*, the fact that the trial court’s decisions were legally permissible and made with discretion, did not absolve the appellate court from concluding that the trial court’s conduct and decision were arbitrary. *Id.* at 647-48. The same standard should be applied in this case to the post-conviction court’s decision to deny Mr. Nichols’s proposed settlement.

Additionally, the State also fails to rebut Mr. Nichols’s argument that the post-conviction court arbitrarily denied the proposed settlement in violation of Mr. Nichols’s rights to due process and equal protection. (*AB* at 45-47). Mr. Nichols’s argument is strengthened by the fact that the post-conviction court’s dismissal of the *Johnson* claim relied on an unpublished order contrary to clearly established federal law. The State’s own concession that *Johnson* is retroactive and applicable to post-conviction proceedings like Mr. Nichols’s reopened proceedings further supports the assertion that Mr. Nichols’s sentence was rejected based upon erroneous legal analysis. (*SB* at 12).

V. The Post-Conviction Court Erred When It Vacated the Scheduled Hearing and Denied Mr. Nichols’s Pending Claims without Notice and Fair Opportunity to Be Heard.

The State contends that Mr. Nichols was afforded a fair opportunity to be heard “on at least three occasions” before the post-conviction court dismissed his petition. (*SB* at 22). This argument is specious at best and fails to address the due process element of Mr. Nichols’s claim. (*SB* at

22). While the State correctly identifies the fact that Mr. Nichols appeared before the post-conviction court three separate times, those appearances did not provide a full and fair hearing.

The State identifies that the motion to reopen proceeding was held on October 4, 2016. That proceeding was governed by a separate section of the post-conviction statute and addressed whether Mr. Nichols had raised a colorable claim sufficient to reopen his post-conviction proceeding. Tenn. Code. Ann. § 40-30-117. This proceeding did not address, nor should it, the merits of Mr. Nichols's post-conviction claims. PC Tr. at 3-4 (Oct. 4, 2016). This hearing addressed the procedural hurdles presented by a motion to reopen.

Next, Mr. Nichols's legal team had a brief scheduling conference with the post-conviction court for the purpose of scheduling a disposition hearing date. It was at this telephone conference that post-conviction court was informed that there would be a joint settlement forthcoming. PC Tr. at 3-4 (Dec. 8, 2017). This telephone call lasted only a few minutes, however, at no point did the post-conviction court inform the parties that it had reservations about settlement. *Id.* at 1-6.

Finally, Mr. Nichols's third and final hearing was held on January 31, 2018. The purpose of this hearing was to set the case for disposition on the joint proposed settlement. The hearing is described in detail in the *Brief of Appellant*. (AB at 40-42). The State addresses the proper dismissal procedures pursuant to the post-conviction procedure statute, however, the State entirely fails to address the facts and circumstances of the disposition hearing itself, including the letter sent by a previous victim to the post-conviction court. (AB at 43-44) ("Have you spoken to

the victim's family about this?").

None of these hearings were hearings on the merits of Mr. Nichols's post-conviction claims nor were they intended to be such when they were scheduled. PC Tr. at 4 (Dec. 8, 2017). Mr. Nichols was not afforded the opportunity to put on an evidentiary hearing or even hold oral argument on his legal claims such is the overwhelming practice in capital cases being heard in post-conviction.

In every step of the legal process death is different: "[t]he taking of life is irrevocable. *It is in capital cases especially that the balance of conflicting interests must be weighed most heavily in favor of the procedural safeguards of the Bill of Rights.*" *Reid v. Covert*, 354 U.S. 1, 45-46 (1957) (on rehearing) (Frankfurter, J., concurring); *See also Gregg v. Georgia*, 428 U.S. 153, 188 (1976) ("the penalty of death is different in kind from any other punishment imposed under our system of criminal justice.").

For these reasons, Mr. Nichols urges this Court to remand his case to a newly assigned post-conviction court—because similar to *Cota-Luna* the post-conviction court made up its mind before affording Mr. Nichols an opportunity to be heard—for consideration of the proposed joint settlement agreement.

VI. Cumulative Error.

No specific response to the State's Brief is needed. Mr. Nichols relies on the arguments and authorities set forth in the *Brief of Appellant*.

CONCLUSION

For the foregoing reason, as well as those set in the *Brief of Appellant*, Mr. Nichols respectfully requests that this Court grant sentencing relief and impose a sentence of life with the possibility of parole. In the alternative, Mr. Nichols asks for this Court to remand his case to the post-conviction court and either 1) direct the post-conviction court to accept the joint settlement agreement, or 2) allow Mr. Nichols to argue the merits and basis of his post-conviction claims in a hearing before a newly assigned post-conviction court.

Respectfully submitted,

s/ Deborah Y. Drew

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CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to Tenn. R. App. P. 46, Section 3, Rule 3.02, that the number of words contained in this brief is 4,926. This word count does not include the words contained in the title page, table of contents, table of authorities and certificate of compliance. This word count is based upon the word processing system used to prepare this brief.

s/ Deborah Y. Drew

Deborah Y. Drew

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

HAROLD WAYNE NICHOLS)	
Appellant,)	Hamilton County
)	Post-Conviction No. 205863
v.)	
)	No. E2018-00626-CCA-R3-PD
STATE OF TENNESSEE,)	
Appellee.)	CAPITAL CASE APPEAL
)	

SUPPLEMENTAL BRIEF OF APPELLANT

Submitted by:

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INTRODUCTION

This supplemental briefing is filed pursuant to the Order of the Court of Criminal Appeals entered November 13, 2018. That Order directed Mr. Nichols to file supplemental briefing and stated:

This matter was initiated in the trial court as a motion to reopen post-conviction proceedings. An appeal of right does not lie from an order denying a motion to reopen post-conviction proceedings, or from a subsequently filed petition for post-conviction relief, or from an order denying entry of an agreed settlement. Tenn. R. App. P. 3(b).

Order, Ogle, Norma McGee J., November 13, 2018. The court directed Mr. Nichols to “submit supplemental briefing addressing whether the court has jurisdiction to review this matter.” *Id.* at 1.

Mr. Nichols now submits the following argument and authorities in support of his position that his case is properly before the court pursuant to Tenn. R. App. P. 3(b) (“Rule 3”) and Tenn. Code Ann. § 40–30–117(b).

QUESTION PRESENTED

Whether Mr. Nichols' Appeal is Properly Before the Court Pursuant to Tennessee Rule of Appellate Procedure 3(b) After the Motion to Reopen Was Granted by The Trial Court but the Subsequently Reopened Post-Conviction Proceedings Were Dismissed Pursuant to a Final Order Dismissing his Amended Petition for Post-Conviction Relief.

PROCEDURAL INTRODUCTION

Designations to the materials in this case shall be as follows:

Post-Conviction	Technical Record:	PC vol. [#] at [pg #]
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The Appellant, Harold Wayne Nichols, will be referred to as: "The Appellant;" "Mr. Nichols;" and "Petitioner." The Appellee will be referred to as the "State" or the "Attorney General."

RELEVANT PROCEDURAL HISTORY

On June 24, 2016, Mr. Nichols filed a Motion to Reopen Post-Conviction Proceedings asserting the prior violent felony aggravator which supports his death sentence is void for vagueness in light of new substantive Supreme Court law, as decided in *Johnson v. United States*, 135 S.Ct. 2551 (2015)¹, and held to be retroactive in *Welch v. United States*, 136 S.Ct. 1257 (2016). Mr. Nichols argued:

This Court should reopen the post-conviction proceedings in light of the new constitutional rule in *Johnson*. Under *Johnson*, an unconstitutionally vague aggravating circumstance supports Mr. Nichols' death sentence. Because *Johnson* is a "final ruling of an appellate court establishing a constitutional right that was not recognized as existing at the time of trial" and "retrospective application of that right is required[.]" (Tenn. Code Ann. § 40-30-117(a)(1)), this Court should reopen Mr. Nichols' post-conviction proceeding in light of *Johnson* and *Welch*.

PC vol. I at 36. Mr. Nichols argued that *Johnson* offered an avenue to reopen his post-conviction proceedings under Tenn. Code Ann. § 40-30-117(1).² *Id.* In support of this position, Mr. Nichols relied on *Welch v.*

¹ This opinion of the United States Supreme Court is referred to in this brief as both "*Johnson*" and "*Johnson v. United States*." This is distinguished from the case discussed herein titled "*Donnie Johnson v. State*" which refers to a motion to reopen proceeding appealed to the Court of Criminal Appeals in the State of Tennessee.

² The statute reads: "[t]he claim in the motion is based upon a final ruling of an appellate court establishing a constitutional right that was not recognized as existing at the time of trial, if retrospective application of that right is required. The motion must be filed within one (1) year of the ruling of the highest state appellate court or the United States Supreme

United States which held that *Johnson* applied retroactively as a new substantive rule of constitutional law.

On September 29, 2016, the State filed a response to Mr. Nichols' Motion to Reopen. PC vol. I at 56. The State argued that though *Johnson* and *Welch* did announce a new substantive rule, the statute which that new right was based on (the Armed Career Criminal Act) was not similar to the violent felony aggravator under which Mr. Nichols was sentenced, and therefore no relief was available to him. PC vol. I at 58. On October 4, 2016, a hearing was held to determine whether Mr. Nichols could present a colorable claim and reopen his post-conviction proceedings.

Also, on October 4, 2016, the post-conviction court determined that Mr. Nichols has indeed raised a "colorable claim" and granted the Motion to Reopen. *Id.* at 12–13. Specifically, the post-conviction court determined:

It appears the death penalty statute under which Petitioner was sentenced and case law interpreting the statute may have offered little guidance to judges in determining whether an offense involved "the use or threat of violence to the person" and was, therefore, appropriate for the jury's consideration. This alleged lack of guidance regarding the trial court's application of the pre-1989 prior violent felony conviction statutory aggravating circumstance forms part of the Court's basis for concluding **Petitioner's motion states a colorable claim for relief.** This Court notes the finding of a colorable claim here is not a finding of the language being unconstitutionally vague. "A colorable claim is a claim, in a petition for post-conviction relief, that, if taken in the light most favorable to petitioner would entitle petitioner to relief

Court establishing a constitutional right that was not recognized as existing at the time of trial. Tenn. Code Ann. § 40–30–117(1).

under the Post-Conviction Procedure Act.” Tenn. S. Ct. R. 28, Section 2(H). The parties will be required to fully brief and argue this issue before this Court.

PC vol. I at 71 (emphasis added).

The court directed Mr. Nichols to file an amended petition for post-conviction relief on the *Johnson* claim and to investigate and raise all other meritorious claims. *Id.* Mr. Nichols filed his amended petition on January 17, 2017. PC vol. II at 80. Mr. Nichols raised claims pursuant to *Johnson v. United States* as well as other claims. *Id.*

Ultimately, the post-conviction court issued an Order Dismissing all claims contained in the Amended Petition two days before the scheduled hearing. PC vol. VI at 615. The Order dismissing the post-conviction proceedings was issued pursuant to Tenn. Code Ann. § 40–30–106. The post-conviction court addressed the merits of each of the claims in turn raised by Mr. Nichols (including the *Johnson* claim). PC vol. VI at 615–46. The post-conviction court ultimately held “[t]his Court has now reviewed the pleadings of the parties, the record, and applicable law, and hereby enters this order pursuant to statute. *See* Tenn. Code Ann. § 40–30–106.” PC vol. VI at 616.

ARGUMENT

I. **The Plain Language of the Motion to Reopen Section of the Post-Conviction Procedure Act States That a Permissive Appeal Is Required Only if the Motion to Reopen Is Denied—Not Granted.**

The Motion to Reopen Section has two distinct mechanisms governing whether an appeal must be of right or by permission to the Court of Criminal Appeals. Tenn. Code Ann. § 40–30–117. The Motion to Reopen Statute reads in relevant part:

(b) The motion must set out the factual basis underlying its claims and must be supported by affidavit. The factual information set out in the affidavit shall be limited to information which, if offered at an evidentiary hearing, would be admissible through the testimony of the affiant under the rules of evidence. The motion shall be denied unless the factual allegations, if true, meet the requirements of subsection (a). **If the court grants the motion, the procedure, relief and appellate provisions of this part shall apply.**

(hereinafter “Subsection b”). The Following subsection of the Motion to Reopen Section addresses what occurs if the Motion to Reopen is Denied:

(c) If the motion is denied, the petitioner shall have thirty (30) days to file an application in the court of criminal appeals seeking permission to appeal.

(hereinafter “Subsection c”). Tenn. Code Ann. § 40–30–117(b–c).

Subsection c clearly identifies the procedure which applies when the motion to reopen is denied which is to file a permissive appeal within 30 days. Tenn. Code Ann. § 40–30–117(c). Plainly read, the statute

simply identifies that a permissive appeal, as opposed to an appeal of right, is the proper mechanism for review **once a motion to reopen is denied**. This is supported further by distinguishing the typically available appeal of right which lies from the dismissal of a post-conviction proceeding. *See* Tenn. Sup. Ct. R. 28 § 10(a) and Tenn. R. App. P. 3(b).

A. The Motion to Reopen Section Is Not Ambiguous.

When discerning the meaning or application of a statutory provision, the courts must first look to the plain meaning of the terms in the statute before proceeding to the other methods of interpretation. *Eastman Chem. Co. v. Johnson*, 151 S.W.3d 503, 507 (Tenn. 2004). Here, the meaning of the words are not in dispute. The statute and the specific provision at issue here are not ambiguous because any concern about the application of the statute's appeal provision can be resolved based on the plain language of the statute and order of the words chosen by the legislature. Indeed, "[a]mbiguity does not exist merely because the parties proffer different interpretations of a statute." *Powers v. State*, 343 S.W.3d 36 (Tenn. 2011).

B. As Used in Subsection b, "Part" Refers to the Post-Conviction Procedures Act Which Is Broader Than the "Section."

Subsection b addresses what occurs if the motion to reopen is granted. Tenn. Code Ann. § 40-30-117(b). The statute clearly states that once the motion to reopen is granted "the procedure, relief and appellate provisions of **this part** shall apply." *Id.* We know that "[a]n appellate Court presumes that the legislature used each word in a statute

deliberately, and that the use of each word conveys a specific purpose and meaning, and therefore an appellate court must give effect to every word, phrase, clause, and sentence in constructing a statute.” *State v. Strode*, 232 S.W.3d 1 (Tenn. 2007). Additionally, the “[l]egislature is presumed to know the state of the law on the subject under consideration at the time it enacts legislation.” *Lavin v. Jordan*, 16 S.W.3d 362, 368 (Tenn. 2000) (citing *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 899 (Tenn.1992)).

Here, both houses of our legislature passed, concurrently, the same Post-Conviction Procedure Act. Therefore, choosing the word “part” is a clear and unambiguous indication by the legislature that if a motion to reopen is granted, an appeal arising out of a denial of the relief raised in the subsequently filed post-conviction petition and proceedings is an appeal of right. The word “part” has a distinct legislative meaning from the word “section.” The statutory section at issue here is “117” but the part at issue is the entirety of sections “101—122.” Indeed, these sections encompass what is identified within the Post-Conviction Procedure Act as “Part 1.” Tenn. Code Ann. § 40–30–101 (et seq.). Therefore, if the motion is granted, the appellate provisions of “this part” i.e., Part 1, apply. Here, that would be the appeal of right from a final order dismissing the reopened post-conviction proceeding. *See* Tenn. Sup. Ct. R. 28 § 10(a).

This reading is clear and unambiguous and is further supported by the significant problems which would result by reading Subsection b to mean that the “procedure, relief and appellate provisions” only as

contained within the Motion to Reopen Section apply. As an example, the Motion to Reopen Section does not contain provisions identifying an evidentiary hearing be held nor by what procedures nor for any “relief” which might be accorded to the petitioner if his motion is granted. Both of these provisions are governed by other sections of Part 1. Indeed, no mention of relief available to petitioner once his motion to reopen was granted is contained anywhere within the Motion to Reopen Section. *See* Tenn. Code Ann. § 40–30–117. The Motion to Reopen Section cannot stand on its own without incorporating other sections of the Post-Conviction Procedure Act.

Reading Subsection c to contain the exclusive appellate remedy for any case which was initiated by a motion to reopen, even where the motion to reopen was granted, renders the statute as written absurd. Such an interpretation would render the “procedure” and “relief” referred to in Section b meaningless. After a court’s grant of the motion to reopen, a movant would have no recourse other than filing a petition for permission to appeal. The legislature clearly intended for a motion to reopen post-conviction proceedings grant to actually reopen the post-conviction proceedings and afford the successful movant—now petitioner—the procedure afforded to other post-conviction petitioners.

C. Other Interpretive Aids Support Reading the Section to Require a Permissive Appeal only if a Motion to Reopen Is Denied.

Word order and selection by the legislature signal the intended meaning. *See e.g., Sallee v. Barrett*, 171 S.W.3d 822, 828–29 (Tenn. 2005)

(holding that the order of words and the association with other words) and *Lockhart v. United States*, 136 S. Ct. 958, 962–63 (2016) (relying on the order of words and the rule of the last antecedent to discern the meaning of a statute).

Here, the order of the opening sentence of Subsection c further clarifies the legislature intended that a permissive appeal was required if, and only if, the motion to reopen is denied. Subsection c’s first sentence is broken up into an introductory clause and the remainder of the sentence. The clause identifies that the following provisions of the statute apply **if and when** the condition of that introductory clause has been met—namely that the motion has been denied. This sentence is constructed in an antecedent and consequent structure. The introductory clause being the antecedent, and the following portion describing the permissive appeal being the condition consequent. Such a structure demonstrates that the introductory clause’s condition (i.e., “if the motion is denied”) must be met to trigger the consequent—that petitioner must then file a permissive appeal.

Additionally, Mr. Nichols’ interpretation of the statute is supported by a well-known canon of construction which counsels against rendering portions of a statute superfluous (i.e., the Rule Against Surplusage). Indeed, this interpretive tool is well established in Tennessee: “[w]hen construing a statute, a legislature is presumed to have used **no superfluous words**” or phrases. *American Heritage Apartments, Inc. v. Hamilton Co. Water and Wastewater Treatment Auth.*, 494 S.W.3d 31, 45 (Tenn. 2016) (emphasis added). Interpreting against surplusage is

required because “when construing legislative enactments, [a] court presumes that **every word** in a statute has meaning and purpose; each word should be given full effect. . .” *State v. White*, 362 S.W.3d 559, 566 (Tenn. 2012) (emphasis added). A statute’s every word should be read and interpreted in a manner which renders no portions or words superfluous. *State v. Davis*, 484 S.W.3d 138, 144–45 (Tenn. 2016).

The introductory clause of Subsection c specifically identifies the procedure for when a motion is denied, thus limiting the application of that procedure to **when** a motion is denied. If the introductory clause does not modify or condition the requirement that the resulting appeal be permissive, the use of the introductory clause is meaningless within the statute. If this Court were to read the Motion to Reopen Section this way, the introductory clause of Subsection c would be superfluous. Such a reading is impermissible.

D. The Court of Criminal Appeals Does in Fact Apply the Statute to Require a Permissive Appeal Only When the Motion to Reopen Is Denied and Has Done So Repeatedly Without Comment or Objection from the State.

Appellant has identified several cases which illustrate that once the Motion to Reopen is granted and the post-conviction proceedings have been reopened, any resulting denial of the substantive claim warrants an appeal of right pursuant to Rule 3 as is the procedure under Part 1 of the Post-Conviction Procedure Act. This appellate procedure is the same procedure followed by Mr. Nichols in his case once his motion to reopen was granted, an amended post-conviction petition filed, and then subsequently denied in the lower court.

The Court of Criminal Appeals has repeatedly demor once the motion to reopen is granted and the case has proo substantive merits of the claims and then the post-conviction relief, the case proceeds on an appeal of right pursuant to Rule 3. *See accord Black v. State*, No. M2004-01345-CCA-R3-PD (2005) (attachment 3); *Van Tran v. State*, No. W2005-01334-CCA-R3-PD (2006) (attachment 4); *Coleman v. State*, 341 S.W.3d 221 (Tenn. 2011) (attachment 5); *Howell v. State*, No. W2009-02426-CCA-R3-PD (2011) (attachment 6); *Porterfield v. State*, No. W2012-00753-CCA-R3-PD (2013) (attachment 7); and *Perry v. State*, No. W2013-00901-CCA-R3-PC (Tenn. Crim. App. 2014) (non-capital case) (attachment 8).³

Specifically, *Perry v. State*, is instructive regarding the procedural posture and circumstances of Mr. Nichols' case. There, the motion to reopen was granted exclusively on a point of law—just like Mr. Nichols'

³ All of these cases attached to this brief illustrate the point that there an initial Order either granting or denying the motion to reopen pursuant to Tenn. Code § 40-30-117. If this initial Order is a denial, then the case proceeds pursuant to a permissive appeal. However, if this initial motion is granted, but that after substantive briefing or evidence is put forward the post-conviction court determines there is no relief available and dismisses the case it properly proceeds on a Rule 3 appeal to the Court of Criminal Appeals. The cases which are identified as attachments 3 and 5 have subpart attachments which are the Orders issued relevant to the motion to reopen and subsequently reopened proceedings in the case. These orders illustrate that there is a procedural order granting the motion to reopen which was followed by a substantive order denying the reopened post-conviction claims on the merits. Following the second order, the case proceeds on a Rule 3 appeal.

claim pursuant to *Johnson v. United States*. (attachment 8, at *2). Describing the procedural posture, the Court of Criminal Appeals stated:

[O]n August 7, 2012, the petitioner filed a pro se motion to reopen his post-conviction petition in which he argued that his original petition should be reopened. . . . To support his argument for re-opening, he relied upon the United States Supreme Court case of *Miller v. Alabama*. The post-conviction court determined that a colorable claim had been presented.

... Following the filing of an amended motion for relief, a hearing was held before the post-conviction court. However, no evidence was presented, as the case was submitted on a principle of law. After hearing arguments, the post-conviction court took the matter under advisement. The court subsequently entered a written order denying relief. The petitioner thereafter filed notice of appeal.

These are precisely the circumstances which occurred in Mr. Nichols' Case and the final order of the post-conviction court was then appealed pursuant to an appeal of right under Rule 3. (*Id.*) The Court of Criminal Appeals properly had jurisdiction in *Perry v. State* as it does here.

All of these cases cited above in this subsection illustrate that Mr. Nichols' appeal is properly before the court on an appeal of right pursuant to Rule 3. The cases above identify that once the motion to reopen is found to present a "colorable claim" and thereby passes the procedural hurdle presented by the Motion to Reopen Section, that any appeal from dismissal of the proceedings is an appeal of right which grants the Court of Criminal Appeals automatic jurisdiction over the case. Indeed, this point is further bolstered by the fact that the cases identified above (*see*

e.g., Coleman and Perry) distinguished between a dismissal which occurs without granting the motion to reopen on procedural grounds (requiring a permissive appeal) versus when the motion to reopen presents a “colorable claim” and the post-conviction court has heard the merits of the claim in a reopened post-conviction proceeding but then ultimately dismisses the claim.⁴

These cases above also clarify that once the motion to reopen has been granted, the original post-conviction proceeding has been reopened. The reopened proceedings then require filing of an Amended Petition and in some cases an evidentiary hearing.

It is important to note that the amended petition which is filed after the motion to reopen had been granted by the post-conviction court is not a “successor petition,” but as the name states is the original post-conviction proceeding which has subsequently been reopened based on the finding of a colorable claim on one of the grounds identified in the Motion to Reopen Section. *See accord* Tenn. Code Ann. § 40–30–102(c) (distinguishing between successively filed petitions for post-conviction

⁴ Two recent cases further illustrate this distinction between a denial in the post-conviction court after colorable claim threshold has been met and when the denial order states that the claim cannot meet the threshold to reopen the post-conviction proceedings: *Donnie Johnson v. State*, No. W2017–00848–CCA–R28–PD, Shelby Co., (Sept. 11, 2017) (perm. app. denied. January 19, 18) (attachment 1) and *Dennis Wayne Suttles v. State*, No. E2017–00840–CCA–R28–PD, Knox Co., (perm. App. denied. Sept. 19, 17) (attachment 2). Both cases sought a permissive appeal to the Court of Criminal Appeals after the initial motion to reopen the post-conviction proceedings was denied for failure to state a colorable claim.

relief and post-conviction proceedings reopened pursuant to Tenn. Code Ann. § 40-30-117). The appeal which results after the dismissal of the subsequently filed Amended Petition is indeed an appeal of right pursuant to Rule 3.

As in all of the cases cited above in this section, this Court properly has jurisdiction over Mr. Nichols' case.

II. The Appeal of Right Is Also Proper Here Because the Post-Conviction Court's Order Was a Substantive Denial of Post-Conviction Relief and Not a Denial of the Motion to Reopen.

Mr. Nichols also understands the Order requesting supplemental briefing in this case to mean that this Court might consider the second order (PC vol. VI at 615) issued by the post-conviction court to be a denial of a motion to reopen instead of a denial on the merits of the reopened post-conviction proceedings. However, this is not the case. The post-conviction court explicitly stated the motion to reopen had been granted: “. . .this Court granted Petitioner's motion stating a colorable claim” and stated such in the final order dismissing the amended petition. PC vol. VI at 615.

The second Order issued by the post-conviction court in this case was a substantive dismissal of Mr. Nichols' post-conviction claims on the merits, not a mere denial of a motion to reopen for failure to state a colorable claim. PC vol. VI at 615. A denial of a motion to reopen is based on the failure of the movant to meet the colorable claim standard under one of the three grounds for reopening a post-conviction proceeding. *See*

Tenn. Code Ann. § 40–30–117(1–3); *Howell v. State*, 151 S.W.3d 450, 463 (Tenn. 2004). In contrast, Mr. Nichols’ motion to reopen was granted because he had met the colorable claim standard, PC vol. I at 62. In that Order reopening the post-conviction proceedings, the court stated firmly that the grant of such a motion was not a determination on the merits of the claim: “[t]his Court notes the finding of a colorable claim here is **not** a finding of the language being unconstitutionally vague.” *Id.* at 71 (emphasis added). In other words, no determination on the merits of Mr. Nichols’ claim was made by granting the motion to reopen. Had the post-conviction court determined that Mr. Nichols had not met the threshold showing of a colorable claim and dismissed the motion, Mr. Nichols would properly have had to seek a permissive appeal under the requirements of Subsection c of the Motion to Reopen Section. (See attachments 1 and 2).

In contrast to the initial Order, the post-conviction court’s final Order dismissing the post-conviction proceedings states that the court has reviewed and is addressing all the claims raised in the amended petition as is required by Tenn. Code Ann. § 40–30–106. PC vol. VI 615-16. The post-conviction court relied exclusively on the Court of Criminal Appeals denial Order in *Donnie Johnson* to reach this conclusion.⁵ It determined that *Johnson v. United States* was not a “new rule” of constitutional law which must be applied retroactively in a Tennessee

⁵ Importantly, the post-conviction court determined that Mr. Nichols’ claim pursuant to *Johnson* was not available due to the determination of the Court of Criminal Appeals’ denial Order in Donnie Johnson’s case. Indeed, the Order here took almost the entire text of the Court of Criminal Appeals denial Order and block-quoted the analysis.

post-conviction proceeding holding “[t]he “void for vagueness” doctrine was not a new creation of the *Johnson* court in that the due process provisions of the 5th and 14th amendments have been utilized many times prior to *Johnson* to determine that a statute is unconstitutionally vague.” PC vol. VI at 620 (quoting *Donnie Johnson*, attachment 1).

Additionally, the post-conviction court determined:

Even if a new retroactively applicable constitutional right was created by the *Johnson* decision, such ruling would not offer relief to the Petitioner. The argument of the Petitioner is that one of the aggravating factors found by the jury to sentence the Petitioner to death is vague and under the ruling espoused by the *Johnson* court would be unconstitutional. The statute referenced by the Petitioner has been amended since the time of his trial and conviction but at the time of trial stated: “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). A comparison of the two clauses the ACCA and the pre-1989 (i)(2) provision reveals that application of the *Johnson* court ruling would not result in the finding that the pre-1989 (i)(2) provision is unconstitutionally vague.

PC vol. VI at 620 (quoting attachment 1) (emphasis added). This “even if” analysis is significantly beyond what is required in order to dispose of a motion to reopen and goes well beyond determining whether Mr. Nichols presented a colorable claim. This analysis determined the merits of Mr. Nichols’ claim for relief and is a substantive ruling dismissing the post-conviction petition—not a denial of a motion to reopen.

Additionally, the post-conviction court went beyond whether the claim met the threshold for a motion to reopen post-conviction proceedings:

In his January 2017 Amended Petition, Petitioner raised several claims not related to his *Johnson v. United States* claim.

Initially, this Court finds the additional claims raised in Claims II, III, IV, and V were not covered by the order granting the motion to reopen. Although the order may have included general language, it was this Court's intention the petitioner was only permitted to reopen his proceedings as it related to the Johnson claim. Therefore, Claims II– V are beyond the intended scope of the current proceedings.

Due to the general language of the October 2016 order, **however, this Court will conduct a standard preliminary review pursuant to Tenn. Code Ann. § 40–30–106 as to each of these non-*Johnson* claims.**

PC vol. VI at 622 (emphasis added). The post-conviction court then proceeded to analyze the merits of each of Mr. Nichols' remaining claims.

Ultimately, the post-conviction court dismissed the amended petition pursuant to Tenn. Code Ann. § 40–30–106, not pursuant to Section 117. See PC vol. VI at 622. Section 106 addresses the preliminary consideration by a court of an amended petition. Section 106 reads in relevant part:

Upon receipt of a petition in proper form, or upon receipt of an amended petition, the court shall examine the allegations of fact in the petition. If the facts alleged, taken as true, fail to show that the petitioner is entitled to relief or fail to show that the claims for relief have not been waived or previously determined, the petition shall be dismissed. The order of dismissal shall set forth the court's conclusions of law.

Tenn. Code Ann. § 40–30–106(f). Importantly, any dismissal of an amended petition pursuant to Section 106 would be appealable as of right. *See* Tenn. R. App. 3(b).

Here, not only did the post-conviction court dismiss the amended petition on the merits pursuant to 106, but it also did not strike its initial order granting the motion to reopen (no rule in the post-conviction statute prevents such a court from striking a previous order). The post-conviction court did not intend to issue an order rescinding the determination that Mr. Nichols had raised a colorable claim, thereby denying the motion to reopen, but intended to dismiss the reopened post-conviction proceedings after determining that no relief was available to Mr. Nichols on the merits of his claims despite having shown a colorable claim in his initial motion to reopen. *See* PC vol. VI at 636 (holding “. . . there is no claim for **post-conviction relief** before this Court which should survive this Court's statutorily required preliminary order.”) (emphasis added).

For all of these reasons, it is clear that the post-conviction court itself understood that the motion to reopen **was granted**, and that the second Order at issue here (PC vol. VI at 615) was a dismissal of the post-conviction proceedings and the amended petition—not a denial of a motion to reopen.

III. The Post-Conviction Court’s Reliance on an Intervening Order from the Court of Criminal Appeals Did Not Render Its Order a Retroactive Denial of a Motion to Reopen.

The post-conviction court erroneously relied on the denial of a permission to appeal which carries no controlling authority and contained errors of law to determine that no relief was available to Mr. Nichols pursuant to *Johnson v. United States*. (See attachment 1). The post-conviction court determined that this Order, which carries no controlling or persuasive authority was entirely dispositive of Mr. Nichols' *Johnson* claim, "... the appellate courts have now addressed this issue and determined Petitioner is not entitled to relief on this issue." PC vol. VI at 621. This is not the case and did not abrogate the post-conviction court's Order that Mr. Nichols' raised a colorable claim in his motion to reopen.

A. The Post-Conviction Court Relied Exclusively on the Legal Analysis of the Denial Order in *Donnie Johnson v. State* to Dismiss Mr. Nichols' *Johnson v. United States* Claim.

In its substantive denial of Mr. Nichols' *Johnson v. United States* claim, the post-conviction court relied exclusively on an unpublished denial Order from the Court of Criminal Appeals which came down after Mr. Nichols' motion to reopen was granted. PC vol. VI at 618. The Court of Criminal Appeals Order denying the permissive appeal from a denial Order in *Donnie Johnson v. State* was issued on September 11, 2017, which was after the court had reopened Mr. Nichols' post-conviction proceedings. (attachment 1). There, the post-conviction court had denied the motion to reopen by Donnie Johnson pursuant to Section 117. (*Id.*) Then in a denial of the resulting permissive appeal, the Court of Criminal Appeals determined that the post-conviction court had not abused its

discretion finding that Donnie Johnson had not presented a colorable claim that the prior violent felony aggravator was void for vagueness under the new rule announced in *Johnson v. United States*. (*Id.*)

The post-conviction court relied on this unpublished denial Order to determine that no relief was available to Mr. Nichols on his claim pursuant to *Johnson v. United States* because it did not announce a new rule which required retroactive application under Tenn. Code Ann. § 40–30–122. PC vol. VI at 618–21.

Despite having raised similar issues, the denial of the permissive appeal in *Donnie Johnson* did not produce controlling law (and indeed has no authoritative weight) which was dispositive of a claim asserting a statute was void-for-vagueness under the new rule of *Johnson v. United States*. Holding that the denial order of an unpublished permission to appeal is wholly dispositive of the colorable claim raised by Mr. Nichols was in error. Additionally, the *Donnie Johnson* denial Order contains significant errors of law and reached a conclusion contrary to settled law that *Johnson v. United States* announced a new rule of constitutional law which must be applied retroactively by state post-conviction courts. (*See* attachment 1).

B. The Denial Order in *Donnie Johnson v. State* Erroneously Held That *Johnson v. United States* Did Not Announce a New Rule of Constitutional Law Which Applied Retroactively.

The post-conviction court made its determination that no relief was available to Mr. Nichols pursuant to *Johnson v. United States* because the decision did not announce a new rule of constitutional law which

must be applied retroactively. PC vol. VI at 615. This analysis was taken directly from the denial Order in *Donnie Johnson*. Inexplicably, there, the Court of Criminal Appeals held, contrary to the newly announced decision in *Welch v. United States*, 136 S. Ct. 1257, at 1264 (2016), that *Johnson v. United States* had not announced a new rule of constitutional law which applied retroactively to cases on collateral review. *Donnie Johnson v. State*, No. W2017-00848-CCA-R28-PD at *4.

Johnson v. United States “undisputedly” announced a new substantive rule of constitutional law which must be applied retroactively to cases on collateral review under the standards first announced in *Teague v. Lane*, 489 U.S. 288 (1989). *Welch v. United States*, 136 S. Ct. 1257, at 1264 (2016). *Welch* held *Johnson* was substantive because it narrows “the scope of a criminal statute by interpreting its terms” *Id.* at 1265. And that *Johnson’s* holding changed the “substantive reach of the Armed Career Criminal Act, altering the range of conduct or class of persons the [Act] punishes.” *Id.* at 1265. *Welch* held unequivocally, “[i]t is undisputed that *Johnson* announced a new rule.” *Id.* at 1264.

This determination that *Johnson* announced a new substantive rule of constitutional law is binding upon state courts and, therefore, any finding that *Johnson* does not apply retroactively to cases on collateral review in state court is an error of law. *See Montgomery v. Louisiana*, 136 S. Ct. 718 (2016) (“[W]hen a new substantive rule of constitutional law controls the outcome of a case, *the Constitution requires* state

collateral review courts to give retroactive effect to that rule.”) (emphasis added).

However, the post-conviction court’s order and the determination by the Court of Criminal Appeals in the *Donnie Johnson* denial Order that there is a distinction between the Tennessee post-conviction statute’s interpretation of what constitutes a “new rule” and that held by the Supreme Court of the United States is also in error. (See attachment 1).

1. Retroactivity Doctrine and New Substantive Rules of Constitutional Law.

Johnson v. United States’ holding constitutes a new substantive rule of constitutional law based on the required analysis under *Teague v. Lane* and Tenn. Code Ann. § 40–30–102(b)(1) and 40–30–122. When dealing with federal constitutional issues the framework for determining whether a new rule applies to cases which are on collateral review stems from the plurality opinion in *Teague v. Lane* and its progeny. *Teague*, 489 U.S. 288 (1989). *Teague* bars the application of newly announced *procedural* rules to cases on collateral review. *Id.* However new **substantive** rules of constitutional law fall outside of the *Teague* bar against retroactive application. *Id.* at 310. A rule of constitutional law is substantive when “it alters the range of conduct or the class of persons that the law punishes. *Welch*, 136 S.Ct. 1257, 1264—65 (2016) (citing *Schiro v. Summerlin*, 542 U.S. 348, 353 (2004)). Additionally, a new substantive rule may be one which “narrows the scope of a criminal statute by interpreting its terms” or by excluding certain conduct from

“beyond the state’s power to punish.” *Id.* *Johnson v. United States* announced such a rule. *Welch v. United States*, 136 S. Ct. 1257, at 1264 (2016).

2. Under Both the Tennessee Post-Conviction Statute and United States Supreme Court Precedent, New Substantive Rules of Criminal Procedure Are Applied Retroactively.

Tennessee’s Supreme Court adopted and unified its retroactivity doctrine with the *Teague* framework into the interpretation and application of Tenn. Code Ann. § 40–30–122 which governs retroactive application of “new rules of constitutional criminal law.” *Id.* In *Bush v. State*, the Tennessee Supreme Court was faced with a question of statutory interpretation and determined that the newly enacted Post-Conviction Procedure statute was intended to replace the existing retroactivity standard announced in *Meadows v. State*, 849 S.W.2d 748 (Tenn. 1993), with the “federal standard” for retroactivity announced in *Teague v. Lane*. *Bush v. State*, 428 S.W.3d 1, 20 (Tenn. 2014); *See also State v. Gomez*, 163 S.W.3d 632, 651, n. 16 (Tenn. 2005) (holding that Tenn. Code Ann § 40–30–122 is “virtually identical” to the framework in *Teague*).

In *Bush*,⁶ the Tennessee Supreme Court overruled the previous *Meadows* standard and unified the Tennessee post-conviction

⁶ It is important to note that nowhere in the post-conviction court’s order nor in the denial Order in *Donnie Johnson v. State* is *Bush v. State* cited. (See attachment 1). *Bush* is controlling law affirming that the standard for retroactivity under *Teague v. Lane* and under Tenn. Code Ann. § 40–

retroactivity standard with the federal standard announced in *Teague*.

The Court held:

We have also determined that, by adopting Tenn. Code Ann. § 40–30–122, the General Assembly intended to change Tennessee's standard for determining the retroactivity of new constitutional rules in post-conviction proceedings. We generally presume that when the General Assembly passes laws on a particular topic, it knows the current law on that subject and legislates accordingly. In this case, therefore, we presume that the General Assembly knew in 1995 that *Meadows v. State* expressed the current law on the retroactivity of new constitutional rules and that the General Assembly intended to change that law by enacting Tenn. Code Ann. § 40–30–122.

Id. at 19. The Tennessee Supreme Court affirmatively adopted the “functional equivalent of the federal standard from *Teague v. Lane*.” *Id.* at 20.

In addition to incorporating *Teague*'s standard on retroactive application of procedural rules, the Tennessee Supreme Court adopted the exceptions identified in *Teague. Bush*, 428 S.W.3d, at 21. The Court found that the legislature was both aware of and intended to adopt the federal rules on retroactivity announced in *Teague. Id.* at 20. The Tennessee post-conviction statute which interprets whether a new rule will be available as grounds for relief for a post-conviction petitioner

30–122 are one in the same. Therefore, holding that *Welch v. United States*' ruling that *Johnson v. United States* announced a new rule which is retroactive does not apply in Tennessee is contrary to clearly established law from both the United States Supreme Court and the Tennessee Supreme Court in *Bush v. State*.

echoes the very exceptions identified in *Teague* and which run through federal court precedent on the matter or retroactivity. Tenn. Code Ann. § 40–30–122. The statute reads:

For purposes of this part, a new rule of constitutional criminal law is announced if the result is not dictated by precedent existing at the time the petitioner's conviction became final and application of the rule was susceptible to debate among reasonable minds. A new rule of constitutional criminal law shall not be applied retroactively in a post-conviction proceeding ***unless the new rule places primary, private individual conduct beyond the power of the criminal law-making authority to proscribe*** or requires the observance of ***fairness safeguards that are implicit in the concept of ordered liberty***.

Tenn. Code Ann. § 40–30–122 (emphasis added). Again, in *Bush v. State*, the court analyzed the language of the statute and the relationship of that language to the “exceptions” in *Teague*. 428 S.W.3d at 21.

The Tennessee Supreme Court harmonized the language of the new post-conviction statute with *Teague*, and determined the legislature intended to adopt *Teague*’s exception. *Id.* at 19–20. This includes the mandate that new substantive rules of constitutional law are applied retroactively.

The relevant language from Section 122 allows retroactive application for a rule which “places primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.” *Id.* (quoting Tenn. Code Ann. § 40–30–122). Though not analyzed in the *Bush* decision, it is important to note this statutory language is lifted directly from *Teague v. Lane*, 489 U.S. 288, 311 (citing *Mackey v. United States*,

401 U.S., at 692 (1971) (Justice Harlan wrote that a new rule should be applied retroactively if it places “certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe”). This language formed the basis for the exception to the *Teague* bar against applying new rules retroactively.

Bush and the relevant legislative history discussed above demonstrate that the Tennessee State statute governing retroactive application and federal law on retroactivity are in harmony. Tennessee’s interpretation statute incorporates all rules of retroactivity announced in *Teague* including the exception to the bar on retroactivity for new rules of substantive law announced since a petitioner’s case became final. *Bush*, 428 S.W.3d at 15 (i.e., “certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe”).

Any remaining doubt regarding whether a Tennessee court is bound to apply a new substantive rule of constitutional law was resolved in 2016 as a result of *Montgomery v. Louisiana*. 136 S.Ct. 718 (2016).⁷

⁷ In *Montgomery*, the Court was faced with the State of Louisiana’s assertion that it was not bound to apply the ruling of *Miller v. Alabama*, 567 U.S. 460 (2012), retroactively (holding that offenders that committed their crimes before 18 could not be subject to mandatory life without parole sentences). *Montgomery*, 136 S. Ct. at 734. In ruling Louisiana was bound to apply new substantive rules of constitutional law to cases on collateral review, the Court answered the lingering question left after *Danforth v. Minnesota* whether “*Teague*’s two exceptions are binding on the States as a matter of constitutional law.” *Montgomery*, 136 S.Ct. at 729 (citing *Danforth v. Minnesota*, 552 U.S. 264 (2008)).

“[W]hen a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule.” *Id.* at 729. And continued “[t]his Court’s precedents addressing the nature of substantive rules, their differences from procedural rules, and their history of retroactive application establish that the constitution requires substantive rules to have retroactive effect regardless of when a conviction became final.” *Id.* at 730. Finality yields to new substantive rules because as Justice Harlan held “there is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose.” *Mackey*, 401 US at 693.

New substantive rules of federal constitutional law which have been held to apply retroactively by the United States Supreme Court must be applied retroactively under both Tennessee and federal constitutional law—*Johnson v. United States* announced such a rule. *Welch*, 136 S.Ct. at 1264.

3. Dismissal of Mr. Nichols’ *Johnson v. United States* Claim Was Not Required by the *Donnie Johnson* Denial Order Because It Carries No Authoritative Weight and Is Contrary to Established Law.

The post-conviction court’s final Order on the merits in Mr. Nichols’ claim made pursuant to *Johnson v. United States* was based solely on the denial Order in *Donnie Johnson v. States* which is plainly contrary to the settled precedent of both the United States Supreme Court in *Welch* and *Teague*, but also contrary to the Tennessee Supreme Court’s own precedent on retroactivity. *See Bush v. State*, 428 S.W.3d 1, 20.

Therefore, the post-conviction court's determination that the dismissal of Mr. Nichols' *Johnson* claim was required by such an Order is in error. A Court of Appeals denial Order which is directly contrary to settled principles of law cannot be controlling authority nor can it be entirely dispositive of a claim. Here, the post-conviction court's reliance on this error of law and the Donnie Johnson denial Order, which carries no authoritative weight in the State of Tennessee, as the sole basis for dismissal of Mr. Nichols' case did not render that Order a retroactive denial of his motion to reopen post-conviction proceedings for failure to allege a colorable claim. Indeed, the post-conviction court could have issued such an Order vacating its prior determination, but it did not.

Not only does the weight of controlling legal authority from both the United States Supreme Court and the Tennessee Supreme Court fall in Mr. Nichols' favor on retroactivity, the Attorney General has conceded⁸ without analysis that *Johnson v. United States* did announce a new rule of constitutional law which applies retroactively to cases on collateral review in state court. State's Resp. Br. at 12 (filed Nov. 1, 2018). The State conceded:

Johnson announced a new rule; it is retroactive under federal law, *Welch v. United States*, 136 S.Ct. 1257, 1265 (2016); and federal retroactivity principles govern state post-conviction

⁸ Mr. Nichols does not mean to imply that the Attorney General has conceded relief or merit to Mr. Nichols' claim pursuant to *Johnson v. United States*. Indeed, the Attorney General asserts that *Johnson v. United States* simply does not apply on the facts of Mr. Nichols' case even though it is retroactive and applicable in a state post-conviction proceeding. See State's Resp. Br. at 12.

procedure, *Montgomery v. Louisiana*, 136 S.Ct. 718, 731–32 (2016).

State’s Resp. Br., at 12.

It is undisputed that *Johnson v. United States*’ new substantive rule of constitutional law applies retroactively, and further, it is now conceded by the State that that is the case. It follows then, that the post-conviction court’s basis for dismissing the post-conviction proceedings was a denial Order which stands in direct opposition to the settled principles of both federal and Tennessee law.

Here, the post-conviction court’s reliance on this error of law and the denial Order, which is not authoritative law, as the sole basis for dismissal of Mr. Nichols’ case did not render that Order a retroactive denial of his motion to reopen proceedings for failure to allege a colorable claim. Indeed, the post-conviction court could have issued such an Order vacating its prior determination, but it did not. Therefore, Mr. Nichols’ claims are properly before this Court pursuant to Rule 3 after a substantive denial of them as contained in the Amended Petition for post-conviction relief.

C. The Denial of the Agreed Settlement Contained Within the Order Dismissing Post-Conviction Proceedings Is Properly Before the Court Pursuant to Rule 3.

The post-conviction court’s denial of Mr. Nichols’ joint settlement agreement was based on the post-conviction court’s erroneous determination that the unpublished per curium denial Order in *Donnie Johnson v. State* was wholly dispositive of Mr. Nichols’ claim pursuant to

Johnson v. United States (described herein in Section II A-B) The post-conviction court issued its Order dismissing the post-conviction proceedings, but also the rejecting of the proposed agreed settlement under the erroneous belief that this outcome was compelled by the denial Order in *Donnie Johnson* (attachment 1):

Initially, when this Court ruled Petitioner had stated a "colorable claim" as to *Johnson*, there was no authority in Tennessee which addressed this issue. Since then, the Tennessee Court of Criminal Appeals has decided *Donnie Johnson v. State*, No. W2017-00848-CCA-R28-PD perm. app. denied, (Tenn. January 19, 2018). In (Tenn. Crim. App. September 11, 2017).

PC vol. VI at 618. The post-conviction court concluded that dismissal of Mr. Nichols' claim pursuant to *Johnson v. United States* was now **required** because of the denial Order in *Donnie Johnson*: "the appellate courts have now addressed this issue and determined Petitioner is not entitled to relief on this issue." PC vol. VI at 621. Therefore, the post-conviction court rejected the settlement proposed by Mr. Nichols and the State. *Id.* at 636.

Despite the court's claim that "in its discretion" it had determined that settlement was not possible because there was no claim presented in Mr. Nichols' amended petition which presented any possibility of relief, it was in fact that the post-conviction court erroneously determined that it **no longer had discretion** to hear the *Johnson* claim writing:

Petitioner asserts this Court, in its discretion, may accept a proposed agreed disposition of a post-conviction case prior to an evidentiary hearing, and should accept the agreement

here. However, this Court, in its discretion, finds it is not appropriate to accept such a proposed agreement under the circumstances of this case **where there is no claim for post-conviction relief before this Court which should survive this Court's statutorily required preliminary order.**

PC vol. VI at 636. The denial of the settlement was an error of law contained within the post-conviction court's Order dismissing all claims.

Therefore, the post-conviction court's dismissal of the agreed settlement was based on an error of law—the determination that it had no discretion to entertain settlement on the claim pursuant to *Johnson v. United States* because the denial Order in *Donnie Johnson* was dispositive of all such claims. The dismissal was therefore in violation of Mr. Nichols' due process rights and arbitrarily denied Mr. Nichols the opportunity to settle his case through an agreement with the district attorney general.

The settlement was dismissed as part of the post-conviction proceedings and was rejected pursuant to the reasoning that Mr. Nichols presented no claims upon which he could prevail. The rejection of the settlement agreement is one in the same with the dismissal of Mr. Nichols' post-conviction proceedings and therefore was properly appealed pursuant to Rule 3 as a final order of a post-conviction court.

CONCLUSION

Mr. Nichols asserts that this Court does indeed have jurisdiction over his case through a properly and timely filed Notice of Appeal pursuant to Tenn. R. App. P. 3(b). Mr. Nichols urges this Court to proceed with his case in accordance with this rule. Alternatively, Mr. Nichols requests that the court convert his Notice of Appeal into a Tenn. R. App. P. 11 permission to appeal and accept the case for oral argument on the briefs already submitted.

Respectfully Submitted,

s/ Deborah Y. Drew

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IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

HAROLD WAYNE NICHOLS,)
) No. _____
Appellant,)
) Rule 11 Appeal from the Court of
v.) Criminal Appeals
)
STATE OF TENNESSEE,) No. E2018-00626-CCA-R3-PD
)
Appellee.) **CAPITAL CASE APPEAL**

Application for Permission to Appeal

Submitted by:

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Document received by the TN Supreme Court.

Statement of Judgment Below

Petitioner Harold Wayne Nichols, under Tenn. R. App. P. 11, seeks discretionary review of the final decision of the judgment of the Court of Criminal Appeals in his capital post-conviction case. In a judgment and opinion entered on October 10, 2019, the Court of Criminal Appeals affirmed the post-conviction court's denial of Mr. Nichols's claims for post-conviction relief. *Nichols v. State*, 2019 WL5079357, No. E2018–00626–CCA–R3–PD (Tenn. Crim. App., Knoxville, Oct. 10, 2019) (attached as Appendix 1). Mr. Nichols did not file a petition for rehearing in the Court of Criminal Appeals.

This Application has been filed within the time prescribed by Rule 11(b) of the Tennessee Rules of Appellate Procedure. Mr. Nichols requests this Court to grant this application and review his claim that the prior violent felony aggravator which supports his death sentence is void for vagueness in light of new substantive Supreme Court law, as decided in *Johnson v. United States*, 135 S.Ct. 2551 (2015), and held to be retroactive in *Welch v. United States*, 136 S.Ct. 1257 (2016).

Question Presented

Whether, under *Johnson v. United States*, a new substantive rule of constitutional law applicable to cases on collateral review, Mr. Nichols's death sentence is invalid because it is based on an unconstitutionally vague aggravating circumstance.

Facts Relevant to the Question Presented

In 1990, Mr. Nichols pled guilty to first-degree felony murder and a jury sentenced him to death for the 1988 killing of Karen Pulley. The jury considered and found as one of the aggravating circumstances that Mr. Nichols had been previously convicted of "one or more felonies, other than the present charge, the statutory elements of which involved the use or threat of violence to the person." Tenn. Code Ann. § 39-2-204(i)(2). The prior violent felony aggravating circumstance in effect at the time of the 1998 homicide read, "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. § 39-2-203(i)(2) (repealed). Mr. Nichols's jury was erroneously instructed on the prior violent felony aggravator as it was amended in 1989 (Tenn. Code Ann. § 39-2-204(i)(2)): "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[.]" After the jury returned a verdict which listed the prior violent felony aggravating factor, the trial court, with additional convictions of aggravated rape, imposed sentences of 60 years and 15 years to run consecutive to the 60 years. PC vol. I at 6. At his non-capital sentencing hearing in 1991, Mr. Nichols was

sentenced on several convictions for a total of 647 years. *State v. Nichols*, No. 03C01-9108-CR-00236, 1995 WL 755957 *1 (Tenn. Crim. App. Dec. 19, 1995).

The convictions pertaining to the crimes against Ms. Pulley and the death sentence were upheld on direct appeal. *State v. Nichols*, 877 S.W.2d 722 (Tenn. 1994), cert. denied, 513 U.S. 1114 (1995). Post-conviction relief was denied by the state courts. *Nichols v. State*, 2001 WL 55747 (Tenn. Crim. App. Jan 19, 2001); *Nichols v. State*, 90 S.W.3d 576 (Tenn. 2002). Mr. Nichols's timely filed petition for writ of habeas corpus was denied by the United States District court for the Eastern District of Tennessee. *Nichols v. Bell*, 440 F.Supp.2d 730 (2006). The Sixth Circuit Court of Appeals affirmed. *Nichols v. Heidle*, 725 F.3d 516 (6th Cir. 2013), cert. denied, 135 S.Ct. 704 (2014). In 2007, some of Mr. Nichols's non-capital sentences were modified. Based on those modifications, he is currently serving 220 years concurrent to his death sentence.

On June 24, 2016, Mr. Nichols filed a Motion to Reopen Post-Conviction Proceedings asserting the prior violent felony aggravator which supports his death sentence is void for vagueness in light of new substantive Supreme Court law, as decided in *Johnson v. United States*, 135 S.Ct. 2551 (2015), and held to be retroactive in *Welch v. United States*, 136 S.Ct. 1257 (2016). On October 4, 2016, the post-conviction court found that Mr. Nichols had raised a colorable claim and granted his motion. PC vol. I at 62. The court directed Mr. Nichols's counsel to file an amended petition for post-conviction relief on the *Johnson* claim and to investigate and raise all other meritorious claims. *Id.* Mr. Nichols filed

his amended petition on January 17, 2017 raising a claim pursuant to *Johnson v. United States*. PC vol. II at 80. On March 12, 2018, the post-conviction court issued an Order Dismissing the Amended Petition. PC vol. VI at 615.

Mr. Nichols timely appealed the dismissal of his post-conviction petition to the Court of Criminal Appeals. On October 10, 2019, following oral argument, the Court of Criminal Appeals affirmed the post-conviction court's denial of Mr. Nichols's claims for post-conviction relief. *Nichols v. State*, 2019 WL5079357, No. E2085-00626-CCA-R3-PD (Tenn. Crim. App., Knoxville, Oct. 10, 2019) (Appendix 1).

Mr. Nichols now seeks discretionary review of the final decision of the judgment of the Court of Criminal Appeals.

Applicable Standard of Review

This Court employs a *de novo* standard of review for the issues presented. *See, e.g., State v. White*, 362 S.W.3d 559, 565 (Tenn. 2012) (questions of a constitutional dimension are reviewed *de novo* with no presumption of correctness).

Reasons for Granting the Application

The question presented in this appeal offers this Court the opportunity to settle important questions of law and exercise its supervisory control. Specifically, this application gives this Court an opportunity to consider whether, and under what circumstances, a capital petitioner could establish a colorable claim for relief under the retroactive rule of *Johnson v. United States* and its application to the prior violent felony aggravating circumstance.

Two versions of the prior violent felony aggravating circumstance, the pre-1989 version and the 1989 version, are relevant to this case. This Court's jurisprudence establishes that the potential for a violation of the rule of *Johnson* is the same under both versions of the statute. *See State v. Sims*, 45 S.W.3d, 1 (2001) (extending the conduct-based inquiry employed under the pre-1989 circumstance to the 1989 circumstance despite the new "elements" language in the 1989 circumstance).

The Court of Criminal Appeals concluded that the *Johnson* claim fails under either version of the prior violent felony aggravating circumstance because trial courts look at the actual facts of the prior felony to determine the use of violence when it cannot be determined by the elements of the offense alone. 2019 WL5079357, at *6. The court added that Tennessee precedent has never required the use of a judicially imagined ordinary case in applying the prior violent felony aggravating circumstance. *Id.* This reasoning, however, runs afoul of the Supreme Court's holding in *Johnson*.

Johnson's application to Mr. Nichols's death sentence, which rests on the prior violent felony aggravator, is clear: *Johnson's* core holding is that when a sentence enhancement is based on a prior conviction, an after-the-fact inquiry into whether the conduct involved in that conviction qualifies as a violent felony—as opposed to limiting the inquiry to the statutory elements of the prior conviction—is unconstitutional. *Johnson*, 135 S.Ct. at 2563. The act of looking beyond the elements of the prior conviction and basing the sentencing enhancement on what the prior offense "involved" leads to arbitrary results and fails to give

ordinary people fair notice of the conduct the sentencing enhancement punishes. *Id.* at 2551, 2556–59.

This Court should exercise its supervisory control to correct this injustice. This Court therefore should grant this application for permission to appeal and permit Mr. Nichols’s claim to be heard. In so doing, this Court will settle important questions of law.

Argument

I. **Mr. Nichols’s Death Sentence Is Invalid Because It Is Based on an Unconstitutionally Vague Aggravating Circumstance, in Light of *Johnson V. United States*, a New Substantive Rule of Constitutional Law Applicable to Cases on Collateral Review.**

Mr. Nichols’s death sentence is invalid because the sole aggravating circumstance, the prior violent felony conviction aggravator, is unconstitutionally vague. *Johnson v. United States*, 135 S.Ct. 2551 (2015); *Welch v. United States*, 136 S.Ct. 1257 (2016) (holding that *Johnson* is retroactive). The statutory language of the prior violent felony aggravator in effect at the time of Mr. Nichols’s crime (Tenn. Code Ann. § 39–2–203(i)(2)) and as amended at the time of his trial (Tenn. Code Ann. § 39–2–204(i)(2)), is materially the same as the language of the sentencing statute in *Johnson* that the Supreme Court found to be unconstitutionally vague. *See Johnson*, 135 S.Ct. at 2555–57. Accordingly, the *Johnson* Court’s vagueness analysis applies with equal force to the sentencing factor in Mr. Nichols’s case and invalidates it as the basis for his death sentence.

A death sentence which rests, in whole or in part, upon an

unconstitutionally vague aggravating factor is inherently invalid. *Godfrey v. Georgia*, 446 U.S. 420, 427–28 (1980). Mr. Nichols’s death sentence, therefore, stands in violation of Article I, §§ 6, 8, 9, 10, 16, 17, and 32 and Article XI, § 16 of the Tennessee Constitution, and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. The Fifth Amendment guarantees that no person shall be deprived of life, liberty, or property without due process of law. It follows that the Constitution prohibits vague laws. *Johnson v. United States*, 135 S. Ct. 2551 (2015). A statute so vague that it fails to give ordinary people fair notice of punishment, or so standardless that it invites arbitrary enforcement, violates the fundamental principles of justice enshrined under due process of law. *Johnson*, 135 S.Ct. at 2556–57; *Kolender v. Lawson*, 461 U.S. 352, 357–358 (1983). The void-for-vagueness doctrine applies not only to statutes defining elements of crimes, but also to statutes fixing sentences. *Johnson*, 135 S. Ct. 2557 (citing *United States v. Batchelder*, 442 U.S. 114, 123 (1979)).

Vagueness, in the death penalty context, violates not only the Fifth and Fourteenth Amendments but also the Eighth Amendment and Article I, §§ 8 and 16 of the Tennessee Constitution. *See Maynard v. Cartwright*, 486 U.S. 356, 363–64 (1988). The United States Supreme Court has consistently held that, because the death penalty is uniquely different than all other punishments, the Eighth Amendment’s prohibition on cruel and unusual punishment requires heightened procedural safeguards. This heightened due process includes fair notice and a fair and reliable decision-making process, and commands that

death sentences be free from arbitrariness and capriciousness. *See, California v. Ramos*, 463 U.S. 992, 998–999 (1983); *Gardner v. Florida*, 430 U.S. 349, 357–358 (1997); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976); *Maynard v. Cartwright*, 486 U.S. 356 (1988); *Lankford v. Idaho*, 500 U.S. 110 (1991); *Van Tran v. State*, 66 S.W.3d 790, 807 (Tenn. 2001); and *Howell v. State*, 151 S.W.3d 450, 462–463 (Tenn. 2004). It is therefore required that a sentence of death which rests, in whole or in part, upon an unconstitutionally vague aggravating factor must be invalidated. *Godfrey v. Georgia*, 446 U.S. 420, 427–28 (1980).

A. *Johnson v. United States* Is a New Rule of Substantive Law Which Applies Retroactively Under Both Federal and Tennessee Law.

Johnson v. United States announced a new substantive rule of constitutional law which must be applied retroactively to cases on collateral review. *Welch v. United States*, 136 S. Ct. 1257, 1264 (2016) (“[i]t is undisputed that *Johnson* announced a new rule”). *Welch* held *Johnson* was substantive because it narrows “the scope of a criminal statute by interpreting its terms . . .” *Id.* at 1265. And that *Johnson*’s holding changed the “substantive reach of the Armed Career Criminal Act, altering the range of conduct or class of persons the [Act] punishes.” *Id.* at 1265. The Sixth Circuit held “*Johnson* was no doubt a sea-change, with far-reaching precedential effects.” *Shuti v. Lynch*, 828 F.3d 440, 444 (2016) (cert. denied. May 14, 2018).

B. *Johnson v. United States* Stands for the Principle That a Sentencing Statute Must Be Written and Applied in a Way Which Provides Fair Notice to Defendants and Prevents Arbitrary Enforcement by Judges.

In *Johnson*, the United States Supreme Court held that when a statute permits increasing a sentence due to a defendant's prior convictions but the requirements for determining what prior convictions justify such an enhancement are vague, the enforcement of that statute violates due process because the statute fails to give a defendant proper notice and invites "arbitrary enforcement" by judges. *Johnson*, 135 S.Ct. at 2557.

The *Johnson* Court considered the Armed Career Criminal Act ("ACCA") and concluded that the language of the residual clause of the ACCA was unconstitutionally vague. *Id.* at 2563. The ACCA provided for a sentencing enhancement if a defendant had certain prior "violent felony" convictions. *Id.* at 2555. The language of the ACCA in question reads:

Any crime punishable by imprisonment for a term exceeding one year ... that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, ***or otherwise involves conduct that presents a serious potential risk of physical injury to another.*** § 924(e)(2)(B).

(emphasis added). *Johnson*, 135 S.Ct. at 2556–57. The Court found that this language is unconstitutional because it "denies fair notice to

defendants and invites arbitrary enforcement by judges.” *Id.* at 2557.

Johnson’s core holding is that when a sentence enhancement is based on a prior conviction, an after-the-fact inquiry into whether the conduct involved in that conviction qualifies as a violent felony—as opposed to limiting the inquiry to the statutory elements of the prior conviction—is unconstitutional. *Id.* at 2563. The act of looking beyond the elements of the prior conviction and basing the sentencing enhancement on what the prior offense “involved” leads to arbitrary results and fails to give ordinary people fair notice of the conduct the sentencing enhancement punishes. *Id.* at 2556–59; *see also Mathis v. United States*, 136 S.C. 2243, 2251 (2016) (“It is impermissible for ‘a particular crime [to] sometimes count towards enhancement and sometimes not, depending on the facts of the case.’” (quoting *Taylor v. United States*, 495 U.S. 575, 601 (1990))); *Nordahl v. State*, 306 Ga. 15, 19–20 (2019) (Sixth Amendment principles prohibit courts from analyzing conduct involved in a prior conviction when assessing whether that conviction can be used as a sentence enhancement).

C. The Prior Violent Felony Aggravator in Effect at the Time of Mr. Nichols’s Crime Was Unconstitutionally Vague for Failing to Provide Fair Notice.

The prior violent felony aggravator in effect at the time Mr. Nichols committed the capital offense in this case read:

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. 39–13–203(i)(2) (repealed and replaced 1989). Per

Johnson, the prior violent felony conviction aggravating circumstance is unconstitutionally vague.

A sentencing statute is void for vagueness if it fails to give ordinary people fair notice of the conduct it punishes. *Johnson*, 135 S.Ct. at 2556–57. The clause “involves the use or threat of violence” in Tenn. Code Ann. § 39–13–203(i)(2) (repealed) operates in the same way that the residual clause in the ACCA operated: “or otherwise involves conduct that presents a serious potential risk of physical injury to another.” The language of the prior violent felony conviction aggravator statute in effect at the time of Mr. Nichols’s crime—specifically the “involves” clause—was vague in that it failed to give proper notice to the ordinary person as to what crime or crimes could be considered as prior violent felony convictions for the purpose of enhancing a first degree murder sentence to life without the possibility of parole or death. Mr. Nichols’s death sentence violates due process of law and the prohibition on cruel and unusual punishment because at the time of the homicide, the statute failed to give the ordinary citizen fair notice as to what felony convictions qualified as violent.¹

D. The Prior Violent Felony Conviction Aggravator on Which the Jury Was Instructed Was Unconstitutionally Vague, Which Invited Arbitrary Application by the Courts.

Mr. Nichols’s jury was erroneously instructed with the newly

¹ As discussed in subsection D below, this analysis is not altered by the judge instructing the jury with the language of the aggravator as amended in 1989.

amended prior violent felony aggravator, which read:

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*.[.]

Tenn. Code. Ann. § 39–2–204(i)(2) (emphasis added). This amended language used in the instruction is irrelevant to the fair notice prong of the vagueness analysis because it was not in effect at the time of the offense. Regardless of what the jury was instructed at trial, there was no fair notice to Mr. Nichols based on the statute in effect at the time of the offense as constitutionally required. However, as explained below, the addition of the word “elements” to the statute did not significantly alter the meaning of the statute. Tenn. Code. Ann. § 39–2–204(i)(2) (1989). Therefore, if the amended statutory aggravator had been in effect at the time of his offense, it too would have failed to provide the constitutionally mandated fair notice. Like the residual clause in *Johnson*, the language of the amended statute with which Mr. Nichols’s jury was charged is vague.² “A statute is void for vagueness if it is so vague, indefinite, and uncertain that persons must speculate as to its meaning.” *State v. James Stacey Carroll*, No. W2001–01464–CCA–R3–CD, 2002 WL 1841627, at *4 (Tenn. Crim. App. Aug. 9, 2002). By this definition, the language of the prior violent felony aggravator violates the principle articulated in *Johnson*. Moreover, the amended prior violent felony conviction aggravator—specifically its “elements involve” clause—is impermissibly

² Black’s Law Dictionary defines “vague” as follows: “Imprecise or unclear by reason of abstractness; not sharply outlined; indistinct; uncertain.” Black’s Law Dictionary (10th ed. 2014).

vague because it invites arbitrariness by the courts. *See Johnson* at 2556–57.

E. Introduction of the Word Elements Did Not Cure the Unconstitutional Vagueness of the Prior Violent Felony Aggravator.

Despite the introduction of the term “elements” into the prior violent felony aggravator, in application, it still produces the exact same vague and arbitrary result which is prohibited under *Johnson*. In *Johnson* the Court upheld the portion of the ACCA’s prior violent felony aggravator identified as the “force clause” which reads “*any crime . . . that (i) has an element the use, attempted use, or threatened use of physical force against the person of another;*” *Johnson*, 135 S.Ct. at 2555. The Court upheld the force clause because it *clearly defined* all crimes which would fall into that category. *Id.* at 2557. By containing the crimes just to those which have the use or attempted use of force against another as a statutory element, the force clause properly provided notice to defendants and removed the arbitrariness of the “searching inquiry” required by the residual clause. *Id.* Under the force clause, a sentencing court only need review the statutory elements of the prior conviction in order to enforce this statute.

The Court of Criminal Appeals analyzed the addition of the word “elements” to the Tennessee prior violent felony aggravator in two prior cases: *Dennis Wayne Suttles v. State*, No. E2016–02162–CCA–R28–PD (Tenn. Crim. App. Feb. 13, 2017) and *Gary W. Sutton v. State*, No. E2016–02112–CCA–R28–PD (Tenn. Crim. App. Jan. 23, 2017). In those cases, the appellate court found that the elements language of the amended

prior violent felony aggravator was more like the language in the “force clause” of the ACCA and was therefore constitutional under *Johnson*. *Suttles*, Slip. Op. at 3 (citing *Sutton* Slip. Op. at 3). While it may be true that if the prior violent felony aggravator was indeed written and therefore applied as the ACCA’s “force clause” is applied, it may be sufficiently definite to survive scrutiny under *Johnson*. However, this is not the case. The amended prior violent felony aggravator is neither written nor applied in the same manner as the “force clause” of the ACCA. Two factors conspire to render the Tennessee statute void for vagueness in violation of *Johnson*.

First, the language of the Tennessee statute maintains the problematic phrasing “whose statutory elements *involve the use of violence to the person*[.]” Tenn. Code. Ann. § 39–2–204(i)(2) (1989). This language broadens the inquiry beyond the statutory elements of the conviction into analysis of what conduct was or may have been involved in the crime, thereby triggering the analysis which applied in *Johnson*. Committing a crime whose element is the use of violence to the person is not the same as committing a crime “whose statutory elements *involve the use of violence to the person*.” The constitutionally permissible limiting language of the force clause (directly limiting the sentencing court to examining only the statutory elements of the crime) is not present in the Tennessee statute.

Comparing the hypothetical effect of these two different phrases clarifies this point. For example, consider a defendant that has been convicted of the prior felony of robbery as defined in Tenn. Code Ann. §

39–13–401. In Tennessee, a robbery “*is the intentional or knowing theft of property from the person of another by violence or putting the person in fear.*” *Id.* Based on the statutory definition, how would a sentencing court under the prior violent felony aggravator determine whether a robbery was committed with violence or with fear? The clear dilemma faced by applying the prior violent felony aggravator would not be present under the “force clause” of the ACCA, which does not ask what the elements of the crime “involve” but what the elements of the crime **are** under the statute.

Second, instead of reading the “elements involve” clause in the way that the federal courts have read the ACCA’s “force clause,” this Court directed the lower courts to go beyond the statutory elements of a prior violent felony conviction and review the facts of the underlying crime, see *State v. Sims*, 45 S.W.3d, 1 (2001), but this is the type of analysis prohibited as both arbitrary and in conflict with the plain language of the statute. This is contrary to clear United States Supreme Court precedent. When a statute focuses on elements, the sole focus must be on the elements of the crime, and particular facts of the case cannot be considered. *Mathis*, 136 S.Ct. at 248. Additionally, by the use of the term “previous conviction” of a crime, the legislature indicates that a sentencer should consider only whether the defendant has been convicted of crimes falling within certain categories not the underlying facts upon which that conviction is based. *Mathis*, 136 S.Ct. at 2252; *Taylor*, 495 U.S. at 600. Legislative bodies understand that if they want to direct sentencers to underlying facts, they craft laws that use the phrase “offense committed”

instead of “convicted.” *Mathis*, 136 S.Ct. at 2252. The statutes’ “elements” and “conviction” language tell the court that the legislature did not intend any examination of the underlying facts of the specific case. *Mathis* at 2251 (citing *Taylor v. United States*, 495 U.S. 575, 600); see also *Sessions v. Dimaya*, 138 S Ct. 1204, 1218 (2018) (a court cannot properly substitute its own judgement for that of the legislature). As the Supreme Court held “[i]f Congress had wanted judges to look into a felon’s actual conduct, “it presumably would have said so. . .” *Descamps*, 570 U.S., at 267. See accord, *Sykes v. United States*, 564 U.S. 1, 7 (2011) (quoting *James*, 550 U.S. at 202 (“[W]e consider [only] the elements of the offense [,] without inquiring into the specific conduct of this particular offender.”); see also *Descamps* , 570 U.S. at 261 (“The key, as we emphasized, is elements, not facts.”). Accordingly, the language of the statute controls the analysis. See *Nordahl v. State*, 306 Ga. at 19–20 (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—runs afoul of the Sixth Amendment).

This Court’s decision in *Sims* makes clear that the reach of the amended prior violent felony aggravator with which Mr. Nichols’s jury was charged (like the residual clause invalidated in *Johnson*) is not limited to an examination of the statutory elements of the felony without regard for the facts of the prior conduct. *State v. Sims*, 45 S.W.3d at 11. In *Sims*, the defendant had been convicted of aggravated assault, and the prosecution wished to rely on the amended prior violent felony aggravator to enhance the defendant’s sentence. *Id.* at 10 (quoting Tenn.

Code Ann. § 39–13–204(i)(2)). However, the indictments against the defendant for his prior convictions of aggravated assault charged him solely with putting others in fear of imminent bodily harm, not with violence to the person. *Id.* at 11. Thus, when the defendant pled guilty to the crimes charged in the indictment, he pled guilty to crimes whose statutory elements involved putting others in fear, not violence to the person. *Id.* A plain reading of the statute meant the defendant’s prior crime was not a prior violent felony.³ *Id.* However, the trial court disregarded the language and conducted an examination of the defendant’s conduct in the proposed felony to determine whether the defendant’s conduct might have involved the use of violence to the person and found his conduct did involve “violence to the person.” *Id.*

On direct appeal, “Sims assert[ed] that the statutory definition of the prior violent felony aggravator only permits an examination of the statutory elements of the felony without regard for the facts in a particular case.” *Id.* at 11. Instead, this Court held that if the statutory

³ It is important to note, that under the “force clause” of the ACCA which was held to be constitutional and not vague, the sentencing court’s analysis would have stopped here, and no further examination of the underlying felony would be conducted. *See Johnson v. United States*, 135 S.Ct. 2551, 2557 (2015). Tennessee prior violent felony aggravator is therefore more akin to the ACCA’s residual clause than the “force clause” because “[t]he court’s task goes beyond deciding whether creation of risk is an element of the crime. That is so because, unlike the part of the definition of a violent felony that asks whether the crime “has as an element the use ... of physical force,” the residual clause asks whether the crime “involves conduct” that presents too much risk of physical injury.” *Id.*

elements of a generic prior conviction may be satisfied with or without proof of violence, then the trial judge “must necessarily examine the facts underlying the prior felony” to determine whether the prior conviction satisfies the prior violent felony aggravating circumstance. *Id.*

This Court reached this conclusion despite the amendments to the prior violent felony aggravating circumstance, ostensibly requiring that the statutory *elements* of the prior felony involve the use of violence to the person. *Id.* As a result, even though the statutory elements of the prior violent felony purportedly supporting the application of the aggravating circumstances to the defendant in *Sims* specifically did not involve the use of violence to the person, this Court held that the conduct of the offense nonetheless supported the application of the aggravating circumstance. *Id.* at 12. This Court reasoned:

In determining whether the statutory elements of a prior felony conviction involve the use of violence against the person for purposes of § 39–13–204(i)(2), we hold that the trial judge must necessarily examine the facts underlying the prior felony if the statutory elements of that felony may be satisfied either with or without proof of violence. **To hold otherwise would yield an absurd⁴ result**, the particular facts of this case being an ideal example.

Id. at 11–12 (emphasis added). The *Sims* Court effectively annulled the

⁴ While the absurdity doctrine is used in Tennessee’s canons of construction, it is to be used sparingly. *Seals v. H & F, Inc.*, 301 S.W.3d 237, 250–51 (Tenn. 2010). There this Court explained: “[T]he “absurdity doctrine” remains a part of our state’s law of statutory construction, albeit one that should be applied sparingly—only when a result is manifestly absurd, and not simply unpleasant or peculiar.” *Id.*

introduction of the word elements into the statute as amended and continued to maintain the prior analysis of underlying facts. Through *Sims*, the constitutional error of the prior statute was incorporated into the amended version. Indeed, the *Sims* court specifically rejected the notion that the new statute (including the word “elements”) should alter the analysis Tennessee courts already employed under the prior version of the statute and endorsed continued use of an underlying fact analysis. *Id.* at 11.

Now, *Johnson* prohibits the *Sims* procedure. Using the *Sims* procedure, depending on the particular inquiry conducted by a Court in a particular case, a defendant could be faced with a death sentence or not. Under the *Sims* procedure the court can find a prior violent felony is indeed violent based on its own inquiry of the underlying facts even if the statutory elements of that offense charged did not involve the use of violence to the person. *Sims*, S.W.3d. at 12. This procedure clearly fails to provide notice of what prior felonies may be used to sentence a person to death. “It is impermissible for ‘a particular crime [to] sometimes count towards enhancement and sometimes not, depending on the facts of the case.’” *Mathis*, 136 S.Ct. at 2251 (quoting *Taylor*, 495 U.S. at 601).⁵

A law increasing a sentence based on vague requirements violates

⁵ Again, the act of a sentencing court analyzing facts of the underlying conviction and the defendant’s conduct in a given case raises serious concerns regarding the defendant’s Sixth Amendment right to have a jury determine all facts which can be used to determine the maximum penalty faced by a defendant. *See Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000).

due process because it fails to give ordinary people fair notice of the conduct to which it applies and invites arbitrary enforcement. *Johnson*, 135 S.Ct. at 2556–63. The Tennessee courts’ application of the prior violent felony aggravator is arbitrary and violates due process. *Johnson* prohibits an after-the-fact inquiry into whether the conduct involved in that conviction qualifies as a violent felony—as opposed to limiting the inquiry to the statutory elements of the prior conviction—when the language of the statute clearly calls for such limited inquiry. *Johnson*, 135 S. Ct. at 2557, 2562; *See also Mathis*, 136 S.Ct. at 2255 and *Dimaya*, 138 S.Ct. 1216–17.

Ultimately, the introduction of the word “elements” into the Tennessee sentencing statute failed to reign in the sentencing courts’ examination of the underlying facts which results in a lack of notice and arbitrary enforcement against a capital defendant. By combining the language signaling the categorical approach and then expanding the proper inquiry beyond the language of the statute and into the underlying facts of a given case, Tennessee’s prior violent felony aggravator is so vague that it runs afoul of Mr. Nichols’s right to Due Process of Law.

F. The Court of Criminal Appeal Erred in Denying the *Johnson* Claim.

The Court of Criminal Appeals in Mr. Nichols’s case found that the *Johnson* claim had no merit. The lower court’s denial relied on this Court’s prior decisions in *Sims* and *State v. Moore*, 614 S.W.2d 348, 351 (Tenn. 1981). 2019 WL5079357, at *6. In doing so, the appellate court held that a trial court must examine the facts underlying the prior felony

if the statutory elements of that felony may be satisfied either with or without proof of violence. *Id.* This analysis, however, is now erroneous under the guidance of *Johnson v. United States*. After *Johnson*, it is improper for a trial court to examine the underlying facts of the specific felony conduct. See *Nordahl v. State*, 305 Ga. at 20 (state courts must follow the United States Supreme Court’s precedent in the ACCA cases because that analysis is based in Sixth Amendment principles).

The trial court’s application of the prior violent felony aggravator in this case was arbitrary and, as a result of the procedure required of Tennessee’s sentencing judges, violated Mr. Nichols’s due process rights. *Sims* was decided 18 years ago, and *Johnson* now prohibits a trial court from determining whether any conviction involved conduct justifying an enhanced punishment, without limiting that inquiry to the previously-defined statutory elements of the conviction because doing so leads to arbitrary results. *Johnson*, 135 S.Ct. at 2559. The Supreme Court found this to be true even where “common sense” might dictate what type of conduct is involved in committing certain offense. *Id.*

Furthermore, this Court has issued no published opinion addressing this new substantive constitutional rule and constituting controlling law on this issue. Such a decision fully-addressing the merits of Mr. Nichols’s claim pursuant to *Johnson v. United States* is necessary to determine *Johnson’s* application to the “prior violent felony” aggravator in Tennessee. See Tenn. R. App. P. 11 (a) (1-2).

G. A Statute That Is Unconstitutionally Vague Is Void Regardless of Whether It Is Vague in Every Instance.

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. The fact that some crimes would necessarily require the type of conduct required to satisfy the statutory requirements does not make it less vague when applied to other crimes. “[O]ur holdings squarely contradict the theory that a vague provision is constitutional because there is some conduct that clearly falls within the provision’s grasp.” *Id.* at 2561 (citing *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 89 (1921) (holding that a law prohibiting groceries from charging unjust or unreasonable rates was void for vagueness) and *Coates v. Cincinnati*, 402 U.S. 611 (1971) (holding that a law prohibiting persons on sidewalks from conducting themselves in a “manner annoying to persons passing by” was void for vagueness)). The fact that in application a statute could clearly encompass some conduct is not enough to cure unconstitutional vagueness.

In *Johnson*, the Court held “[i]nvoking so shapeless a provision to condemn someone to prison for 15 years to life does not comport with the Constitution’s guarantee of due process.” 135 S.Ct. at 2560. The statute cannot be vague in application to any defendant; if its application is vague in one instance, then its application is vague in all instances and is rendered unconstitutional.

Just as was the case in *Johnson*, here the application of Tennessee’s prior violent felony aggravator to Mr. Nichols’s case “does not comport

with the Constitution’s guarantee of due process.” *Id.* at 2560. The fact that Mr. Nichols’s prior violent felony aggravator was a “rape” conviction is not enough to provide definiteness to a statute which on its face is vague. Indeed, if a sentence enhancement of 15 years to life under the ACCA’s now unconstitutional residual clause violates due process of law then in a capital case which enjoys the protection of heightened due process produces an invalid sentence of death. *Johnson*, at 2555–56; see also *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) and *Lockett v. Ohio*, 438 U.S. 586, 597–98 (1978) (both finding heightened due process protections in the context of capital case).

H. Harmless Error Analysis Is Not Properly Applicable in Mr. Nichols’s Case.

It cannot be harmless error for a jury to weigh and apply an unconstitutional aggravating factor in a capital case. In a weighing state—one whose capital sentencing scheme requires the sentencer to weigh aggravating and mitigating factors—such as Tennessee, it is constitutional error for the jury to give weight to an unconstitutionally vague aggravating factor, even if that jury also weighed other, valid aggravating factors. *Richmond v. Lewis*, 506 U.S. 40, 46–47 (1992); see also *Stringer v. Black*, 503 U.S. 222, 229–232 (1992), Tenn. Code Ann. § 39–13–204(e)(1). A vague aggravating factor used in the weighing process creates the possibility of arbitrariness and the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying upon the existence of an illusory circumstance. *Stringer*, at 235–236.

Here, Mr. Nichols's jury gave weight to an unconstitutionally vague aggravator—the prior violent felony conviction aggravating circumstance. PC vol. II at 90. The jury was instructed on just one other aggravator—the felony murder aggravating factor—which was invalidated as unconstitutional on direct appeal based on *Middlebrooks* error. *State v. Nichols*, 877 S.W.2d, 738; *State v. Middlebrooks*, 840 S.W.2d 317, 346 (Tenn. 1992); PC Vol. II at 97–98. Because there is no other aggravating factor supporting the verdict of death, conducting a harmless error analysis is not possible here. To meaningfully conduct a harmless error analysis, the reviewing court must completely examine the record for the presence of factors that potentially influenced the sentence, including but not limited to the following: 1) the number and strength of remaining valid aggravating circumstances; 2) the prosecutor's argument at sentencing; 3) the evidence admitted establishing the invalid aggravator; and 4) the nature, quality and strength of mitigating evidence. *State v. Howell*, 868 S.W.2d, 260–261. These factors are completely dependent on the existence of at least one remaining valid aggravator. Because there is no remaining valid aggravating factor, this analysis cannot apply to Mr. Nichols's case.

Conclusion

For these reasons, this Court should grant Mr. Nichols's application for permission to appeal, grant sentencing relief and impose a sentence of life with the possibility of parole. In the alternative, Mr. Nichols asks for this Court to remand his case to the trial court for further proceedings.

Respectfully Submitted,

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Certificate of Service

I hereby certify that a true and exact copy the foregoing was provided via hand-delivery or first-class mail to Nicholas W. Spangler, Senior Assistant Attorney General, Criminal Appeals Division. Office of the Attorney General, P.O. Box 20207, Nashville, TN 37202 on this 6th day of December, 2019.

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