

CAPITAL CASE¹

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 COURT OF CRIMINAL APPEALS OF TENNESSEE

**REPLY TO RESPONDENT'S BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI**

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¹ On July 17, 2020, Tennessee's Governor reprieved Mr. Nichols' execution through the end of the year. Executive Order available at:

http://www.tncourts.gov/sites/default/files/docs/nichols-notice_of_governors_reprieve.pdf

TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ii

I. Corrections to Respondent’s Statement of Facts 1

 A. The crimes used for the prior felony aggravating circumstance occurred after the murder 1

 B. The post-conviction court rejected the life sentence agreement based on the erroneous premise that the rule in *Johnson v. United States*, 135 S. Ct. 2551 (2015) was not retroactive to cases on collateral review..... 1

II. Question One: The death sentence violates the Eighth and Fourteenth Amendments because the state court arbitrarily and capriciously overrode of the life sentence agreement 3

 A. This issue was fairly presented to the state court 3

 B. The federal question is properly presented to this Court for review 6

III. Question Two: The prior violent felony conviction aggravating circumstance is void for vagueness 7

 A. State laws must abide by the Eighth and Fourteenth Amendments to the United States Constitution..... 9

 B. The aggravator’s plain language is unconstitutionally vague and fails to provide a standard that prevents arbitrary application or notice to defendants 10

IV. Question Three: Mr. Nichols is actually innocent of the death penalty because the sole aggravating circumstance is void for vagueness..... 12

V. Conclusion 13

INDEX TO APPENDIX

Appendix L: Order, *Donnie Johnson v. State*, No. W2017-00848-CCA-R28-PD (Tenn. Crim. App. Sept. 11, 2017) (unpublished) *perm. app. denied*, (Tenn. Jan. 19, 2018) *cert denied*, 139 S. Ct. 67 (Oct.1 2018) 239a

TABLE OF AUTHORITIES

Federal Cases

<i>Coates v. Cincinnati</i> , 402 U.S. 611 (1971)	11
<i>Furman v. Ga.</i> , 408 U.S. 238 (1972)	4
<i>Godfrey v. Ga.</i> , 446 U.S. 420 (1980)	9
<i>Henry v. Spearman</i> , 899 F.3d 703 (9th Cir. 2018)	10
<i>In re Harold Wayne Nichols</i> , No. 19-8179, 2020 WL 3038413 (Jun. 8, 2020)	8
<i>Johnson v. United States</i> , 135 S. Ct. 2551 (2015)	1, 10, 12
<i>Maynard v. Cartwright</i> , 486 U.S. 356 (1988)	9
<i>North Carolina v. Alford</i> , 400 U.S. 25, 38 (1970)	4
<i>O’Sullivan v. Boerckel</i> , 526 U.S. 838 (1999)	5
<i>Picard v. Connor</i> , 404 U.S. 270 (1971)	3
<i>Richmond v. Lewis</i> , 506 U.S. 40 (1992)	9
<i>Romano v. Okla.</i> , 512 U.S. 1 (1994)	11
<i>Sessions v. Dimaya</i> , 138 S. Ct. 1204 (2018)	10, 11
<i>Shell v. Mississippi</i> , 498 U.S. 1 (1990)	9
<i>Smith v. Goguen</i> , 415 U.S. 566 (1974)	12

<i>United States v. Davis</i> , 139 S. Ct. 2319 (2019)	11, 12
<i>United States v. Gaskins</i> , 485 F.2d 1046 (D.C. Cir. 1973)	4
<i>United States v. Moore</i> , 916 F.2d 1131 (6th Cir. 1990).....	4
<i>Zant v Stephens</i> , 462 U.S. 862 (1983)	11
 State Cases	
<i>State v. Ford</i> , 643 S.W. 2d 913 (Tenn. Crim. App. 1982)	4
<i>State v. Moore</i> , 614 S.W.2d 348 (Tenn. 1981)	9
<i>State v. Moore</i> , 814 S.W.2d 381 (Tenn. Crim. App. 1991)	7
<i>State v. Williams</i> , 851 S.W.2d 828 (Tenn. Crim. App. 1992).....	3, 4
 State Statutes	
Tenn. Code Ann. § 39-13-204(i)(2) (1988)	7
Tenn. Code Ann. § 39-13-206	5
Tenn. Code Ann. § 40-30-102(b)(1)	6
Tenn. Code Ann. § 40-30-111(a)	7
Tenn. Code Ann. § 40-30-117	6
 Rules	
Tenn. Sup. Ct. R. 39	5
 Constitutional Provisions	
U.S. Const. amend. VIII	9
U.S. Const. amend. XIV	9

Reply to Brief in Opposition

I. Corrections to Respondent's Statement of Facts

A. **The crimes used for the prior felony aggravating circumstance occurred after the murder**

Respondent's brief in opposition ("BIO") obfuscates the fact that the crimes supporting the prior violent felony aggravator took place after the murder. *Compare* Petition p.3 ("To support the prior violent felony aggravator, the prosecutor introduced evidence of five convictions for the aggravated rape of four women that occurred after the capital murder."), *with* BIO p.2 (first noting that, "Over the course of several months in 1988 and 1989, Nichols raped multiple women," then revealing September 30, 1988, as the date of the capital crime). Using after-the-fact crimes to increase punishment for an earlier-occurring crime denies notice to defendants and also strips the prior conviction aggravator of any recidivist value.

B. **The post-conviction court rejected the life sentence agreement based on the erroneous premise that the rule in *Johnson v. United States*, 135 S. Ct. 2551 (2015) was not retroactive to cases on collateral review**

The BIO omits the fact that the post-conviction court denied Petitioner's *Johnson* claim upon the erroneous premise that *Johnson* was not retroactive. *Compare* Petition p.9 ("Two days before the scheduled hearing, however, the court entered an order summarily denying relief. It denied the *Johnson* claim finding that the new rule *Johnson* announced was not retroactive."), *with* BIO p.4 (noting that the Tennessee Court of Criminal Appeals denied a *Johnson* claim in a different case and, "[a]ccordingly, the post-conviction court found Nichols's petition was 'appropriate for disposition without a hearing' and that it was 'not appropriate to

accept ... [the] proposed settlement agreement ... where there is no claim for post-conviction relief before this Court which should survive this Court’s statutorily required preliminary order.”). In the “different case” alluded to by Respondent the Tennessee Court of Criminal Appeals stated in an unpublished order that *Johnson* was not retroactive. *Donnie Johnson v. State*, No. W2017-00848-CCA-R28-PD (Tenn. Crim. App. Sept. 11, 2017) (unpublished order) *perm. app. denied* (Tenn. Jan. 19, 2018) *cert denied*, 139 S. Ct. 67 (Oct.1 2018). (Pet. App. 239a-244a).

Here, the post-conviction court determined that Petitioner was not entitled to relief because of that order in *Donnie Johnson v. State, supra*. It also decided that Petitioner was not entitled to relief even if this Court’s ruling in *Johnson* was retroactive, finding that *Johnson* did not apply to the pre-1989 version of the aggravating circumstance. (Pet. App. 24a-27a). The post-conviction court therefore determined that the *Johnson* claim “should [not] survive” the court’s initial colorable-claim order and the court rejected the life sentence agreement. (Pet. App. 42a).

The Tennessee Court of Criminal Appeals rejected both of the reasons why the post-conviction court found Petitioner’s *Johnson* claim lacking. The state appeals court reversed course from its earlier decision in *Donnie Johnson v. State, supra*, and determined that *Johnson* “*did* announce a new substantive rule which applied retroactively on collateral review.” (Pet. App. 8a) (emphasis added). It also rejected any distinction between the pre-1989 version and the present version of the aggravator. (Pet. App. 9a). The court, however, affirmed for a different reason: that the aggravator’s statutory language is not void-for-vagueness because “courts are to

look to the actual facts of the prior felony to determine the use of violence[.]” (Pet. App. 9a).

II. Question One: The death sentence violates the Eighth and Fourteenth Amendments because the state court arbitrarily and capriciously overrode of the life sentence agreement

Respondent recasts the question presented as a state law issue regarding a trial court’s jurisdiction to accept a proposed settlement agreement, (BIO p.6), and argues that the issue presented in Question One was not presented below (BIO p.8). Petitioner, however, fairly presented the state court with the Eighth and Fourteenth Amendment argument that the post-conviction court arbitrarily vetoed the parties’ life sentence agreement.

A. This issue was fairly presented to the state court

Addressing Respondent’s second argument first, a claim is exhausted and properly presented for federal review if the federal claim’s factual and legal substance was presented to the state court for consideration of the federal claim on its merits. *Picard v. Connor*, 404 U.S. 270, 275 (1971). The BIO acknowledges that the issue was presented to the state court but argues Petitioner “did not cite specifically to the Eighth Amendment nor did he brief any Eighth Amendment argument.” (BIO p.9). Petitioner’s appellate brief cited both federal and state law and presented the Tennessee Court of Criminal Appeals with a question regarding the post-conviction court’s erroneous denial of the life sentence agreement. (Resp. App. 11a, 61a-71a).

For example, Petitioner cited *State v. Williams*, 851 S.W.2d 828, 830 (Tenn. Crim. App. 1992), (Resp. App. 61a) which explains that state and federal rules

regarding plea bargains “are substantially the same.” The *Williams* case, *supra*, addressed constraints on a trial court’s discretion over a plea agreement, stating: “That there is discretion at all implies that there are limits to its exercise. It must not be arbitrary.” *Williams*, 851 S.W.2d at 832 (citing *North Carolina v. Alford*, 400 U.S. 25, 38 (1970); *see also United States v. Gaskins*, 485 F.2d 1046, 1048 (D.C. Cir. 1973)). Petitioner’s state-court briefing repeatedly cited the Eighth and Fourteenth Amendments and explained why the post-conviction court’s rejection of the life sentence agreement was “capricious, arbitrary, or palpably abusive of the court’s discretion.” (Resp. App. 64a) (quoting *State v. Ford*, 643 S.W. 2d 913, 916 (Tenn. Crim. App. 1982)). “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.’” (Resp. App. 69a) (quoting *United States v. Moore*, 916 F.2d 1131, 1136 (6th Cir. 1990)). Petitioner’s brief cited *Furman v. Georgia*, 408 U.S. 238 (1972), (Resp. App. 70a), and argued further that, “[a]rbitrary 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.” (Resp. App. 69a-71a) (discussing principles of equal protection and due process).

The state appellate court recognized the federal issue, acknowledging: “Petitioner asserts that the post-conviction court abused its discretion and acted arbitrarily and without legal authority in concluding 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." (Pet. App. 16a).

The justiciability of this claim also is not affected by Respondent's assertion that this issue was "abandoned" in Petitioner's application for permission to appeal to the Tennessee Supreme Court. (BIO p.10). A Tennessee defendant need not file an application for permission to appeal to the Tennessee Supreme Court following an adverse decision of the Court of Criminal Appeals in order to exhaust all available state court remedies. Rule 39 of the Tennessee Supreme Court governs "exhaustion of remedies" and provides:

In all appeals from criminal convictions or post-conviction relief matters from and after July 1, 1967, *a litigant shall not be required to petition for rehearing or to file an application for permission to appeal to the Supreme Court of Tennessee following an adverse decision of the Court of Criminal Appeals in order to be deemed to have exhausted all available state remedies respecting a claim of error. Rather, when the claim has been presented to the Court of Criminal Appeals or the Supreme Court, and relief has been denied, the litigant shall be deemed to have exhausted all available state remedies available for that claim.* On automatic review of capital cases by the Supreme Court pursuant to Tennessee Code Annotated, § 39-13-206, a claim presented to the Court of Criminal Appeals shall be considered exhausted even when such claim is not renewed in the Supreme Court on automatic review.

Tenn. S. Ct. R. 39; *See also O'Sullivan v. Boerckel*, 526 U.S. 838, 847 (1999) ("The exhaustion doctrine ... turns on an inquiry into what procedures are 'available' under state law."). This issue was fairly presented to the Tennessee Court of Criminal Appeals (Resp. App. 9a, 11a, 61a-71a), it is deemed exhausted under Tenn. S. Ct. R. 39, and it is properly presented to this Court for review.

B. The federal question is properly presented to this Court for review

Respondent's next argument against certiorari review characterizes the constitutional issue as a matter concerning the state court's jurisdiction. (BIO p.6) (arguing the question is "whether the post-conviction court had jurisdiction under [state law] to commute Nichols's death sentence"). The BIO further clouds the question presented by characterizing the parties' supplemental briefing below as "address[ing] jurisdictional issues of state law" without revealing that the briefing related to the jurisdiction of the *appellate* court, not the trial court. (Resp. App. 107a-125a) (briefing the nature of the appeal as an appeal of right; *see also* Pet. App. 1a, 7a). The question presented to this Court does not concern the state court's jurisdiction.

There is no dispute that prosecutors maintain discretion in cases with obtained convictions or that judges retain some authority over prior judgments.² In this case, because Tennessee law expressly provides a remedy for a new retroactive right. *See* Tenn. Code Ann. § 40-30-102(b)(1); *see also* Tenn. Code Ann. § 40-30-117 (providing for motions to reopen post-conviction proceedings). The state post-

² For example, a California county prosecutor recently announced: "if the governor's moratorium [on executions] were lifted, he would move to convert the county's death sentences to life without parole." Robert Salonga, *Santa Clara County District Attorney unveils wide-ranging reform plan to address racial equity disparities in prosecutions: Jeff Rosen announces he's dropping death penalty charges, revamps charging criteria, increasing police oversight, and backing off minor violations*, The Mercury News (Jul. 22, 2020), available at: <https://www.mercurynews.com/2020/07/22/santa-clara-county-district-attorney-unveils-wide-ranging-reform-plan-to-address-racial-equity-disparities-in-prosecutions/>

conviction court had jurisdiction over the final judgment to apply the retroactive rule from this Court's *Johnson* decision to Petitioner's case.

The Tennessee Court of Criminal Appeals' decision focused on a provision of the state's post-conviction statute regarding the disposition of post-conviction petitions, Tenn. Code Ann. § 40-30-111(a). Relief under that provision is available if the post-conviction court finds a denial or infringement of rights that renders the judgment void or voidable, although that provision does not directly address the issue of settlement. (*See* Pet. App. 18a) (quoting *State v. Moore*, 814 S.W.2d 381, 383 (Tenn. Crim. App. 1991) (acknowledging circumstances "authorized by statute or rule" allow a post-conviction to change a defendant's sentence)). If the post-conviction court had held oral argument on the *Johnson* claim as scheduled, Petitioner's counsel could have addressed the state court's erroneous belief that *Johnson* is not retroactive. Had the court's erroneous belief about retroactivity been corrected, there would have been no question that the court could enter the sentencing agreement. (Resp. App. 95a-99a).

But for the arbitrary and capricious judicial override of the parties' sentencing agreement Petitioner would currently be serving a life sentence. Review of this important issue should be granted.

III. Question Two: The prior violent felony conviction aggravating circumstance is void for vagueness

This case squarely presents the question whether Tennessee's prior violent felony aggravating circumstance, which comprises a prior conviction that "involve[s] the use or threat of violence to the person," Tenn. Code Ann. § 39-13-204(i)(2) (1988), is unconstitutionally vague under *Johnson*. Respondent's BIO fails to

address the plain language of the prior violent felony aggravator. Respondent does not deny that qualifying convictions for the aggravator are not identifiable by their elements. Nor does Respondent contest the fact that qualifying convictions are unknowable until after a murder is committed and after an even later determination about the aggravator's applicability is made. Respondent, instead, seeks to avoid review of Petitioner's *Johnson* claim by arguing that this is a state law issue and by asserting that the aggravator cannot be unconstitutionally vague because it is applied without use of a categorical approach. Both contentions are wrong.

As a preliminary matter, Respondent also wrongly contends that Mr. Nichols previously presented this issue to the Court. (BIO p.10) ("Nichols also asks this Court—and not for the first time—to invalidate Tennessee's statutory prior-violent-felony aggravating factor."). And Respondent improperly cites to this Court's denial of an original writ of habeas corpus as a rejection of "Nichols's 'vagueness' theory." (BIO p.11) (citing *In re Harold Wayne Nichols*, No. 19-8179, 2020 WL 3038413 (Jun. 8, 2020)). The petition for an original writ of habeas corpus presented a jurisdictional question of the federal court of appeals' ability to decide the merit of a claim presented in an application for authorization to file a second or successive petition. *In re Harold Wayne Nichols*, No. 19-8179, Original Writ at i (question presented). Although the second habeas petition for which authorization to file was requested contained the *Johnson* claim, Petitioner's request for an original writ did not present this Court with the ultimate merit of the claim.

A. State laws must abide by the Eighth and Fourteenth Amendments to the United States Constitution

The constitutionality of state criminal sentencing statutes is not a state law issue. In particular, “if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty.” *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980). Accordingly, this Court has ruled that Georgia’s “outrageously or wantonly vile, horrible and inhuman” aggravating circumstance was unconstitutionally vague under the Eighth Amendment, *Godfrey, supra*, and likewise for Oklahoma’s “especially heinous, atrocious, or cruel” aggravator. *Maynard v. Cartwright*, 486 U.S. 356 (1988). *See also Shell v. Mississippi*, 498 U.S. 1 (1990) (limiting instruction used to define the “especially heinous, atrocious, or cruel” aggravating factor was unconstitutionally vague); *Richmond v. Lewis*, 506 U.S. 40 (1992) (same for Arizona aggravating factor). In those cases, the plain language of a state’s aggravating factor or jury instruction related to an aggravating factor was deemed unconstitutionally vague or overbroad because it failed to provide any “inherent restraint on the arbitrary and capricious infliction of the death sentence.” *Godfrey*, 446 U.S. at 428.

This case presents a similar challenge to the constitutionality of Tennessee’s prior violent felony aggravating factor. Respondent does not dispute that the aggravator’s plain language is vague but defends the state court’s practice of determining whether a prior conviction involved, “in fact[,] either violence or threat of violence to a person,” because that practice does not utilize a categorical approach. (BIO p.12) (quoting *State v. Moore*, 614 S.W.2d 348, 351 (Tenn. 1981)).

Johnson dictates, however, that the act of looking beyond the elements of the prior conviction and basing a 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. *Johnson*, 135 S. Ct. at 2556-59.

B. The aggravator’s plain language is unconstitutionally vague and fails to provide a standard that prevents arbitrary application or notice to defendants

Respondent’s position on this claim ignores the vague language of Tennessee’s prior violent felony aggravator discussed in Mr. Nichols’ petition (*see, e.g.*, Petition pp.14-19) and aligns itself with the state court’s faulty decision by relying entirely on the argument that state law does not require a categorical approach to the aggravator. (BIO pp.10-13). But, as Nichols explained in the petition, the categorical approach did not cause the problem with the ACCA’s residual clause laid bare by the *Johnson* decision; the clause’s vague language was the problem. (Petition p.20). *Johnson* noted that the history of courts struggling with the residual clause could “provide evidence of vagueness,” *Johnson*, 135 S. Ct. at 2558, or “confirm its hopeless indeterminacy.” *Id.* “*Johnson* did not expressly limit its holding based on the residual clause’s record in the courts, but said that this evidence confirmed its earlier holding that the residual clause is unconstitutional.” *Henry v. Spearman*, 899 F.3d 703, 711 (9th Cir. 2018) (authorizing a second or successive petition challenging California’s second-degree felony-murder rule under *Johnson*). For instance, “the provision at issue in [*Sessions v.*] *Dimaya*, [138 S. Ct. 1204, 1223 (2018)], lacked this troubled history, yet the Court reaffirmed that judicial experience struggling with a statute is not

necessary for it to be declared impermissibly vague.” *Id.* The state courts need not use a categorical approach for this Court to find the aggravator is impermissibly vague.

Respondent’s reliance on the state court’s case-by-case fact determinant approach to classifying prior convictions only highlights the fact that the aggravator’s vague language is not narrowed or defined by judicial precedent. Application of the aggravator is dependent upon a review of the defendant’s past conduct underlying a prior conviction and this leads to arbitrary and overly-broad application. *See United States v. Davis*, 139 S. Ct. 2319, 2331-32 (2019). There is no guidance as to what the state court’s case-specific review entails, what criteria is used to determine the presence or absence of “violent” conduct, or what threshold must be met for past conduct to qualify for the prior violent felony aggravator. Such an unascertainable, subjective standard renders the aggravator vague in all its applications. *See generally Coates v. City of Cincinnati*, 402 U.S. 611 (1971) (holding unconstitutional a criminal violation reliant upon a police officer’s annoyance with the defendant’s conduct). *See also Romano v. Oklahoma*, 512 U.S. 1, 7 (1994) (The criteria that make defendants eligible for the death penalty must “genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.”) (quoting *Zant v Stephens*, 462 U.S. 862, 877 (1983)).

Finally, the BIO attempts to align Tennessee’s prior conviction aggravator with the case-specific approach mentioned in *Johnson* and *Dimaya* by characterizing the state court practice as “an evaluation of real-world facts of the

particular case,” (BIO p.12) (emphasis added), which obfuscates the fact that the evaluation is not related to offense conduct in the present capital prosecution. The *Johnson* Court clearly rejected treating offense statutes and sentencing statutes the same. *Johnson*, 135 S. Ct. at 2562. The statute at issue in *Davis* involved “the conduct with which the defendant is *currently charged.*” *Davis*, 139 S. Ct. at 2327. The *Davis* Court emphasized this distinction, pointing out that the statutes in *Johnson* and *Dimaya* required a determination of a defendant’s prior conviction. *Id.* See also *id.* at 2329-30 (further distinguishing statutes that refer to presently charged conduct rather than a past conviction). *Johnson*’s fundamental holding applies to instances where a sentencer engages in an after-the-fact consideration of conduct underlying a prior conviction based on a cold record to determine whether the prior conviction qualifies as a violent felony. *Johnson*, 135 S. Ct. at 2558; see also *Smith v. Goguen*, 415 U.S. 566, 575 (1974) (explaining that any judicial narrowing of a vague statute must occur before the defendant commits the crime for which the enhanced punishment is to be imposed). The state court’s present-day determination that a defendant’s long-ago conduct will increase punishment for a crime currently under prosecution fails to provide constitutional notice – an issue Respondent does not even address.

Review should be granted to align Tennessee’s capital sentencing scheme with the fundamental requirements of Due Process.

IV. Question Three: Mr. Nichols is actually innocent of the death penalty because the sole aggravating circumstance is void for vagueness

Respondent’s brief fails to address the third question presented. As Mr. Nichols explained in his petition, (Petition pp. 25-27), the sole aggravating circumstance is

void for vagueness and, therefore, this case presents an innocence question of exceptional importance that should now be answered.

V. Conclusion

For these reasons, Petitioner requests that this Court grant the Petition for Writ of Certiorari.

Respectfully submitted,

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