

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT KNOXVILLE  
September 24, 2019 Session

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**NICHOLAS TODD SUTTON v. STATE OF TENNESSEE**

**Appeal from the Criminal Court for Morgan County**  
**No. 7555 Jeffrey H. Wicks, Judge**

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**No. E2018-00877-CCA-R3-PD**

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In 1986, the Petitioner, Nicholas Todd Sutton, was convicted of the January 15, 1985 first degree murder of Carl Estep, which occurred while both were inmates at the Morgan County Regional Correctional Facility. At sentencing, the jury imposed the death penalty based upon the weight of three aggravating circumstances. The Petitioner's conviction and death sentence were affirmed on appeal. *State v. Sutton*, 761 S.W.2d 763 (Tenn. 1988), *cert. denied*, 497 U.S. 1031 (1990). The Petitioner unsuccessfully pursued post-conviction relief, the denial of which was affirmed by this court. *Nicholas Todd Sutton v. State*, No. 03C01-9702-CR-00067, 1999 WL 423005 (Tenn. Crim. App. June 25, 1999), *perm. app. denied* (Tenn. Dec. 20, 1999), *cert. denied*, 530 U.S. 1216 (2000). The Petitioner then unsuccessfully pursued federal habeas corpus relief, the denial of which was affirmed by the Sixth Circuit Court of Appeals. *Sutton v. Bell*, 645 F.3d 752 (6th Cir. 2011), *cert. denied*, 566 U.S. 933 (2012).

On June 8, 2016, the Petitioner filed a motion to reopen post-conviction proceedings, alleging that the United States Supreme Court's decision in *Johnson v. United States*, 576 U.S. \_\_\_, 135 S. Ct. 2251 (2015), announced a new constitutional rule requiring retrospective application to reopen post-conviction proceedings that invalidates the prior violent felony aggravating circumstance in his case. *See* T.C.A. § 40-30-117(a)(1) (2018). Based upon the post-conviction court's finding that the Petitioner had stated a colorable claim, the Petitioner amended the post-conviction petition with additional claims. *Id.* §§ 40-30-106 (2018), -107 (2018), 117(b) (2018). Upon prehearing consideration, the post-conviction court summarily denied relief. *Id.* § 40-30-109(a) (2018). The Petitioner now appeals from the post-conviction court's order summarily denying relief on the amended post-conviction petition and argues that (1) the decision in *Johnson* invalidated the prior violent felony aggravating circumstance; (2) the post-conviction court's summary denial following the amendment of the post-conviction petition was improper because (a) the United States Supreme Court's decision in *Hurst v. Florida*, 577 U.S. \_\_\_, 136 S. Ct. 616 (2016), invalidated the death sentence; (b) the Petitioner's appearance in shackles before the jury at the original trial violated his due

process rights; (c) the jury selection process produced a jury skewed in favor of a death sentence; (d) trial counsel rendered the ineffective assistance of counsel relative to the investigation and the presentation of evidence concerning the Petitioner's mental health; (e) the State committed prosecutorial misconduct when placing the knives on trial counsel's table within reach of the Petitioner and his codefendants, causing officers to "reach[] for their weapons" and trial counsel were ineffective for not seeking a mistrial based upon the display of the knives; (f) the Petitioner's experience of mistreatment and unsafe conditions while incarcerated at Brushy Mountain State Prison and Morgan County Regional Correctional Facility violated the Eighth Amendment's prohibition against cruel and unusual punishment; (g) the death sentence in this case was arbitrarily sought following the State's offering a sentence of life imprisonment during pretrial plea negotiations; (h) the State's reliance on a prior murder conviction that was committed when the Petitioner was eighteen years of age to establish the prior violent felony aggravating circumstance violated the Eighth Amendment; (3) the Assistant District Attorney General's previous representation of the victim, Carl Estep, creates an actual conflict of interest and an appearance of impropriety requiring disqualification and a rehearing of the post-conviction proceedings; and (4) the cumulative errors render unconstitutional the imposition of the death penalty in this case. Following our review, we affirm the judgment of the post-conviction court.

### **Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed**

ROBERT H. MONTGOMERY, JR., J., delivered the opinion of the court, in which THOMAS T. WOODALL and ROBERT W. WEDEMEYER, JJ., joined.

Justyna Garbaczewska Scalpone, Post-Conviction Defender; Deborah Y. Drew, Deputy Post-Conviction Defender; Andrew L. Harris, Assistant Post-Conviction Defender; and Lucie T. Butner, Assistant Post-Conviction Defender, Nashville, Tennessee, for the appellant, Nicholas Todd Sutton.

Herbert H. Slatery III, Attorney General and Reporter; Andree Sophia Blumstein, Solicitor General; James E. Gaylord, Senior Assistant Attorney General; Russell Johnson, District Attorney General; and Robert Edwards, Assistant District Attorney General, for the appellee, State of Tennessee.

## OPINION

### Factual and Procedural Background

A Morgan County Criminal Court jury convicted the Petitioner of the January 15, 1985 first degree murder of Carl Estep. The evidence presented at trial was summarized by the Tennessee Supreme Court:

The defendant Sutton and co-defendants Freeman and Street were residents of Guild 6 at the Morgan County Regional Correctional Facility on the day of the murder. The victim, Carl Estep, was a resident of Guild 5, which was located next to Guild 6. The facility is composed of one story buildings, guilds, which are equivalent to dormitories. Each guild has approximately 30 cells located along the outer walls. These cells are approximately 5' x 10' and have a wooden door with a vertical window. The cells contain a bunk bed for two inmates and have a toilet and sink. In the center of the guild is the correctional officer's station which is totally enclosed with glass. Also in the center of the guild are tables and benches and open space for the inmates, referred to as the dayroom area. The correctional officer, from his station in the center of the building, can observe the cells of the inmates. On January 15, 1985, when Carl Estep was murdered, there was no correctional officer in Guild 5 between 9:30 and 10:00 a.m. During a routine "shakedown" after 10:00 a.m. correctional officers found the body of Estep lying on the lower bunk of his cell in Guild 5. There were signs of a struggle and blood was observed on the wall, the bed covers and on Estep's body. Attempts made to revive Estep proved unsuccessful. The entire facility was then "locked down," and all inmates in Guild 5 were interviewed.

Estep, who had been serving a sentence for child molesting, had been stabbed thirty-eight times in the chest and neck. Most of the wounds were superficial, but nine were potentially fatal, having penetrated Estep's lungs, his vena cava and carotid artery. The examining pathologist testified that this latter wound would have caused death in a matter of minutes. There were seven defensive wounds on Estep's hands and right arm and a wound to the back of his head caused by a blow. It was the opinion of the pathologist that from the size of the wounds two knives had been used by Estep's attackers. On the bottom bunk investigating officers found two homemade knives, called "stickers" in prison jargon, which matched the wounds on Estep's body. A later investigation of the cell uncovered a third knife hidden under a lamp beside Estep's bed.

The testimony of four inmates, sometimes contradictory and evasive, linked the defendant Sutton to the murder. The first to testify was Harold Meadows, a resident of Guild 5. He testified that he was sitting in the dayroom area when he saw Sutton and Street enter the guild and go straight to Estep's cell. He stated that each day between 9:30 a.m. and shortly after 10:00 a.m. there was a period of five to ten minutes when no guards were in Guild 5 due to a duty change. It was during this time on January 15, that he observed Sutton and Street enter the guild. When they entered Estep's cell, his roommate immediately came out and shortly thereafter the volume of the tv or radio increased, and Meadows heard a scream, and Sutton and Street came out. When questioned by correctional officers immediately after the incident, he told them what he had seen and identified Sutton and Street from a photographic line-up. Meadows further testified that on Sunday, January 13, he had seen Estep having a "physical discussion" with Sutton and Street, during which Sutton held a knife to Estep's throat.

Another resident of Guild 5, Estel Green, testified that he was standing in front of the door to his cell (# 1), right next to Estep's cell (# 2), when he saw Sutton and another inmate go inside Estep's cell. Green then went into his cell. When he came back out, he saw the other men in the guild moving toward the back away from Estep's cell. Green moved away with them and heard Estep "holler out. He said, 'Don't do that; please don't do that.' [A]nd then he hollered louder, he hollered, 'Somebody help me; somebody please help me.' [A]nd that was all I heard." Green was not able to see who left Estep's cell.

Ralph Edward Scates was a resident of Guild 3, but he worked as a laundry man in Guild 1. Scates testified that he had a casual conversation with Street while Street was confined to Guild 1 for investigative purposes after the killing. Street admitted to Scates that "he [Street] cut him . . . he stuck him, cut his throat." Street said that homemade knives had been used and that he had tried to flush his down the commode in his cell in Guild 6. Scates stated that Sutton had told him, "The SB got exactly what he deserved."

The last inmate to testify for the State was Cary Scoggins. He testified that Estep was a marijuana dealer at the facility and had sold defendants some "bad merchandise" and had refused to refund the defendants' money. He testified that after the defendants took Estep's watch and some other articles, Estep had threatened to kill Sutton. Scoggins, a resident of Guild 6, happened to be in Guild 5 on the morning

of January 15 between 9:30 a.m. and 10:30 a.m. He stated that he saw Sutton, Street and Freeman come into the guild and enter Cell 2, Estep's cell. He looked through the window in the door of Estep's cell, a vertical window four inches by thirteen inches and saw all three defendants standing in front of the bunk bed with their backs to the window. He saw Estep try to get up from the bottom bunk and Sutton and Freeman pulled knives. Sutton started to stab Estep, who screamed. Scoggins stated that Sutton "just kept on stabbing" about sixteen times. The three defendants then washed their hands in the sink. Scoggins then moved away from the door and left the guild before the defendants did.

In order to contradict Scoggins' testimony, the defendant Freeman presented the testimony of Gary Lumbert, Scoggins' cellmate. Lumbert testified that Scoggins was working with him in the prison library at the time Estep was murdered.

The State recalled James Worthington, the administrative assistant to the warden at the time of the killing, and he testified that he had investigated the murder. He stated that Lumbert had told him that he was present in Guild 6 immediately after Estep had been killed, and that he observed Sutton and Street enter the guild, remove their clothes, and place their clothes in the laundry. Lumbert also told Worthington that Sutton bragged "about stabbing Carl Estep twenty-some times."

On January 15, two garbage bags found outside Guild 8 were brought to Worthington, one containing trash and the other prison clothing. A telephone pass for defendant Freeman was found in one pair of the pants. F.B.I. analysis of the debris from the clothing in the garbage bag revealed a hair consistent with that of the victim on a pair of button-fly jeans and a hair consistent with that of Charles Freeman on one of the jackets. A forensic serologist employed by the T.B.I. testified that she was able to identify a human blood stain matching the victim's blood type on the sleeve of one of the jackets, one of the knives and a work shirt. She also found human blood on one of the jackets, a pair of zipper-fly blue jeans and an elastic bandage. Tests were inconclusive as to whether human blood was on the other knife.

*Sutton*, 761 S.W.2d at 765-66. The jury acquitted Freeman. Street was convicted of first degree murder. At the penalty phase of the Petitioner's trial, the jury imposed the death penalty based upon its finding of three aggravating circumstances: (1) that the Petitioner was previously convicted of one or more felonies which involved the use or threat of

violence to the person, T.C.A. § 39-2-203(i)(2) (repealed); (2) that the murder was especially heinous, atrocious and cruel in that it involved torture or depravity of mind, *Id.* § 39-2-203(i)(5) (repealed); and (3) that the murder was committed by the defendant while he was in lawful custody or in a place of lawful confinement, *Id.* § 39-2-203(i)(8) (repealed).

On appeal to the Tennessee Supreme Court, the Petitioner challenged the sufficiency of the evidence to support the conviction and the aggravating circumstances. He also challenged the constitutionality of Tennessee's death penalty statutes, alleged that prosecutorial misconduct surrounding the State's notice of witnesses and placement of knives at defense counsel table deprived him of a fair trial, and raised evidentiary issues concerning the trial court's admitting bloody clothing and permitting the State to present Mr. Worthington as a rebuttal witness. The court affirmed the Petitioner's conviction and death sentence. *Sutton*, 761 S.W.2d at 764.

On December 14, 1990, the Petitioner filed a petition for post-conviction relief. Following hearing, the post-conviction court denied relief. On appeal, the Petitioner mounted constitutional challenges to his conviction and death sentence including allegations that prosecutorial misconduct occurred in the discovery process, that the trial court failed to adequately monitor the discovery process, that excessive courtroom security deprived him of a fair trial, that the State presented false testimony concerning prison conditions, that the State presented perjured testimony through Mr. Lumbert, that the State committed violations of *Brady v. United States*, 397 U.S. 742 (1970), and *Giglio v. United States*, 405 U.S. 150 (1972), and that the unsafe conditions in Tennessee Department of Correction facilities rendered his death sentence fundamentally unfair. The Petitioner also argued that trial counsel were ineffective for failing to challenge the lawful custody aggravating circumstance, adequately investigate and present mitigation evidence concerning the Petitioner's childhood, adequately investigate and present mitigation evidence concerning the Petitioner's mental health history, present an adequate and effective opening statement and closing argument at the penalty phase of the trial, effectively utilize co-counsel, object to jury instructions, object to instances of prosecutorial misconduct, and raise issues on direct appeal. The Petitioner also raised numerous challenges to the constitutionality of Tennessee's death penalty statute. Upon full consideration and review, this court affirmed the post-conviction court's denial of relief. *Nicholas Todd Sutton*, 1999 WL 423005, at \*32.

The Petitioner next filed a petition for a writ of habeas corpus in federal district court, alleging four ineffective assistance of trial counsel claims. He argued that counsel failed to object to courtroom security issues, which included (1) the presence of ten uniformed officers and (2) the officers' reaching for weapons when the prosecutor placed the knives on the defense table, causing defense counsel to startle. The Petitioner also

argued that counsel failed to object to three instances of prosecutorial misconduct, including (1) the prosecutor's guilt phase comment that the Petitioner and his codefendants were guilty based upon their immediate arrest by prison guards, (2) the prosecutor's guilt phase comment characterizing a defense witness's testimony as an affirmation that inmates "live by their own rules," and (3) the prosecutor's future dangerousness statement made during closing argument during the penalty phase. The Petitioner argued that counsel failed to object to the trial court's jury instruction concerning the heinous, atrocious, and cruel aggravating circumstance and that counsel failed to adequately investigate and present mitigating evidence concerning the violence in the prison system and the Petitioner's background. The Sixth Circuit Court of Appeals affirmed the district court's denial of relief. *Sutton*, 645 F.3d at 765.

### **Motion to Reopen Post-Conviction Petition**

On June 8, 2016, the Petitioner filed a motion to reopen his post-conviction petition alleging that the Supreme Court's decisions in *Johnson, Glossip v. Gross*, 576 U.S. \_\_\_, 135 S. Ct. 2726 (2015), and *Obergefell v. Hodges*, 574 U.S. \_\_\_, 135 S. Ct. 2584 (2015), announced new constitutional rules requiring retrospective application that render his death sentence unconstitutional. The State filed a response in opposition to the motion to reopen, arguing that Tennessee's prior violent felony aggravating circumstance survives scrutiny under *Johnson*. The State further argued that the Petitioner could not claim relief by relying on the dissent in *Glossip* and that *Obergefell* was simply not applicable to death penalty litigation.

On October 4, 2016, the post-conviction court denied the motion to reopen as to the *Glossip* and *Obergefell* claims, but it preliminarily granted the motion to reopen as to the *Johnson* claim. See T.C.A. § 40-30-117(b) ("The motion shall be denied unless the factual allegations, if true, meet the requirements of subsection (a). If the court grants the motion, the procedural, relief and appellate provisions of this part shall apply."); *Id.* § 40-30-107 (requiring the post-conviction court to enter a preliminary order if the pleading "is not dismissed upon preliminary consideration"). In the preliminary order, the post-conviction court directed the Petitioner to "investigate all possible constitutional grounds for relief for the purpose of filing an amended petition if necessary . . . [and] raise any additional issues counsel deems necessary."

On February 2, 2017, the Petitioner filed an amended petition for post-conviction relief reasserting the *Johnson* claim. The Petitioner also alleged seven additional claims: (1) that the Supreme Court's decision in *Hurst* announced a new rule of constitutional law requiring retrospective application that, if applied to Tennessee's thirteenth juror rule, invalidated the death sentence; (2) that being shackled during trial within view of the jury violated his right to a fair trial; (3) that the jury selection process created a jury

skewed to impose a death sentence; (4) that trial counsel were ineffective for failing to investigate and present mental health evidence in mitigation at the penalty phase of the trial; (5) that the State committed prosecutorial misconduct by placing the knives on the defense table and that the resulting police response deprived the Petitioner of a fair trial; (6) that the mistreatment suffered by the Petitioner when incarcerated, coupled with the death sentence, violated the Eighth Amendment; and (7) that Tennessee's death penalty system was broken and violated the Eighth Amendment.

At a status hearing held on March 6, 2017, the post-conviction court noted that the October 4, 2016 order "maybe wasn't worded exactly as narrow as I wanted it but I thought we were going to basically address the issues related to the ruling in *Johnson*." The court further stated that any additional allegations would have to be "ones that weren't waived or [outside] the statute of limitations or that had been previously determined." The court advised the parties that it would "put down a preliminary order that may narrow the issues." *See id.* §§ 40-30-106, -107.

On July 27, 2017, the State filed a response in opposition to the amended petition, asserting that *Johnson* was inapplicable to Tennessee's prior violent felony aggravating circumstance and that the additional allegations raised by the petition were "outside the scope of the [post-conviction court's October 4, 2016] order."

On March 12, 2018, the Petitioner filed a supplemental petition for post-conviction relief, adding that the death sentence was arbitrary, having been imposed after the State's offer of a life sentence during pretrial plea negotiations and that the prior violent felony aggravating circumstance could not stand because the prior violent felony relied upon was committed by the Petitioner when he was eighteen years old. *See Roper v. Simmons*, 543 U.S. 551 (2005).

On April 12, 2018, the post-conviction court entered an order summarily denying relief. The court held that *Johnson* was inapplicable to Tennessee's prior violent felony aggravator and denied relief as to that claim. The court held that the additional claims were beyond the scope of the preliminary order but reviewed them on the merits. The court determined that *Hurst* did not announce a new constitutional rule and that the remaining claims had been waived or previously determined. The court did not make any findings concerning the two additional claims included in the Petitioner's March 12, 2018 supplemental petition. On May 7, 2018, the Petitioner filed a motion to reconsider the post-conviction court's order, alleging for the first time that the Assistant District Attorney General's previous representation of the victim required the prosecutor's disqualification from the post-conviction proceedings. The Petitioner filed a timely notice of appeal.



On appeal, the Petitioner argues that he is entitled to relief as to all the claims raised in the amended and supplemental post-conviction petitions. Additionally, he contends that the post-conviction court deprived him of a full and fair hearing by summarily denying relief. The Petitioner also argues that the Assistant District Attorney General's previous representation of the victim, while in private practice and years before his employment with the District Attorney General's Office, during the prosecution that led to the victim's child molestation conviction and incarceration at the Morgan County Regional Correctional Facility constitutes an actual conflict of interest requiring a new hearing on the post-conviction petition. The State argues that the *Johnson* and *Hurst* claims do not provide any relief from the Petitioner's death sentence, that the remaining claims are not cognizable in a motion to reopen a post-conviction petition, and that the Petitioner cannot prevail on the conflict of interests allegation because he failed to file a timely motion to disqualify the Assistant District Attorney General in the trial court and that this court properly denied the Petitioner's motion to supplement or remand the case concerning the conflict of interests issue.

### **Analysis**

This court recently analyzed the parameters of a post-conviction court's review of a motion to reopen and a subsequent amendment to a first post-conviction petition made pursuant to a post-conviction court's granting a motion to reopen. *See Harold Wayne Nichols v. State*, No. E2018-00626-CCA-R3-PD, 2019 WL 5079357 (Tenn. Crim. App. Oct. 10, 2019), *perm. app. denied* (Tenn. Jan. 15, 2020). Concerning the general availability of post-conviction relief in Tennessee, this court explained

In *Case v. Nebraska*, 381 U.S. 336, 85 S. Ct. 1486, 14 L.Ed.2d 422 (1965), the United States Supreme Court recommended that the states implement post-conviction procedures to address alleged constitutional errors arising in state convictions in order to divert the burden of habeas corpus litigation in the federal courts. In response, the Tennessee legislature passed the Post-Conviction Procedure Act whereby a defendant may seek relief "when a conviction or sentence is void or voidable because of the abridgement of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States." T.C.A. § 40-30-103. In its current iteration, the Post-Conviction Procedure Act "contemplates the filing of only one (1) petition for post-conviction relief. In no event may more than one (1) petition for post-conviction relief be filed attacking a single judgment." T.C.A. § 40-30-102(c). While "any second or subsequent petition shall be summarily dismissed," a petitioner may seek relief on the basis of claims that arise after the disposition of the initial petition by filing a motion to reopen the post-conviction proceedings "under the limited

circumstances set out in § 40-30-117.” *Id.*; see *Fletcher v. State*, 951 S.W.2d 378, 380 (Tenn. 1997).

*Harold Wayne Nichols*, 2019 WL 5079357, at \*3. Thus, while Tennessee provides for only one petition for post-conviction relief, there are limited circumstances whereby a petitioner may allege later arising claims via a motion “to reopen the first post-conviction petition.” T.C.A. § 40-30-117(a). As relevant in this case, a motion to reopen the first petition should be granted when “[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.” *Id.* § 40-30-117(a)(1). Once a motion to reopen is granted, “the procedure, relief and appellate provisions of this part shall apply.” *Id.* § 40-30-117(b)(1).

That said, “a post-conviction court’s grant of a motion to reopen does not fully place a petitioner back into the procedural posture of his original post-conviction proceedings.” *Harold Wayne Nichols*, 2019 WL 5079357, at \*7. As noted by the Tennessee Supreme Court, claims raised in a motion to reopen and subsequent amendments might be barred by the statute of limitations and previous determination. *Coleman v. State*, 341 S.W.3d 221, 255 (Tenn. 2011). Generally, a petitioner must file a petition for post-conviction relief “within one (1) year of the date of the final action of the highest state appellate court to which an appeal is taken or, if no appeal is taken, within one (1) year of the date on which the judgment became final, or consideration of the petition shall be barred.” T.C.A. § 40-30-102(a) (2018). The statutory grounds for tolling the statute of limitations are coextensive to those for granting a motion to reopen. *Id.* § 40-30-102(b) (2018). Thus, if an amended claim arising from a motion to reopen a post-conviction petition does not meet the requirements of Code sections 40-30-102(b) and 40-30-117(a), the claim is barred by the statute of limitations. “A ground for relief is previously determined if a court of competent jurisdiction has ruled on the merits after a full and fair hearing.” *Id.* § 40-30-106(h) (2018). Further, a claim will be treated as waived when “not raised before a court of competent jurisdiction in which the ground could have been presented.” *Id.* § 40-30-110(f) (2018); see *Coleman*, 341 S.W.3d at 257 (discussing the waiver of a specific ineffective assistance of counsel claim for failing to raise it in the original post-conviction petition). Claims that are raised beyond the statute of limitations, have been previously determined, or have been waived shall be summarily dismissed. T.C.A. § 40-30-106(b), (f). We review the post-conviction court’s summary denial of relief de novo. *Arnold v. State*, 143 S.W.3d 784, 786 (Tenn. 2004).

### **I. Johnson Motion to Reopen Allegation**

In support of the motion to reopen the post-conviction petition, the Petitioner alleged that the Supreme Court’s holding in *Johnson* renders void the prior violent felony

aggravating circumstance. While the post-conviction court preliminarily granted the motion to reopen based upon this allegation, the court ultimately determined that the decision in *Johnson* was inapplicable to Tennessee’s prior violent felony aggravating circumstance. On appeal, the Petitioner argues that the prior violent felony aggravating circumstance is unconstitutionally vague in light of *Johnson*. The State asserts that the holding in *Johnson* is inapplicable to the Petitioner’s case.

In *Johnson*, the Supreme Court examined the definition of a violent felony under the Armed Career Criminal Act (ACCA), which provides increased punishment for a defendant convicted of being a felon in possession of a firearm if a defendant has three or more previous convictions for a violent felony. *See* 18 U.S.C. § 924(e)(1). The ACCA defined a violent felony as

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 involves the use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another.*

18 U.S.C. § 924(e)(2)(B) (emphasis added). The “otherwise involves conduct” language is referred to as the ACCA’s residual clause. *Johnson*, 135 S. Ct. at 2556. The Court observed that the residual clause does not involve an examination of the elements of a prior offense, but instead “asks whether the crime ‘*involves conduct*’ that presents too much risk of physical injury.” *Id.* at 2557 (emphasis in the original). The Court determined that the judicial assessment of risk under the residual clause, which was not tied to the facts concerning the particular offense or to the statutory elements, rendered the residual clause unconstitutionally vague. *Id.* at 2557. In so doing, however, the Court limited its holding and held that the elements clause contained in subsection (i) survived constitutional scrutiny. *Id.* at 2563.

This court recently analyzed the application of *Johnson* to Tennessee’s prior violent felony aggravating circumstance. *See Harold Wayne Nichols*, 2019 WL 5079357. In *Harold Wayne Nichols*, we noted that “this Court has rejected *Johnson* claims with respect to both the pre- and post-1989” versions of the prior violent felony aggravating circumstance when raised in applications for permission to appeal from the denial of a motion to reopen a post-conviction petition “because our supreme court has held, that under either version of the statute, trial courts are to look to the actual facts of the prior felony to determine the use of violence when such cannot be determined by the elements of the offense alone.” *Id.* at \*6 (citations omitted). Unlike the approach to the ACCA’s residual clause, “our precedent has never required the use of a judicially imagined ordinary case in applying the prior violent felony.” *Id.* “Tennessee’s prior violent felony

aggravating circumstance is not void for vagueness under *Johnson*.” *Id.* Therefore, the Petitioner is not entitled to relief as to this claim.

## II. Claims Raised in the Amended and Supplemental Petitions

### A. *Hurst* and Thirteenth Juror Rule

The Petitioner argues that the Supreme Court’s decision in *Hurst* is a new rule of constitutional law requiring retrospective application which, if so, qualifies as a basis to reopen the post-conviction petition and to argue that Tennessee’s thirteenth juror rule violates the holding in *Hurst* because the rule allows a trial judge to overrule a jury’s penalty phase verdict. The State asserts that “this Court has already determined that *Hurst* did not announce a new constitutional rule requiring retrospective application” and that the thirteenth juror rule does not undermine a defendant’s constitutional right to jury sentencing in a capital case.

The State correctly notes that this court has consistently held that *Hurst* did not announce a new constitutional rule requiring retrospective application in the context of applications for permission to appeal from the denial of a motion to reopen and, furthermore, that the *Hurst* rule is inapt as a challenge to the thirteenth juror rule. *See, e.g., Charles Rice v. State*, No. W2017-01719-CCA-R28-PD (Tenn. Crim. App. Nov. 14, 2017) (order), *perm. app. denied* (Tenn. Mar. 15, 2018); *Richard Odom v. State*, No. E2017-01027-CCA-R28-PD (Tenn. Crim. App. Oct.20, 2017) (order); *Jonathan Stephenson v. State*, No. E2017-01067-CCA-R28-PD (Tenn. Crim. App. Sept. 19, 2017) (order), *perm. app. denied* (Tenn. Jan. 18, 2018); *Dennis Wade Suttles v. State*, No. E2017-00840-CCA-R28-PD (Tenn. Crim. App. Sept. 18, 2017) (order), *perm. app. denied* (Tenn. Jan. 18, 2018); *Gary W. Sutton v. State*, No. E2017-01394-CCA-R28-PD (Tenn. Crim. App. Sept. 13, 2017) (order), *perm. app. denied* (Tenn. Jan. 18, 2018); *David Lynn Jordan v. State*, No. W2017-00921-CCA-R28-PD (Tenn. Crim. App. Sept. 11, 2017) (order). Likewise, this court has recently held that “[b]ecause *Hurst* did not announce a new rule of constitutional law that must be applied retrospectively, [a *Hurst*] claim is procedurally barred by both the one-year statute of limitations and the one-petition rule.” *Harold Wayne Nichols*, 2019 WL 5079357, at \*8. The Petitioner is not entitled to relief on this basis.

### B. Shackling

The Petitioner asserts that his constitutional rights were violated “when he was forced to appear before the jury wearing visible shackles and handcuffs.” The Petitioner argues that this claim has not been previously determined or waived because it could not be raised previously due to both trial and original post-conviction counsels’

ineffectiveness. The State argues that the post-conviction court did not err by denying this claim.

The post-conviction proceedings and the federal habeas corpus proceedings examined the increased courtroom security at the Petitioner's trial. *Nicholas Todd Sutton*, 1999 WL 423005, at \*8-10; *Sutton*, 645 F.3d at 756-57. To the extent that the Petitioner now seeks to include the shackling allegation with additional claims of ineffective assistance of counsel, we conclude that the Petitioner is precluded from raising additional ineffective assistance of counsel allegations because the ineffective assistance of counsel claim was previously litigated and determined. *See Cone v. State*, 927 S.W.2d 579, 581-82 (Tenn. Crim. App. 1995) (stating that "[a] petitioner may not relitigate a previously determined issue by presenting additional factual allegations"). Further, "a post-conviction petitioner is not entitled to the effective assistance of counsel." *Grindstaff v. State*, 297 S.W.3d 208, 219 (Tenn. 2009) (citing *House v. State*, 911 S.W.2d 705, 712 (Tenn. 1995); *State v. Garrard*, 693 S.W.2d 921, 922 (Tenn. Crim. App. 1985)). Therefore, the Petitioner is not entitled to relief as to this issue.

### **C. Jury Selection**

The Petitioner argues that he was denied an impartial jury because (1) several jurors expressed "automatic death-voting" bias and (2) counsel were ineffective in failing to select "life-qualified" jurors. The State asserts that the post-conviction court did not err by denying relief.

On direct appeal, the Petitioner challenged the trial court's dismissal of "prospective jurors . . . who expressed that under no circumstances could they find a death penalty." *Sutton*, 761 S.W.2d at 769. The court concluded that the trial court committed no error concerning the dismissal of jurors. *Id.* Thus, a general challenge to the jury selection process had been previously determined. A specific claim that the jury selection process resulted in several "automatic death-voting" jurors to be selected is waived. As this claim relates to an additional allegation of the ineffective assistance of counsel, the Petitioner cannot relitigate that claim by adding new factual allegations. *See Grindstaff*, 297 S.W.3d at 219. The Petitioner is not entitled to relief on this basis.

### **D. Ineffective Assistance of Counsel**

The Petitioner argues that counsel were ineffective for failing to investigate adequately and to present mental health evidence regarding diminished capacity during both phases of the trial. The State argues that the post-conviction court did not err by denying this claim because it had been previously determined.

The Petitioner raised myriad allegations of ineffective assistance of counsel in the original post-conviction proceedings and in the federal habeas corpus proceedings, including allegations related to the presentation of mitigation evidence. *Sutton*, 645 F.3d at 756-765; *Nicholas Todd Sutton*, 1999 WL 423005, at \*10-27. The Petitioner cannot relitigate this issue by adding new factual allegations. See *Grindstaff*, 297 S.W.3d at 219. Further, we note the Sixth Circuit’s characterization of the unrepresented mitigation evidence concerning the Petitioner’s background, the conditions of the prison system, and unproffered testimony when the court concluded that “[t]he net mitigating value of all of this evidence is too low, and the aggravating circumstances are too strong.” *Sutton*, 645 F.3d at 765. This claim has been previously determined, and the Petitioner is not entitled to relief on this basis.

#### **E. Prosecutorial Misconduct**

The Petitioner contends that prosecutorial misconduct “tainted the jury’s death verdict” and that counsel were ineffective for failing to move for a mistrial at trial or to interview jurors “during post-conviction.” The State asserts that the post-conviction court did not err by denying this claim because it has been previously determined.

The Petitioner raised allegations of prosecutorial misconduct in the direct appeal from the conviction proceedings. *Sutton*, 761 S.W.2d at 769. Likewise, he presented allegations of prosecutorial misconduct, either free-standing or in relation to counsel’s effectiveness, in both the post-conviction and the federal habeas corpus proceedings. *Sutton*, 645 F.3d at 757-760; *Nicholas Todd Sutton*, 1999 WL 423005, at \*27-30. The Petitioner cannot relitigate the ineffective assistance of counsel issue by adding new factual allegations. See *Grindstaff*, 297 S.W.3d at 219. This claim has been previously determined, and the Petitioner is not entitled to relief on this basis.

#### **F. Prison Conditions**

The Petitioner asserts that the mistreatment he has endured while incarcerated precludes the imposition of the death penalty. The State argues that the post-conviction court properly determined that this issue has been waived.

Evidence of prison conditions was presented at the trial, in the post-conviction proceedings, and in the federal habeas corpus proceedings. For the first time pursuant to this motion to reopen, the Petitioner now claims that the Eighth Amendment precludes his death sentence when he has endured the conditions of his incarceration. This issue is waived for failing to raise it “before a court of competent jurisdiction in which the ground could have been presented.” See T.C.A. § 40-30-110(f). The Petitioner is not entitled to relief on this basis.

### **G. Death Penalty Following Plea Offer of Life Imprisonment**

The Petitioner argues that his death sentence is arbitrary and capricious “because it was imposed following the prosecution’s offer of a life sentence” during plea negotiations. This issue is waived for failing to raise it “before a court of competent jurisdiction in which the ground could have been presented.” *See id.* The Petitioner is not entitled to relief on this basis.

### **H. Prior Violent Felony Committed at Age Eighteen**

The Petitioner asserts that his death sentence is unconstitutional because the prior violent felony – first degree murder – upon which one of the aggravating circumstances rests was committed when he was eighteen years old. This issue is waived for failing to raise it “before a court of competent jurisdiction in which the ground could have been presented.” *See id.* The Petitioner is not entitled to relief on this basis.

### **I. Summary Denial of Post-Conviction Relief Claims**

The Petitioner is not entitled to relief as to any claim alleged in the motion to reopen or in the amended and supplemental petitions. Nevertheless, the Petitioner contends that he was denied due process by the post-conviction court’s summary denial of relief. As this court explained in *Harold Wayne Nichols*,

the post-conviction court did not err in denying relief on any of the claims raised by Petitioner. The *Johnson* claim was the only one that was not procedurally barred; because that claim raised only a question of law and statutory interpretation, there was no need for an evidentiary hearing. The post-conviction court, despite its earlier finding that Petitioner had raised a colorable claim, was clearly authorized by the Post-Conviction Procedure Act to dismiss the amended petition without an evidentiary hearing upon conclusively determining that Petitioner was not entitled to relief.

*Harold Wayne Nichols*, 2019 WL 5079357, at \*11 (citations omitted); *see also* T.C.A. § 40-30-109(a). “All that due process requires in the post-conviction setting is that the defendant have ‘the opportunity to be heard at a meaningful time and in a meaningful manner.’” *Stokes v. State*, 146 S.W.3d 56, 61 (quoting *Matthews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893 (1976)). The Petitioner has been afforded due process at every stage of his direct and collateral litigation challenging his first degree murder conviction and death sentence.

### III. Conflict of Interest

The Petitioner alleges that the Assistant District Attorney General's prior representation of the victim before the Assistant District Attorney General's employment with the District Attorney General's Office creates an actual conflict of interest and an appearance of impropriety. The State asserts that the Petitioner failed to file a timely motion to disqualify the Assistant District Attorney General, that there is no ruling for this court to review, and that the "Petitioner can only ask for a remand for a hearing on the question." The State also notes, however, that this court has already denied the Petitioner's request for remand and that this court properly denied the remand because nothing the Assistant District Attorney General may have learned in his representation of the victim over thirty years ago when the victim was prosecuted for child molestation would bear on the Petitioner's ability to raise a claim under the narrow procedural mechanism provided in a motion to reopen the first post-conviction petition.

On May 7, 2018, almost one month after the post-conviction court's order summarily denying the post-conviction claims, the Petitioner filed a motion to reconsider the court's order, alleging that counsel had learned that the Assistant District Attorney General had represented the victim in the late-1980s child rape prosecution that ultimately resulted in the victim's incarceration at the Morgan County Regional Correctional Facility. The Petitioner argued that this prior relationship created "competing ethical duties" in that the now Assistant District Attorney General had a duty to disclose favorable evidence to the Petitioner that he might have learned through his representation of the victim.

On May 21, 2018, the State filed a response to the Petitioner's motion to reconsider. In it, the Assistant District Attorney General argued that no conflict of interest or appearance of impropriety could be established based upon counsel's representation of the victim thirty-two years before counsel's employment as a government attorney involved in this collateral matter. The Assistant District Attorney General also noted that the Petitioner's speculative allegation that counsel "likely learned during his representation of Carl Estep that he had a propensity towards violence" would have "absolutely no bearing upon the issues and legal analysis that the Court set out in the Order that the petitioner seeks to set aside."

On July 12, 2018, the post-conviction court denied the motion to reconsider for lack of jurisdiction. Before this court, the Petitioner sought a stay of the briefing schedule and a remand for an evidentiary hearing on the conflict issue. We denied the motion, noting that "[n]othing in the trial court's disposition of this matter would suggest any use of information allegedly known to [the Assistant District Attorney General] through his representation of Estep." The Presiding Judge of this court later denied the



Petitioner’s motion for en banc review. The Petitioner then sought permission to supplement the appellate record with pleadings and a transcript concerning the disqualification of the District Attorney General’s Office that occurred in the Petitioner’s related petition for a writ of error coram nobis. We denied the Petitioner’s motion to supplement the appellate record because the matters were not reviewed and addressed by the post-conviction court in its disposition of this matter.

Initially, the Court observes that “a motion to reconsider is not expressly authorized in a post-conviction proceeding.” *Michael Joe Boyd v. State*, No. W1999-01981-CCA-R3-PC, 1999 WL 33261797, at \*5 (Tenn. Crim. App. Dec. 21, 1999); *see also State v. Rockwell*, 280 S.W.3d 212, 214 (Tenn. Crim. App. 2007) (noting that the “rules of criminal procedure do not provide for a motion to rehear or reconsider”). Even if authorized, a motion to reconsider would not affect the tolling of the notice of appeal or maintain jurisdiction in the post-conviction court. *See* T.R.A.P. 4(e). The post-conviction court lost jurisdiction when the Petitioner filed a notice of appeal on May 15, 2018. This court has ruled twice that the Petitioner has not established the necessity of a remand. The post-conviction court summarily denied relief because the Petitioner was not entitled to reopen the first post-conviction petition and because the amended claims had been waived or previously determined. The Petitioner is not entitled to relief on this basis.

#### **IV. Cumulative Error**

Finally, the Petitioner argues that “all claims of error coalesced into a unitary abridgement of [his] constitutional rights” under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and Article I, sections 6, 7, 8, 9, 16, 17, 19, and 32 and Article XI, sections 8 and 16 of the Tennessee Constitution. “To warrant assessment under the cumulative error doctrine, there must have been more than one actual error committed in the trial proceedings.” *State v. Hester*, 324 S.W.3d 1, 77 (Tenn. 2010). Because the Petitioner has not established any error, he is not entitled to relief pursuant to the cumulative error doctrine.

#### **Conclusion**

Based upon the foregoing, we affirm the judgment of the post-conviction court.

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ROBERT H. MONTGOMERY, JR., JUDGE

- 17 -

IN THE SUPREME COURT OF TENNESSEE  
AT KNOXVILLE

**FILED**

02/14/2020

Clerk of the  
Appellate Courts

**STATE OF TENNESSEE v. NICHOLAS TODD SUTTON**

**Criminal Court for Morgan County  
No. 2017-CR-52**

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**No. E2019-01062-SC-R11-ECN**

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**ORDER**

Upon consideration of the application for permission to appeal of Nicholas Todd Sutton and the record before us, the application is denied.

PER CURIAM

IN THE SUPREME COURT OF TENNESSEE  
AT KNOXVILLE

<b>FILED</b> 02/14/2020 Clerk of the Appellate Courts
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**STATE OF TENNESSEE v. NICHOLAS TODD SUTTON**

**Circuit Court for Morgan County  
No. 7555**

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**No. E2000-00712-SC-DDT-DD**

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**ORDER**

On January 15, 1985, while serving a life sentence for the murder of his grandmother, Mr. Sutton and other inmates stabbed inmate Carl Estep thirty-eight times. A Morgan County jury convicted Mr. Sutton of first degree murder. On March 4, 1986, the jury sentenced him to death based on three aggravating circumstances: (i)(2) (the defendant was previously convicted of one or more felonies, other than the present charge, which involved the use or threat of violence to the person); (i)(5) (the murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind); and (i)(8) (the murder was committed by the defendant while he was in . . . a place of lawful confinement). Tenn. Code Ann. § 39-2-203(i)(2), (5), and (8). Over thirty-one years ago, this Court affirmed Mr. Sutton’s conviction and sentence of death. *State v. Sutton*, 761 S.W.2d 763 (Tenn. 1988), *reh’g denied*, 1988 WL 129356 (Tenn. 1988), *cert. denied*, 497 U.S. 1031 (1990). Mr. Sutton unsuccessfully sought post-conviction relief. *Sutton v. State*, No. 03C01-9702-CR-00067, 1999 WL 423005 (Tenn. Crim. App. June 25, 1999), *perm. app. denied* (Tenn. Dec. 20, 1999), *cert. denied*, 530 U.S. 1216 (2000).

Mr. Sutton’s petition for a writ of habeas corpus was denied by the federal district court. *Sutton v. Bell*, No. 3:00-CV-00013 (E.D. Tenn. Dec. 4, 2002). The Sixth Circuit Court of Appeals affirmed. *Sutton v. Bell*, 645 F.3d 752 (6th Cir. 2011), *reh’g* and *reh’g en banc denied*, (Aug. 26, 2011), *cert. denied*, *Sutton v. Colson*, 566 U.S. 938 (Apr. 16, 2012), *reh’g denied*, 566 U.S. 1043 (2012). The federal courts subsequently denied applications for second or successive habeas corpus petitions. *See Order, In re: Nicholas T. Sutton*, No. 13-6190 (6th Cir. Nov. 25, 2013) (denying petitioner relief based on *Martinez v. Ryan*, 566 U.S. 1 (2012))

and Order, *In re: Nicholas T. Sutton*, No. 16-5945 (6th Cir. Aug. 3, 2016) (denying petitioner relief based on *Johnson v. United States*, 135 S.Ct. 2551 (2015)).

On December 17, 2013, the Court set the execution of Mr. Sutton for November 17, 2015. On April 10, 2015, the Court vacated its order pending the outcome of litigation involving the lethal injection protocol. This litigation concluded in May 2019. See *West v. Schofield*, 519 S.W.3d 550 (Tenn. 2017), *cert. denied sub nom. West v. Parker*, 138 S.Ct. 476 (Nov. 27, 2017), and *cert. denied sub nom. Abdur’Rahman v. Parker*, 138 S.Ct. 647 (Jan. 8, 2018), *reh’g denied*, 138 S.Ct. 1183 (Feb. 26, 2018); *Abdur-Rahman v. Parker*, 558 S.W.3d 606 (Tenn. 2018), *cert. denied sub. nom. Zagorski v. Parker*, 139 S.Ct. 11 (Oct. 11, 2018), and *cert. denied sub. nom. Miller v. Parker*, 139 S.Ct. 626 (Dec. 6, 2018), *cert. denied*, 139 S.Ct. 1533 (Sotomayor, J., dissenting). Under the provisions of Tennessee Supreme Court Rule 12(4)(E), the Court sua sponte re-scheduled Mr. Sutton’s execution for February 20, 2020.

On June 8, 2016, Mr. Sutton filed a Motion to Reopen Post-Conviction Proceedings arguing that *Johnson v. United States*, 135 S.Ct. 2551 (2015), announced a new constitutional rule requiring retroactive application that would invalidate the application of the prior violent felony aggravating circumstance in his case. The post-conviction court initially granted the motion to reopen only as to the *Johnson* claim. Mr. Sutton subsequently filed an amended post-conviction petition raising additional claims, including a claim he was forced to appear before the jury wearing shackles and handcuffs. The post-conviction court ultimately denied relief without a hearing. The Court of Criminal Appeals affirmed the post-conviction court. *Sutton v. State*, No. E2018-00877-CCA-R3-PD, 2020 WL 525169, \*11 (Tenn. Crim. App. Jan. 31, 2020). On February 7, 2020, Mr. Sutton filed an application for permission to appeal pursuant to Rule 11 of the Tennessee Rules of Appellate Procedure. On February 13, 2020, the Court denied the application. Order, *Sutton v. State*, No. E2018-00877-SC-R11-PD (Tenn. Feb. 13, 2020).

On February 2, 2017, during the pendency of these post-conviction proceedings, Mr. Sutton filed a petition for a writ of error coram nobis alleging “newly discovered evidence” in that he was “visibly shackled and handcuffed during his capital trial and sentencing.” The coram nobis court entered an order on May 17, 2019, denying relief without a hearing. The Court of Criminal Appeals affirmed. *State v. Sutton*, No. E2019-01062-CCA-R3-ECN, 2020 WL 703607 (Tenn. Crim. App. Feb. 11, 2020). On February 13, 2020, Mr. Sutton filed a Rule 11 application for permission to appeal. On February 14, 2020, the Court denied

the application. Order, *State v. Sutton*, No. E2019-01062-SC-R11-ECN (Tenn. Feb. 14, 2020).

Mr. Sutton has filed a motion to stay his execution pending his appeals in his post-conviction and error coram nobis proceedings. Tennessee Supreme Court Rule 12(4)(E) provides that this Court “will not grant a stay or delay an execution date pending resolution of collateral litigation in state court unless the prisoner can prove a likelihood of success on the merits of that litigation.” Tenn. Sup. Ct. R. 12(4)(E). “In order to establish a likelihood of success on the merits of a claim, a plaintiff must show more than a mere possibility of success.” *State v. Irick*, 556 S.W.3d 686, 689 (Tenn. 2018) (quoting *Six Clinics Holding Corp II v. Cafcomp Sys.*, 119 F.3d 393, 402 (6th Cir. 1997)). Given the denial of the Rule 11 applications as noted above, Mr. Sutton has failed to prove a likelihood of success on the merits of the litigation in both matters. Accordingly, Mr. Sutton’s motion to stay his execution is DENIED.

PER CURIAM

IN THE CRIMINAL COURT FOR MORGAN COUNTY, TENNESSEE

NICHOLAS TODD SUTTON,	)	
Petitioner	)	
v.	)	No. 7555
	)	(CAPITAL CASE)
STATE OF TENNESSEE,	)	(POST-CONVICTION)
Respondent.	)	(REOPENED)

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ORDER

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I. Introduction

On June 8, 2016, Petitioner, Nicholas Todd Sutton, filed a motion to reopen his petition for post-conviction relief pursuant to Tenn. Code Ann. § 40-30-117(a)(1) claiming he was entitled to relief based upon new rules of law as announced in (1) Justice Breyer's dissent in Glossip v. Gross, 576 U.S. \_\_\_\_, 135 S. Ct. 2726 (2015), (2) the majority opinion in Obergefell v. Hodges, 576 U.S. \_\_\_\_, 135 S. Ct. 2584 (2015), and (3) the majority opinion in Johnson v. United States, 576 U.S. \_\_\_\_, 135 S. Ct. 2251 (2015). The State filed its response on September 15, 2016, seeking summary denial of the motion to reopen. After reviewing the motion and the relevant authorities, this Court DENIED the Motion to Reopen as to the claims under Glossip and Obergefell, and GRANTED the Motion to Reopen as to the Johnson claim.

Petitioner then filed an Amended Petition for Post-Conviction Relief on February

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2, 2017, and the State filed its response to the Amended Petition on July 27, 2017.<sup>1</sup> The amended petition raises the claim pursuant to Johnson as well as several other claims. This Court has reviewed all pleadings, records, and applicable law in preparation of this order to address all the claims in the February 2017 Amended Petition as required by statute. See Tenn. Code Ann. § 40-30-106.

## II. Procedural History

### *Trial*

In 1986, Petitioner was convicted of the January 15, 1985, first degree murder of Carl Estep. At the time of the offense, Petitioner, his codefendants,<sup>2</sup> and the victim were all inmates at the Morgan County Regional Correctional Facility. Estep was stabbed, in his cell, thirty-eight times in the chest and neck and nine of the wounds were potentially fatal. State v. Sutton, 761 S.W.2d 763 (Tenn. 1988). Two homemade knives were found near his body and a third was found under his lamp. Id. The jury found the following aggravating circumstances beyond a reasonable doubt in sentencing Petitioner to death for the murder:

- (1) 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;
- (2) The murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of the mind; and
- (3) The murder was committed by the defendant while he was in lawful custody or in a place of lawful confinement or during his escape from lawful custody or from a place of lawful confinement.

See Tenn. Code Ann. § 39-2-203(i)(2), (5), and (8) (1982).

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<sup>1</sup> Petitioner also filed a Petition for writ of error coram nobis on February 2, 2017, to which the State filed its response July 20, 2017. The petition for writ of error coram nobis is addressed by separate order.

<sup>2</sup> One co-defendant was found not guilty and another was found guilty and received a life sentence.

On appeal, the Tennessee Supreme Court affirmed both his conviction and sentence. State v. Sutton, 761 S.W.2d 763 (Tenn. 1988), cert. denied, 497 U.S.1031 (1990).

### ***Post-Conviction***

Petitioner subsequently filed his first petition for post-conviction relief on December 14, 1990, and amended it on January 2, 1992. Following a hearing held from October 9, 1996, to October 14, 1996, the petition was denied by the trial court's order on October 23, 1996.<sup>3</sup> The trial court's denial was affirmed on appeal. Nicholas Todd Sutton v. State, 1999 WL 423005 (Tenn. Crim. App. June 25, 1999), perm. app. denied, (Tenn. Dec, 20, 1999), cert. denied, 530 U.S. 1216 (2000).

### ***Federal Habeas Corpus Proceedings***

Petitioner filed an unsuccessful petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, and the trial court's denial of relief was affirmed on appeal. Sutton v. Bell, 645 F.3d 752 (6<sup>th</sup> Cir. 2011), cert. denied, 132 S. Ct. 1917 (2012).

## **III. Motion to Reopen/Post-Conviction Standards**

The Tennessee Supreme Court has summarized the statutes governing motions to reopen:

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<sup>3</sup> Judge William Inman was appointed In November of 1994 to hear the petition but granted the Petitioner's motion to recuse in March 1996. Judge Gary R. Wade was then appointed to hear the petition. After five days of hearing in October 1996, the post-conviction court denied relief on October 23, 1996.



Under the provisions of the Post-Conviction Procedure Act, a petitioner "must petition for post-conviction relief ... within one (1) year of the final action of the highest state appellate court to which an appeal is taken ... ." Tenn. Code Ann. § 40-30-202(a). Moreover, the Act "contemplates the filing of only one (1) petition for post-conviction relief." Tenn. Code Ann. § 40-30-202(c). After a post-conviction proceeding has been completed and relief has been denied, ... a petitioner may move to reopen only "under the limited circumstances set out in 40-30-217." *Id.* These limited circumstances include the following:

(1) The 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. Such motion must be filed within one (1) year of the ruling of the highest state appellate court or the United States Supreme Court establishing a constitutional right that was not recognized as existing at the time of trial; or

(2) The claim in the motion is based upon new scientific evidence establishing that the petitioner is actually innocent of the offense or offenses for which the petitioner was convicted; or

(3) The claim in the motion seeks relief from a sentence that was enhanced because of a previous conviction and such conviction in the case in which the claim is asserted was not a guilty plea with an agreed sentence, and the previous conviction has subsequently been held to be invalid, in which case the motion must be filed within one (1) year of the finality of the ruling holding the previous conviction to be invalid; and

(4) It appears that the facts underlying the claim, if true, would establish by clear and convincing evidence that the petitioner is entitled to have the conviction set aside or the sentence reduced.

(Citing Tenn. Code Ann. § 40-30-217(a)(1)-(4))(now Tenn. Code Ann. § 40-30-117(a)(1)-(4)). The statute further states:

The statute of limitations shall not be tolled for any reason, including any tolling or saving provision otherwise available at law or equity. Time is of the essence of the right to file a petition for post-conviction relief or motion to reopen established by this chapter, and the one-year limitations period is an element of the right to file the action and is a condition upon its exercise. Except as specifically provided in subsections (b) and (c) [of section 102], the right to file a petition for post-conviction relief or a motion to reopen under this chapter shall be extinguished upon the

expiration of the limitations period. Tenn. Code Ann. § 40-30-102(a).

Harris v. State, 102 S.W.3d 587, 590-91 (Tenn. 2003).

The post-conviction statutes further provide

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.

Relief under the Post-Conviction Procedure Act is available when a petitioner's "conviction or sentence is void or voidable because of the abridgment of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States."

Tenn. Code Ann. ' 40-30-103 (2014). "The petition must contain a clear and specific statement of all grounds upon which relief is sought, including full disclosure of the factual basis of those grounds." Tenn. Code Ann. ' 40-30-106(d). The court preliminarily reviews the petition to determine if any issues raised should be dismissed as either previously determined and/or waived. Tenn. Code Ann. ' 40-30-106(f)-(h).

The procedural bars of previous determination and waiver are statutorily defined:

(g) A ground for relief is waived if the petitioner personally or through an attorney failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented unless:

(1) The claim for relief is based upon a constitutional right not recognized as existing at the time of trial if either the federal or state constitution requires retroactive application of that right; or

(2) The failure to present the ground was the result of state action in violation of the federal or state constitution.

(h) A ground for relief is previously determined if a court of competent jurisdiction has ruled on the merits after a full and fair hearing. A full and fair hearing has occurred where the petitioner is afforded the opportunity to call

witnesses and otherwise present evidence, regardless of whether the petitioner actually introduced any evidence.

Tenn. Code Ann. § 40-30-106(g) and (h); see Tenn. S. Ct. R. 28, Section 2(D) and (E). In a post-conviction proceeding, the petitioner has the burden of presenting his case and establishing the factual grounds alleged by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f) and Tenn. S. Ct. R. 28, Section 8(D)(1); see also Davidson v. State, 453 S.W.3d 386, 392 (Tenn. 2014).

Here, Petitioner filed a motion to reopen on specific grounds which this Court granted and ordered the filing of an amended petition if necessary. In his February 2017 Amended Petition, Petitioner raised several claims not related to his Johnson v. United States claim raised in the motion to reopen.

Initially, this Court finds the additional claims raised in Claims II through V and VII through IX were not covered by the order granting the motion to reopen and are not permitted pursuant to Tenn. Code Ann. § 40-30-117. Although the order allowing an amended petition may have included general language, this Court did not intend to allow the petitioner to reopen his post-conviction proceedings other than as it related to the Johnson claim and any claims cognizable under Tenn. Code Ann. § 40-30-117. Therefore, Claims II through V and VII through IX are beyond the scope of the current proceedings. Claim VI was appropriately raised as a potential additional claim pursuant to Tenn. Code Ann. § 40-30-117. However, in an effort to address all issues, this Court will review these issues pursuant to Tenn. Code Ann. § 40-30-106.

#### IV. Analysis of Claim I: Johnson Claim

Petitioner argues in his Amended Petition for Post-Conviction Relief he is entitled

to relief pursuant to what he claims is a new rule announced in Johnson v. United States, 135 S. Ct. 2551 (2015). Specifically, Petitioner claims the language of the prior violent felony aggravating circumstance in Tennessee’s capital sentencing statute, Tenn. Code Ann. § 39-2-203(i)(2)(1982), is unconstitutionally vague under Johnson.

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 (Tenn. Crim. App. September 11, 2017), perm. app. denied, (Tenn. January 19, 2018). In Johnson, the court held

In [*Johnson v. United States*], the Supreme Court held that the “residual clause” contained in the definition of a violent felony of the federal Armed Career Criminal Act of 1984 (ACCA) is unconstitutionally vague. *Johnson*, 135 S. Ct. at 2557. The ACCA increases the punishment of a defendant convicted of being a felon in possession of a firearm if he or she has three or more previous convictions for a violent felony. 18 U.S.C. § 924(e)(1). The ACCA defines “violent felony” as

“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 the use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.”§924(e)(2)(B) (emphasis added).

The “otherwise involves conduct that presents a serious potential risk of physical injury to another” language is known as the ACCA’s “residual clause.” *Johnson*, 135 S. Ct. at 2556. The court observed that, “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.* at 2557. (emphasis in original). In making its ruling, the Supreme Court reasoned that the residual clause is unconstitutionally vague because it “leaves grave uncertainty about how to estimate the risk posed by a crime” and it “leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony.” *Id.* at 2557-58. In other words, “[d]eciding whether the residual clause covers a crime thus 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 physical injury.” *Id.* at 2557. That “task goes beyond deciding whether creation of risk is an element of the crime.” *Id.* (emphasis added). As such, the majority declined the dissent’s suggestion that looking at the particular facts underlying the prior violent felony could save the residual clause from vagueness. *Id.* at 2561-62.

The Petitioner alleges that the *Johnson* decision created a new constitutional right that would provide an avenue of relief pursuant to Tennessee Code Annotated section 40-30-117(a)(1). We must first look at *Johnson* to determine if a new constitutional right was created. Tennessee Code Annotated section 40-30-122 addresses interpretation of a new rule of constitutional law stating in part:

"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."

Further, the courts have determined that a "case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government [or] ... if the result was not dictated by precedent existing at the time the defendant's conviction became final." *Teague v. Lane*, 109 S.Ct. 1060, 1070 (1989) (citations omitted); see also *Van Tran v. State*, 66 S.W.3d 790, 810-11 (Tenn. 2001). On its face, the *Johnson* decision does not appear to create a new constitutional right but only applies an existing constitutional test to a statute. When referencing *Johnson*, the United States Supreme Court described the reasoning for the decision as follows:

"Last Term, this Court decided *Johnson v. United States*, 135 S. Ct. 2551 (2015). *Johnson* considered the residual clause of the Armed Career Criminal Act of 1984, 18 U.S.C. § 924(e)(2)(B)(ii). The Court held that provision void for vagueness."

*Welch v. United States*, 136 S. Ct. 1257, 1260–61 (2016) (emphasis added). The court further stated:

"Less than three weeks later, this Court issued its decision in *Johnson* holding, as already noted, that the residual clause is void for vagueness."

*Id.* (emphasis added). The ruling of the *Welch* court reinforces the idea that no new constitutional right was created by the *Johnson* opinion. The "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. *City of Chicago v. Morales*, 119 S. Ct. 1849 (1999) (speculation as to meaning of statute not allowed); *Maynard v. Cartwright*, 108 S. Ct. 1853 (1988) (aggravating circumstance language held as unconstitutionally vague); *Kolender v. Lawson*, 103 S. Ct. 1855 (1983) (statute held to be unconstitutionally vague by requiring "credible and reliable" identification); *Colautti v. Franklin*, 99 S. Ct. 675 (1979) (statute vague due to required interpretation of "is viable" and "may be viable"); *Smith v. Goguen*, 94 S. Ct. 1242 (1974) (due process is denied where inherently vague statutory language permits selective law enforcement); *Grayned v. City of Rockford*, 92 S. Ct. 2294 (1972) (enactment is void for vagueness if its prohibitions are not clearly defined). As such, we cannot find that the United States Supreme Court established a new constitutional right through its ruling in *Johnson*.

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.

The "residual clause" of the ACCA defines a violent felony as a felony that "otherwise involves conduct that presents a serious risk of physical injury to another" while the pre-1989 (i)(2) provision required that the felony "involve the use or threat of violence to the person." The vagueness of the ACCA provision arose out of the multitude of potential means for physical injury to arise from a crime. As set out in the *Johnson* opinion, the phrasing of the ACCA required the trier of fact to determine any number of outcomes of a crime that may result in injury. *Id.* at 2557-2558. The determination was not a fact based determination upon the actual crime for which the defendant was being tried but a determination that in the ordinary course of the listed crime could the risk of physical injury arise. *Id.* The reason for this interpretation of the ACCA was the prior ruling by the Supreme Court in *Taylor v. United States* requiring the court to use the "categorical approach" in applying the ACCA. *Id.* (citing *Taylor v. United States*, 110 S. Ct. 2143 (1990)). Under this "categorical approach", the court must assess "whether a crime qualifies as a violent felony 'in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion.'" *Id.* (citing *Begay v. United States*, 128 S. Ct. 1581 (2008)). With these constraints, the ACCA, as written, required the trier of fact to imagine some far reaching machination to determine any number of possible outcomes not specifically related to the underlying felony.

The pre-1989 (i)(2) provision differs from the ACCA in its specificity that the prior felonies involve the use or threat of violence to a person and the governance of how the prior crime is to be interpreted. Unlike the ACCA, which had been limited in interpretation by *Begay* and *Taylor*, there was no such limitation requiring the "ordinary case" interpretation of the prior felony portion of the (i)(2) aggravator at the time of the trial of the Petitioner. The Tennessee Supreme Court had previously taken up the issue of how to determine if the prior felony involved violence to a person pursuant to the (i)(2) provision as then written. See *State v. Moore*, 614 S.W.2d 348 (Tenn. 1981). The instruction given from the Tennessee Supreme Court in *Moore* distinguishes itself from the stated unconstitutional weakness in *Johnson* in that the *Moore* court required a determination of the existence of violence to a person to be made on the facts of the actual crime charged. *Id.* at 351. *Moore* centered its determination around prior crimes of arson and burglary, both of which the court found could be crimes that did or did not involve violence to the person depending upon the facts of the specific case. *Id.* With *Moore* as guidance for the application of the "use or threat of violence" language of the pre-1989 (i)(2) provision, the vagueness shortcoming of the ACCA as found in *Johnson* would not apply. *Moore* did not limit determination of the pre-1989 (i)(2) provision to an "ordinary case" of the prior felony but required the court to look at the specific acts of the prior felony to determine if the use or threat of violence to a person was present. As such, the ruling of the Supreme Court in *Johnson* would have no effect upon the pre-1989 version of Tennessee

Code Annotated section 39-13-204(i)(2) and the post-conviction court did not abuse its discretion in denying the Petitioner's motion.

In Andre Benson v. State, 2018 WL 486000 (Tenn. Crim. App. January 19, 2018), the Court discussed the post-conviction process and stated as follows:

A colorable claim is a claim that, "if taken as true, in the light most favorable to petitioner, would entitle petitioner to relief under the Post-Conviction Procedure Act." *Arnold v. State*, 143 S.W.3d 784, 786 (Tenn. 2004)(quoting Tenn. Sup. Ct. R. 28, § 2(H)). A post-conviction court may also dismiss the petition later in the process but still prior to a hearing, after reviewing the petition, the State's response, and the records and files associated with the petition, on the basis that a petitioner is conclusively not entitled to relief. T.C.A. § 40-30-109(a).

Here, this Court initially granted the motion to reopen to determine if Johnson was applicable to the Tennessee capital sentencing statutes. As previously stated, the appellate courts have now addressed this issue and determined Johnson does not entitle a petitioner to relief on the claims raised here. Accordingly, this Court finds this issue is appropriate for disposition without a hearing as Petitioner is not entitled to relief based upon Johnson.

## **V. Analysis of Non-*Johnson* Claims Raised: Claims II through IX**

### **Claim II**

In Claim II, Petitioner asserts his conviction and death sentences should be vacated because he was visibly shackled and handcuffed during his capital trial and sentencing. Specifically he states:

[His] rights to due process, an impartial jury and freedom from cruel and unusual punishment were violated when he was forced to appear before the jury wearing visible shackles and handcuffs. There was no showing that shackling and handcuffing were justified by an essential state interest, alternatives were not

explored, and steps were not taken to minimize the prejudicial effect of the restraints. Petitioner's conviction and death sentence must be vacated because the appearance of Mr. Sutton in chains was inherently prejudicial, undermined his constitutional rights, eroded the presumption of innocence, and tipped the scales in favor of conviction and the imposition of a death sentence.

Amended Petition, page 24-25. Petitioner has submitted several affidavits of trial jurors from October of 2016 in support of his claim. In addition, Petitioner claims counsel was ineffective in failing to interview the jurors prior to the motion for new trial.

These issues, however, have been previously determined on direct appeal, in his original post-conviction proceedings, and in his federal habeas proceedings. The Tennessee Court of Criminal Appeals held as follows:

Next, the petitioner contends that the post-conviction court erred in concluding that the issue of excessive security in the courtroom was previously determined, waived, or without merit. In his post-conviction petition, the petitioner claimed that the state used the extraordinary courtroom security as a prop, that he was denied a fair trial as a result of the excessive courtroom security, that the trial court failed to regulate the excessive courtroom security, and that defense counsel was ineffective in failing to limit the excessive security, object to its use as a prop, or properly present the issue in the motion for new trial and on direct appeal.

Regarding this issue, Charles E. Jones, now warden at MCRCF, testified that he was in charge of courtroom security during the petitioner's trial. According to Jones, the goal was to provide security during the trial and to ensure that inmates were transported in a timely manner, however, there was no written plan or order. Uniformed officers armed with shotguns were stationed at each corner of the courthouse. Two officers with a hand held metal detector were stationed outside the door to the courtroom. Inside the courtroom, officers were stationed at each door. Three more officers were stationed in the front row directly behind the defendants. One officer was positioned to backup the three officers by the defendants, one was next to the jury, and two were in the balcony. Some of the officers were in uniform, and all the officers were armed with the exception of the three officers directly behind the defendants. One street by the courthouse was blocked off, and the officers used it for parking and unloading inmates.

Judge Eugene Eblen, who presided over the trial, testified that the officers in the courtroom were not overly conspicuous. Considering that there were three inmates on trial and that many of the witnesses were also inmates, Judge Eblen believed that the security was appropriate.

Contrary to this testimony, Fox, counsel for co-defendant Street, testified that the courthouse was an "armed fortress." Charles Burchett, who attended the trial and testified on behalf of the petitioner at the sentencing hearing, testified that he was amazed at the number of armed officers.



On the general issue of courtroom security, the post-conviction court made these findings:

Even if the issue had not been previously determined or waived, the proof at the evidentiary hearing simply did not establish this as a ground for relief. Obviously courtroom security is necessary when three prison inmates are on trial. All of the key witnesses were inmates as well. The environment at the trial, due to all this, was certainly not ideal. Nonetheless, the trial court took measures to reduce any prejudicial effect. The defendants wore certain clothes, their hands were free, and measures were taken to hide from the jury the shackles on their feet. Moreover, Morgan County, with two state prison facilities in 1986, is more likely than other counties to be desensitized to a possibly coercive atmosphere.

Before introducing the homemade knives into evidence, General Harvey placed them on the defense table so that defense counsel would have an opportunity to examine the knives. This was done even though defense counsel had been instructed to only use felt tip pens, not pencils, so that the defendants could not use the pencils as weapons in taking hostages. Appman testified that he reacted by jerking away from the table because he was afraid of becoming a hostage. According to Appman, it was a tense moment in the courtroom. Being startled, Appman did not make a motion for a mistrial or raise the issue at that time.

Judge Eblen testified that it is common practice for lawyers to approach opposing counsel and present an exhibit before it is introduced into evidence. When the prosecutor placed the homemade knives on the defense table, Judge Eblen saw Appman jump, and he heard an officer pull a gun, although he did not see any guns drawn. According to Judge Eblen, the courtroom quickly quieted down, and the jury seemed to get a "smile" out of the incident. Judge Eblen believed that he told the prosecutor not to do it again.

The post-conviction court accredited the testimony of Judge Eblen on this issue: Moreover, Judge Eblen testified that this was really "not a big event in Morgan County" and that the "officers were not overly conspicuous." While Judge Eblen expressed some concern about the incident wherein an assistant district attorney general placed several knives at the table occupied by the defendants and their counsel, John Appman reacted with some surprise. The record demonstrates, however, that there were curative instructions. It was Judge Eblen's opinion that the incident did not affect the results of the trial. This court accredits that account.

Regarding the placing of knives on defense table, the post-conviction court properly held that the issue has been previously determined. T.C.A. § 40-30-112(a) (1990). In fact, Jones was called to testify about the courtroom security at the hearing on the motions for new trial. Jones, who was in charge of courtroom security, testified that there were ten to fourteen guards in the courtroom, some of whom were in civilian clothes. While some of the guards had pistols, no one in the courtroom had a shotgun. When the knives were placed on the table, the officers in the courtroom reached for their guns, however, no pistols were drawn. On direct appeal, the Supreme Court ruled:

The defendant also alleges prosecutorial misconduct by the Assistant District Attorney General. A knife, identified by State's witness James Worthington as a weapon found in Estep's cell after the murder, was placed on the defense table for inspection by counsel before passing it to the jury. Seeing the knife within reach of the defendants, a number of the correctional officers in the courtroom responded by reaching for their weapons. Defendant insists that the reactions by the guards prejudiced him and deprived him of the "physical indicia of innocence." After the incident, the court instructed the State to have defense counsel examine the weapons at the State's table. The jury knew that the defendants were inmates and it probably came as no surprise to the jurors that they would be closely watched and guarded. The record reflects that only one such incident occurred. We do not find that this incident could have so prejudiced the defendant as to deny him a fair trial. We find no reversible error.

*State v. Sutton*, 761 S.W.2d 763, 769.

Furthermore, as held by the post-conviction court, all other claims regarding excessive security in the courtroom were waived by the petitioner's failure to raise them previously. T.C.A. § 40-30-112(b)(1) (1990). Finally, the petitioner has failed to meet his burden to show ineffective assistance of counsel regarding this issue. As stated earlier, on appeal from the denial of post-conviction relief, the findings of fact and conclusions of law made by the trial court are given the weight of a jury verdict, and this Court is bound by those findings unless the evidence contained in the record preponderates otherwise. *Butler v. State*, 789 S.W.2d 898, 899. Questions concerning the credibility of witnesses and weight and value to be given their testimony are for resolution by the trial court. *Black v. State*, 794 S.W.2d 752, 755.

In the present case, the post-conviction court accredited the testimony of Judge Eblen regarding whether the security was excessive or prejudicial at the petitioner's trial. Having reviewed the record, we do not find that the evidence preponderates against this finding, and thus, the petitioner has failed to establish prejudice. *Strickland v. Washington*, 466 U.S. 668, 693, 104 S. Ct. 2052, 2067, 80 L.Ed.2d 674. This issue is without merit.

Nicholas Todd Sutton v. State, 1999 WL 423005 (Tenn. Crim. App. June 25, 1999), perm. app. denied, (Tenn. Dec, 20, 1999), cert. denied, 530 U.S. 1216 (2000). See also Sutton v. Bell, 645 F.3d 752, 756-57 (6<sup>th</sup> Cir. 2011), cert. denied, 132 S. Ct. 1917 (2012). The fact that current counsel has obtained affidavits in 2016 from jurors who have been available since the trial does not change the opinion of this Court that this issue is previously determined and/or waived and is not appropriate to address through

a motion to reopen proceeding.

### **Claim III**

In Claim III, Petitioner asserts his death sentence must be reversed because he was deprived of a fair and impartial jury and he received ineffective assistance of counsel during jury selection. Petitioner relies upon cases decided from 1919 to 1992 to support his claim that jurors were not properly death and life sentence qualified in Petitioner's trial. Petitioner has again submitted several juror affidavits from 2016 in support of his claim.

By Petitioner's own pleadings, this issue has been available, as were the trial jurors, since at least 1992 which is the date of the latest case law cited. Petitioner's hearing on his original post-conviction proceeding was not until 1996. This issue is clearly waived and is not appropriate to address through a motion to reopen proceeding.

### **Claim IV**

In Claim IV, Petitioner asserts he received ineffective assistance of counsel in failing to develop and present mental health evidence establishing diminished capacity that would have negated premeditation and the heinous, atrocious and cruel aggravating circumstance. In Petitioner's amended petition, he asserts "There is a reasonable probability, had trial counsel conducted a minimally adequate investigation and uncovered the evidence identified in post-conviction, that one juror might have voted differently." The issue of mental health evidence both for trial and sentencing was addressed in Petitioner's original post-conviction proceedings. This issue is previously determined and/or waived as to any sub-issue not raised and is not appropriate to address through a motion to reopen proceeding.

### **Claim V**

In Claim V, Petitioner asserts the State committed prejudicial prosecutorial misconduct which tainted the Jury's death verdict. Specifically, Petitioner asserts the State (1) used excessive courtroom and courthouse security as a prop to influence the jury's perception of Petitioner's level of danger, (2) placed murder weapons on the defense table within the reach of the defendants, triggering a response by armed officers present in the courtroom, and (3) argued Petitioner's future dangerousness at sentencing. Amended Petition, page 43. As discussed in Claim II, however, these issues have been previously determined on direct appeal, in his original post-conviction proceedings, and in his federal habeas proceedings. See Nicholas Todd Sutton v. State, 1999 WL 423005 (Tenn. Crim. App. June 25, 1999), perm. app. denied, (Tenn. Dec, 20, 1999), cert. denied, 530 U.S. 1216 (2000). See also Sutton v. Bell, 645 F.3d 752, 756-57 (6<sup>th</sup> Cir. 2011), cert. denied, 132 S. Ct. 1917 (2012). Again, this Court finds the fact that current counsel has obtained affidavits in 2016 from jurors who have been available since the trial does not change the opinion of this Court that this issue is previously determined and/or waived and is not appropriate to address through a motion to reopen proceeding.

### **Claim VI**

In Claim VI, Petitioner asserts Hurst v. Florida, 136 S. Ct. 616 (2016), also announced a new constitutional right which was not recognized as existing at the time of trial and retroactive application of that right is required. In Hurst v. Florida, the United States Supreme Court held Florida's capital sentencing scheme violated Ring v. Arizona, 536 U.S. 584 (2002). Under the Florida law addressed in Hurst, a jury rendered an advisory verdict on capital sentencing, but the trial judge made the ultimate

factual determinations necessary to sentence a defendant to death. Hurst, 136 S. Ct. at 621-22. The Hurst Court held this procedure was invalid because it did “not require the jury to make the critical findings necessary to impose the death penalty” in violation of the Sixth Amendment. Id. at 622.

Here, Petitioner claims the “new constitutional rule” announced in Hurst applies to his case based upon the trial court’s serving as thirteenth juror. In Hurst, the Court held as follows:

The Sixth Amendment provides: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury....” This right, in conjunction with the Due Process Clause, requires that each element of a crime be proved to a jury beyond a reasonable doubt. *Alleyne v. United States*, 570 U.S. —, —, 133 S. Ct. 2151, 2156, 186 L.Ed.2d 314 (2013). In *Apprendi v. New Jersey*, 530 U.S. 466, 494, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000), this Court held 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. In the years since *Apprendi*, we have applied its rule to instances involving plea bargains, *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L.Ed.2d 403 (2004), sentencing guidelines, *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L.Ed.2d 621 (2005), criminal fines, *Southern Union Co. v. United States*, 567 U.S. —, 132 S. Ct. 2344, 183 L.Ed.2d 318 (2012), mandatory minimums, *Alleyne*, 570 U.S., at —, 133 S. Ct., at 2166 and, in *Ring*, 536 U.S. 584, 122 S. Ct. 2428, 153 L.Ed.2d 556, capital punishment.

In *Ring*, we concluded that Arizona’s capital sentencing scheme violated *Apprendi*’s rule because the State allowed a judge to find the facts necessary to sentence a defendant to death. An Arizona jury had convicted Timothy Ring of felony murder. 536 U.S., at 591, 122 S. Ct. 2428. Under state law, “Ring could not be sentenced to death, the statutory maximum penalty for first-degree murder, unless further findings were made.” *Id.*, at 592, 122 S. Ct. 2428. Specifically, a judge could sentence Ring to death only after independently finding at least one aggravating circumstance. *Id.*, at 592–593, 122 S. Ct. 2428. Ring’s judge followed this procedure, found an aggravating circumstance, and sentenced Ring to death.

The Court had little difficulty concluding that “the required finding of an aggravated circumstance exposed Ring to a greater punishment than that authorized by the jury’s guilty verdict.” *Id.*, at 604, 122 S. Ct. 2428 (quoting *Apprendi*, 530 U.S., at 494, 120 S. Ct. 2348; alterations omitted). Had Ring’s judge not engaged in any factfinding, Ring would have received a life sentence. *Ring*, 536 U.S., at 597, 122 S. Ct. 2428. Ring’s death sentence therefore violated his right to have a jury find the facts behind his punishment.

The analysis the *Ring* Court applied to Arizona's sentencing scheme applies equally to Florida's. Like Arizona at the time of *Ring*, Florida does not require the jury to make the critical findings necessary to impose the death penalty. Rather, Florida requires a judge to find these facts. Fla. Stat. § 921.141(3). Although Florida incorporates an advisory jury verdict that Arizona lacked, we have previously made clear that this distinction is immaterial: "It is true that in Florida the jury recommends a sentence, but it does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation is not binding on the trial judge. A Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona." *Walton v. Arizona*, 497 U.S. 639, 648, 110 S. Ct. 3047, 111 L.Ed.2d 511 (1990); accord, *State v. Steele*, 921 So.2d 538, 546 (Fla.2005) ("[T]he trial court alone must make detailed findings about the existence and weight of aggravating circumstances; it has no jury findings on which to rely").

As with Timothy Ring, the maximum punishment Timothy Hurst could have received without any judge-made findings was life in prison without parole. As with Ring, a judge increased Hurst's authorized punishment based on her own factfinding. In light of *Ring*, we hold that Hurst's sentence violates the Sixth Amendment.

136 S. Ct. at 621-22.

On this issue, Petitioner is asserting the Hurst issue falls within one of the specific grounds available for relief through a motion to reopen. Initially, this Court must consider whether Hurst announced a new rule of constitutional law which should be applied retroactively.

A "case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government [or] ... if the result was not dictated by precedent existing at the time the defendant's conviction became final." *Teague v. Lane*, 489 U.S. 288, 301 (1989) (citations omitted); see also *Van Tran v. State*, 66 S.W.3d 790, 810-11 (Tenn.2001). Courts addressing whether *Apprendi* sets forth a new rule have held that, in *Apprendi*, "the Supreme Court announced a new constitutional rule of criminal procedure by holding that 'other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to the jury, and proved beyond a reasonable doubt.'" *In re Clemmons*, 259 F.3d 489, 491 (6th Cir.2001) (quoting *Apprendi*, 530 U.S. at 491); see also *United States v. Sanders*, 247 F.3d 139, 147 (4th Cir.2001) (holding that "*Apprendi* is certainly a new rule of criminal procedure"); *United States v. Moss*, 252 F.3d 993, 997 (8th Cir.2001)(holding that "*Apprendi* is obviously a 'new rule' "). Because *Apprendi* sets forth a new constitutional rule of criminal procedure, the fundamental question becomes whether *Apprendi* applies retroactively to the petitioner's case.

New rules of constitutional criminal procedure are generally not applied retroactively on collateral review. *Teague*, 489 U.S. at 310. However, this general rule is subject to two exceptions. *Id.* "First, 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.' " *Id.* at 307. Second, a new rule should be applied retroactively if it is a "watershed rule of criminal procedure, ... which implicates both the accuracy and fundamental fairness of criminal proceedings." *Moss*, 252 F.3d at 998 (citing *Teague*, 489 U.S. at 312). Clearly, the first exception is not applicable to the petitioner's claim, because the rule set forth in *Apprendi* "did not decriminalize any class of conduct or prohibit a certain category of punishment for a class of defendants." *McCoy v. United States*, 266 F.3d 1245, 1256 (11th Cir.2001). Furthermore, the great weight of authority holds that *Apprendi* is not the type of watershed rule of criminal procedure that qualifies for retroactive application under the second exception. *Dukes v. United States*, 255 F.3d 912, 913 (8th Cir.2001) (holding that "*Apprendi* presents a new rule of constitutional law that is not of 'watershed' magnitude and, consequently, petitioners may not raise *Apprendi* claims on collateral review"); *Sanders*, 247 F.3d at 151 (holding that "the new rule announced in *Apprendi* does not rise to the level of a watershed rule of criminal procedure which 'alters our understanding of the bedrock elements essential to the fairness of a proceeding' "); *McCoy*, 266 F.3d at 1257 (agreeing with the other circuits that "*Apprendi* is not sufficiently fundamental to fall within *Teague*'s second exception"). Accordingly, we conclude that the new constitutional rule of criminal procedure announced in *Apprendi* does not apply retroactively on collateral review.

William Steve Greenup v. State, No. W2001-01764-CCA-R3-PC, 2002 WL 31246136 (Tenn.Crim.App., at Jackson, Oct. 2, 2002).

In Dennis Wade Suttles v. State, No. E2017-00840-CCA-R28-PD (Tenn. Crim. App. Order, September 18, 2017), perm. app. denied, (Tenn. January 18, 2018), the Tennessee Court of Criminal Appeals addressed claims related to Hurst, which included the thirteenth juror issue raised here by Petitioner. In Suttles, the court held the decision in Hurst did not announce a new constitutional rule requiring retrospective application.<sup>4</sup>

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<sup>4</sup> In Suttles, the court went further and stated:

We also observe that an application of *Hurst* to the petitioner's case would not result in relief. First, the Supreme Court excluded its holding in *Ring* from the twenty-nine states, one of which is Tennessee, whose capital sentencing schemes "commit sentencing decisions to juries." *Ring*, 122 U.S. at 608 n.6. Also, the Tennessee Supreme Court has specifically held that the legal determination of a trial judge concerning qualifying prior violent felonies for the (i)(2) aggravating circumstance "does not transgress the dictates of *Apprendi* and its progeny." *State v. Cole*, 155 S.W.3d 885, 902 (Tenn.), *cert denied*, 126 S. Ct. 47 (2005). We also find unpersuasive the petitioner's argument that the trial court's exercising its duty as thirteenth juror results in unconstitutional judicial fact-finding because the trial judge's assessment as thirteenth juror is a legal determination

This Court has carefully considered Petitioner's claims related to Hurst and the applicable law. This Hurst Court simply applied its previous holdings in Apprendi and Ring to Florida's capital-sentencing scheme. Thus, the Court did not announce a new rule of constitutional law, nor did it expand its holdings in Apprendi and Ring. Accordingly, this Court finds Petitioner is not entitled to relief on this issue.

#### **Claim VII**

In Claim VII, Petitioner asserts the State's mistreatment of Petitioner while incarcerated prohibits the State from seeking his execution. He claims his participation in the murder of Carl Estep was a direct result of Post-Traumatic Stress Disorder caused or exacerbated by the constant threats to this life and overall unsafe inhumane conditions he suffered during his incarceration at both Brushy Mountain Prison and Morgan County Regional Correctional Facility. Petitioner claims executing him for a crime which was the result of such alleged cruel and inhumane treatment violates the 8<sup>th</sup> and 14<sup>th</sup> Amendments of the U.S. Constitution and Article I, Sections 8, 13, and 16 of the Tennessee Constitution. Again, this issue previously has been available to petitioner and is either previously determined and/or waived and is not appropriate to address through a motion to reopen proceeding.

#### **Claim VIII**

In Claim VIII, Petitioner asserts the death penalty is unconstitutional because the system is fundamentally "broken." However, as the Court and the parties are well aware, the constitutionality of capital punishment in the United States and in Tennessee

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concerning the weight of the evidence, not a factual determination. *See, generally, State v. Dankworth*, 919 S.W.2d 52 (Tenn. Crim. App.1995).



has been upheld on numerous occasions. Furthermore, this Court notes the Tennessee Supreme Court has addressed this issue previously in the direct appeal of a capital case:

Mr. Hester contends that the current system of capital punishment in the State of Tennessee is fundamentally "broken." Accordingly, he invites this Court to begin dismantling the system by vacating his death sentence. Because this invitation reflects Mr. Hester's misunderstanding of the role of the courts, we respectfully decline.

Tennessee's courts should never hesitate to perform their constitutionally assigned role as a check and balance on the actions of the other branches of government. However, in performing this responsibility, Tennessee's courts must maintain appropriate respect for the breathing room needed for a representative democracy to thrive. At the core of our representative democracy is the principle that the people are the ultimate sovereign. Therefore, the courts must give full effect to the will of the people, expressed through laws duly enacted by their elected representatives, subject only to the limitations imposed by the federal and state constitutions.

The people, through their elected representatives, are primarily responsible for establishing the public policy of this State. The Constitution of Tennessee does not empower us to sit as "Platonic guardians" or as a super-legislature with the power to dismantle statutory systems because they do not meet our standards of desirable social policy. By accepting Mr. Hester's invitation to tear down Tennessee's system of capital punishment, we would be arrogating to ourselves power that is not ours to exercise. This we decline to do.

State v. Hester, 324 S.W.3d 1, 81 (Tenn. 2010) (footnote omitted). The Tennessee Supreme Court's prior review of this claim in Hester makes clear this issue is not a new constitutional issue which would be cognizable here.

Furthermore, the Tennessee Supreme Court continuously reviews the capital punishment system in light of evolving standards of decency. See, e.g., State v. Pruitt, 415 S.W.3d 210-12 (Tenn. 2013) (extensive analysis of proportionality review system in light of evolving standards of decency). Such analysis by the Tennessee Supreme Court helps ensure the death penalty in Tennessee does not become a broken system. Furthermore, as a trial court, this Court is bound by appellate court precedent. Any

assertion the capital punishment system is broken in this state must be addressed to the appellate courts and the General Assembly.

This Court finds this issue has been waived by not having been previously raised and is not appropriate to address through a motion to reopen proceeding.


### Claim IX

Here, Petitioner claims he is entitled to relief based upon the cumulative error of all the issue raised here. This Court has found no issue which would even arguably warrant relief and also does not find his claim of cumulative error warrants any relief or is appropriate to address through a motion to reopen proceeding.

### VI. Conclusion

For the reasons set forth above, this Court finds Petitioner has not stated a claim which warrants relief here. Accordingly, this matter is hereby DISMISSED.

IT IS SO ORDERED this the 10<sup>th</sup> day of April, 2018.

  
Jeffery H. Wicks  
Criminal Court Judge

CERTIFICATE OF SERVICE

I, Pamela Keck B.C., Clerk, hereby certify that I have mailed a true and exact copy of same to Deborah Drew and Andrew Harris of the Office of the Post-Conviction Defender, 404 James Robertson Parkway Suite 1100, Nashville, TN 37219, and counsel of record for the State, District Attorney Russell Johnson and ADA Bob Edwards, this the 12th day of April, 2018.

Pamela Keck B.C.

Clerk

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT JACKSON

**FILED**  
09/11/2017  
Clerk of the  
Appellate Courts

**DONNIE E. JOHNSON v. STATE OF TENNESSEE**

**Criminal Court for Shelby County  
No. P5654**

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**No. W2017-00848-CCA-R28-PD**

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**ORDER**

This matter is before the Court on the Petitioner’s application for permission to appeal the post-conviction court’s denial of his motion to reopen post-conviction petition. The State has responded in opposition to the motion.

Following a jury trial, the Defendant was convicted of first degree murder for the 1984 murder of his wife, Connie Johnson. After conviction, the jury found the Petitioner had been convicted of prior felonies which involved the use or threat of violence to the person and that the murder was especially cruel and involved torture or depravity of mind. Finding that these aggravating circumstances outweighed any mitigating evidence, the jury sentenced the Petitioner to death. Both the conviction and sentence were upheld on appeal and affirmed by our Supreme Court. *See State v. Johnson*, 743 S.W.2d 154 (Tenn. 1987). After his direct appeal, the Petitioner unsuccessfully sought post-conviction relief in the trial court with said denial affirmed on appeal. *See Donnie E. Johnson v. State*, No. 02C01-9111-CR-00237, 1997 WL 141887, at \* 1 (Tenn. Crim. App. Mar. 27, 1997), *perm. app. denied* (Tenn. Sept. 8, 1997); *Johnson v. State*, No. 02C01-9111-CR-00237, 1995 WL 603159 (Tenn. Oct. 9, 1995); *Johnson v. State*, No. 02C01-9111-CR-00237, 1994 WL 90483, at \*1 (Tenn. Crim. App. Mar. 23, 1994); *Johnson v. State*, No. 02-S-01-9207-CR-00041, 1993 WL 61728, at \*1 (Tenn. Crim. App. Mar. 8, 1993).

In June 2016, the Petitioner filed a motion to reopen post-conviction petition, relying upon Justice Breyer’s dissenting opinion in *Glossip v. Gross*, 135 S.Ct. 2726 (2015), the United States Supreme Court’s ruling in *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015), and the United States Supreme Court’s ruling in *Johnson v. United States*, 135 S.Ct. 2551 (2015), as bases to reopen his post-conviction petition. The trial court denied

the motion of the Petitioner and he has timely appealed the denial of his motion to this Court.

Tennessee Code Annotated section 40-30-117(a) authorizes the reopening of post-conviction proceedings only under the following circumstances:

(1) The 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 court establishing a constitutional right that was not recognized as existing at the time of trial; or

(2) The claim in the motion is based upon new scientific evidence establishing that the petitioner is actually innocent of the offense or offenses for which the petitioner was convicted; or

(3) The claim asserted in the motion seeks relief from a sentence that was enhanced because of a previous conviction and the conviction in the case in which the claim is asserted was not a guilty plea with an agreed sentence, and the previous conviction has subsequently been held to be invalid, in which case the motion must be filed within one (1) year of the finality of the ruling holding the previous conviction to be invalid; and

(4) It appears that the facts underlying the claim, if true, would establish by clear and convincing evidence that the petitioner is entitled to have the conviction set aside or the sentence reduced.

Tenn. Code Ann. §40-30-117(a). The decision whether to grant a motion to reopen is within the discretion of the post-conviction court and the review by this Court will be based upon the abuse of discretion standard. *Id.* at (c).

The Petitioner's reliance upon a dissenting opinion in *Glossip* offers him no relief. In order to be successful in reopening a previously filed petition, the claim asserted must be "based upon a final ruling of an appellate court." Tenn. Code Ann. § 40-30-117(a)(1). The majority opinion in *Glossip* concluded that the method of execution utilized by the State of Oklahoma does not constitute cruel and unusual punishment under the Eighth Amendment. *Glossip*, 135 S.Ct. at 2731. Therefore, the trial court did not abuse its discretion in denying relief to the Petitioner based upon his reliance on Justice Breyer's dissent.

The *Obergefell* case held that "same-sex couples may exercise the fundamental right to marry" and that "under the Due Process and Equal Protection Clauses of the

Fourteenth Amendment couples of the same-sex may not be deprived of that right and liberty.” *Obergefell*, 135 S.Ct. at 2604-05. The Petitioner argues that the death penalty, which has been imposed against him, “denies his fundamental right to life, denies him inherent human dignity, and unconstitutionally diminishes his personhood – all of which are prohibited by *Obergefell*.” However, the application of the death penalty has not been ruled unconstitutional by either the United States Supreme Court or the Tennessee Supreme Court. Therefore, the trial court did not abuse its discretion in holding that *Obergefell* did not create a right upon which the Petitioner can base a motion to reopen his post-conviction petition.

The remaining argument of the Petitioner in support of his application for permission to appeal is based on *Johnson v. United States*. In that case, the Supreme Court held that the “residual clause” contained in the definition of a violent felony of the federal Armed Career Criminal Act of 1984 (ACCA) is unconstitutionally vague. *Johnson*, 135 S.Ct. at 2557. The ACCA increases the punishment of a defendant convicted of being a felon in possession of a firearm if he or she has three or more previous convictions for a violent felony. 18 U.S.C. § 924(e)(1). The ACCA defines “violent felony” as

“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 the use of explosives, or *otherwise involves conduct that presents a serious potential risk of physical injury to another.*” §924(e)(2)(B) (*emphasis added*).

The “otherwise involves conduct that presents a serious potential risk of physical injury to another” language is known as the ACCA’s “residual clause.” *Johnson*, 135 S.Ct. at 2556. The court observed that, “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.* at 2557. (*emphasis in original*). In making its ruling, the Supreme Court reasoned that the residual clause is unconstitutionally vague because it “leaves grave uncertainty about how to estimate the risk posed by a crime” and it “leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony.” *Id.* at 2557-58. In other words, “[d]eciding whether the residual clause covers a crime thus 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 physical injury.” *Id.* at 2557. That “task goes beyond deciding whether creation of risk is an *element* of the crime.” *Id.* (*emphasis added*). As such, the majority declined the dissent’s suggestion that looking at the particular facts underlying the prior violent felony could save the residual clause from vagueness. *Id.* at 2561-62.

The Petitioner alleges that the *Johnson* decision created a new constitutional right

that would provide an avenue of relief pursuant to Tennessee Code Annotated section 40-30-117(a)(1). We must first look at *Johnson* to determine if a new constitutional right was created. Tennessee Code Annotated section 40-30-122 addresses interpretation of a new rule of constitutional law stating in part:

“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.”

Further, the courts have determined that a “case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government [or] ... if the result was not dictated by precedent existing at the time the defendant’s conviction became final.” *Teague v. Lane*, 109 S.Ct. 1060, 1070 (1989) (citations omitted); *see also Van Tran v. State*, 66 S.W.3d 790, 810-11 (Tenn. 2001). On its face, the *Johnson* decision does not appear to create a new constitutional right but only applies an existing constitutional test to a statute. When referencing *Johnson*, the United States Supreme Court described the reasoning for the decision as follows:

“Last Term, this Court decided *Johnson v. United States*, 135 S.Ct. 2551 (2015). *Johnson* considered the residual clause of the Armed Career Criminal Act of 1984, 18 U.S.C. § 924(e)(2)(B)(ii). The Court held that provision *void for vagueness*.”

*Welch v. United States*, 136 S. Ct. 1257, 1260–61 (2016) (emphasis added). The court further stated:

“Less than three weeks later, this Court issued its decision in *Johnson* holding, as already noted, that the residual clause is *void for vagueness*.”

*Id.* (emphasis added). The ruling of the *Welch* court reinforces the idea that no new constitutional right was created by the *Johnson* opinion. The “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. *City of Chicago v. Morales*, 119 S.Ct. 1849 (1999) (speculation as to meaning of statute not allowed); *Maynard v. Cartwright*, 108 S.Ct. 1853 (1988) (aggravating circumstance language held as unconstitutionally vague); *Kolender v. Lawson*, 103 S.Ct. 1855 (1983) (statute held to be unconstitutionally vague by requiring “credible and reliable” identification); *Colautti v. Franklin*, 99 S.Ct. 675 (1979) (statute vague due to required interpretation of “is viable” and “may be viable”); *Smith v. Goguen*, 94 S.Ct. 1242 (1974) (due process is denied where inherently vague statutory language permits selective law enforcement); *Grayned v. City of Rockford*, 92 S.Ct. 2294 (1972) (enactment is void for vagueness if its prohibitions are not clearly defined). As such, we cannot find that the United States Supreme Court established a new constitutional right through its ruling in *Johnson*.

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.

The “residual clause” of the ACCA defines a violent felony as a felony that “otherwise involves conduct that presents a serious risk of physical injury to another” while the pre-1989 (i)(2) provision required that the felony “involve the use or threat of violence to the person.” The vagueness of the ACCA provision arose out of the multitude of potential means for physical injury to arise from a crime. As set out in the *Johnson* opinion, the phrasing of the ACCA required the trier of fact to determine any number of outcomes of a crime that may result in injury. *Id.* at 2557-2558. The determination was not a fact based determination upon the actual crime for which the defendant was being tried but a determination that in the ordinary course of the listed crime could the risk of physical injury arise. *Id.* The reason for this interpretation of the ACCA was the prior ruling by the Supreme Court in *Taylor v. United States* requiring the court to use the “categorical approach” in applying the ACCA. *Id.* (citing *Taylor v. United States*, 110 S.Ct. 2143 (1990)). Under this “categorical approach”, the court must assess “whether a crime qualifies as a violent felony ‘in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion.’” *Id.* (citing *Begay v. United States*, 128 S.Ct. 1581 (2008)). With these constraints, the ACCA, as written, required the trier of fact to imagine some far reaching machination to determine any number of possible outcomes not specifically related to the underlying felony.

The pre-1989 (i)(2) provision differs from the ACCA in its specificity that the prior felonies involve the use or threat of violence to a person and the governance of how the prior crime is to be interpreted. Unlike the ACCA, which had been limited in interpretation by *Begay* and *Taylor*, there was no such limitation requiring the “ordinary case” interpretation of the prior felony portion of the (i)(2) aggravator at the time of the trial of the Petitioner. The Tennessee Supreme Court had previously taken up the issue of how to determine if the prior felony involved violence to a person pursuant to the (i)(2) provision as then written. *See State v. Moore*, 614 S.W.2d 348 (Tenn. 1981). The instruction given from the Tennessee Supreme Court in *Moore* distinguishes itself from the stated unconstitutional weakness in *Johnson* in that the *Moore* court required a determination of the existence of violence to a person to be made on the facts of the actual crime charged. *Id.* at 351. *Moore* centered its determination around prior crimes



of arson and burglary, both of which the court found could be crimes that did or did not involve violence to the person depending upon the facts of the specific case. *Id.* With *Moore* as guidance for the application of the “use or threat of violence” language of the pre-1989 (i)(2) provision, the vagueness shortcoming of the ACCA as found in *Johnson* would not apply. *Moore* did not limit determination of the pre-1989 (i)(2) provision to an “ordinary case” of the prior felony but required the court to look at the specific acts of the prior felony to determine if the use or threat of violence to a person was present. As such, the ruling of the Supreme Court in *Johnson* would have no effect upon the pre-1989 version of Tennessee Code Annotated section 39-13-204(i)(2) and the post-conviction court did not abuse its discretion in denying the Petitioner’s motion.

For these reasons, the trial court did not abuse its discretion in denying the motion to reopen. The Petitioner’s application for permission to appeal is, therefore, denied. Because it appears the Petitioner is indigent, costs are taxed to the State.

PER CURIAM

JOHN EVERETT WILLIAMS, JUDGE  
ALAN E. GLENN, JUDGE  
CAMILLE R. MCMULLEN, JUDGE

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT KNOXVILLE

## GARY W. SUTTON v. STATE OF TENNESSEE

Circuit Court for Blount County  
No. C-14433

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No. E2016-02112-CCA-R28-PD

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## ORDER

The Appellant has filed an application for permission to appeal the trial court's denial of his motion to reopen his petition for post-conviction relief. The State opposes. Tennessee Code Annotated Section 40-30-117 provides that a motion to reopen a prior post-conviction petition may be filed in the trial court if certain limited circumstances warrant relief. "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." Tenn. Code Ann. § 40-30-217(c). The application must contain copies of all documents filed by both parties in the trial court, as well as the order denying the motion. *Id.* The instant application is timely, and based upon the information included, this Court is able to consider the merits thereof.

The Post-Conviction Procedure Act imposes limits on the nature, number, and timing of petitions for post-conviction relief. *See* Tenn. Code Ann. §§ 40-30-102, -103. Although the Act also provides a means for reopening previously filed petitions, the types of claims which may be raised in a motion to reopen are limited. *See* Tenn. Code Ann. § 40-30-117. Relief will only be granted in a motion to reopen if the claim presented is based upon a final ruling of an appellate court establishing a constitutional right not previously recognized at the time of trial, if retrospective application is required, if the claim is based upon new scientific evidence establishing that the appellant is actually innocent of the crime, or if the claim presented seeks relief from a sentence that was enhanced because of a previous conviction which has subsequently been invalidated. § 40-30-117(a). Furthermore, the facts underlying the claim, if true, must establish by clear and convincing evidence that the Appellant is entitled to have his conviction set aside or his sentence reduced. *Id.* This Court will grant the application for permission to

appeal only if we conclude that the trial court abused its discretion in denying the motion to reopen. § 40-30-117(c).

The Appellant and his co-defendant, James Henderson Dellinger, were convicted of premeditated first degree murder and sentenced to death. *State v. Dellinger*, 79 S.W.3d 458 (Tenn. 2002). The Appellant was sentenced to death based upon the prior violent felony aggravating circumstance: “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. § 39-13-204(i)(2). Following affirmance of his conviction and sentence on direct appeal, the Appellant was unsuccessful in his subsequent pursuit of post-conviction relief. *Gary Wayne Sutton v. State*, No. E2004-02305-CCA-R3-PD, 2006 WL 1472542 (Tenn. Crim. App., May 30, 2006), *perm to app. denied*, (Tenn., Oct. 2, 2006).

In the instant matter, the Appellant argues that his post-conviction petition should be reopened in light of the United States Supreme Court's ruling in *Johnson v. United States*, 135 S.Ct. 2551 (2015). In that case, the court held that the definition of a violent felony contained in the residual clause of the federal Armed Career Criminal Act of 1984 (ACCA) is unconstitutionally vague. *Id.* at 2557. The ACCA increases the punishment of a defendant convicted of being a felon in possession of a firearm if he or she has three or more previous convictions for a violent felony. 18 U.S.C. § 924(e)(1). The ACCA defines “violent felony” as “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 the use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.” § 924(e)(2)(B). The *otherwise involves conduct that presents a serious potential risk of physical injury to another* language is known as the ACCA’s “residual clause.” 135 S.Ct. at 2556. The court observed that, “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.* at 2557. (emphasis in original). The court concluded that the residual clause is unconstitutionally vague because it “leaves grave uncertainty about how to estimate the risk posed by a crime” and it “leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony.” *Id.* at 2557-58. In other words, “[d]eciding whether the residual clause covers a crime thus 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 physical injury.” *Id.* at 2557. That “task goes beyond deciding whether creation of risk is an *element* of the crime.” *Id.* (emphasis added). As such, the majority declined the dissent’s suggestion that looking at the particular facts underlying the prior violent felony could save the residual clause from vagueness. *Id.* at 2561-62. Importantly, however, the

court's invalidation of the residual clause did not call into question the remainder of the ACCA's definition of a violent felony, i.e., the elements clause. *Id.* at 2563.

According to the Appellant's argument herein, the language of the prior violent felony aggravating circumstance is akin to the language of the ACCA the Supreme Court found to be unconstitutionally vague in *Johnson*. The Appellant focuses his argument on the word "involve," contained in both statutes, and suggests that the trier of fact in this state "is required to apply imprecise language and determine whether the prior conviction 'involved' conduct of a certain type." He cites *State v. Sims* to bolster his argument. 45 S.W.3d 1 (Tenn. 2001). In that case, the Tennessee Supreme Court held that a trial court "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." *Id.* at 12.

The trial court disagreed with the Appellant's argument. The court observed that the language of the aggravating circumstance at issue herein "focuses the court's inquiry on the elements of the predicate conviction rather than a judicially imagined hypothetical scenario as in the residual clause of the federal act."

Upon review, we determine that the trial court did not abuse its discretion in denying the Appellant's motion to reopen. While the Appellant correctly states that *Johnson* established a new rule of constitutional law which must be applied retroactively, see *Welch v. United States*, 136 S.Ct. 1257 (2016), the Supreme Court's holding in *Johnson* does not apply herein. *Johnson* invalidated as vague that part of the federal statutory definition of "violent felony" requiring a court to examine whether an offense could potentially involve *conduct* which poses a risk of physical injury. It left intact the language defining a "violent felony" as one having the use of physical force as a statutory *element* of the offense. As the Supreme Court later stated: "For purposes of the residual clause, then, courts were to determine whether a crime involved a 'serious potential risk of physical injury' by considering not the defendant's actual conduct but an 'idealized ordinary case of the crime.'" *Welch v. United States*, 136 S. Ct. at 1262 (citing *Johnson*, 135 S.Ct. at 2561). "The residual clause failed not because it adopted a 'serious potential risk' standard but because applying that standard under the categorical approach required courts to assess the hypothetical risk posed by an abstract generic version of the offense." *Id.*

The plain language of the (i)(2) aggravating circumstance resembles that of the ACCA held to be valid. In order to qualify as an aggravating circumstance in Tennessee, a conviction for a prior felony must be for one whose statutory elements involve the use of violence. § 39-13-204(i)(2). Whether the *statutory elements* of an offense include the use of violence to the person is a question of law for the trial court. *Sims*, 45 S.W.3d at 11. However, whether the State has proven the defendant has a prior conviction for that

offense pursuant to the (i)(2) aggravating circumstance remains a matter for the trier of fact. *See State v. Ivy*, 188 S.W.3d 132, 151 (Tenn. 2006) (citing *State v. Cole*, 155 S.W.3d 885, 904 (Tenn. 2005)). The finding of the trier of fact is subject to a sufficiency of the evidence analysis. In its analysis in *Johnson*, the Supreme Court explained that “a court assesses whether a crime qualifies as a violent felony in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion.” 135 S.Ct. at 2557 (internal citation omitted). Because the ACCA refers to a person who has previous “convictions,” instead of a person who “committed” previous offenses, the Supreme Court opined that “Congress intended the sentencing court to look only to the fact that the defendant had been convicted of crimes falling within certain categories, and not to the facts underlying the prior convictions.” *Id.* at 2562 (internal citation omitted). The Appellant’s argument in the case at hand is, therefore, misplaced.

For these reasons, the trial court did not abuse its discretion in denying the motion to reopen. The Appellant's application for permission to appeal is, therefore, denied. Because it appears the Appellant is indigent, costs are taxed to the State.

PER CURIAM

(Witt, J., Woodall, P.J., Montgomery, J.)

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE

**FILED**  
06/29/2018  
Clerk of the  
Appellate Courts

**DERRICK QUINTERO v. STATE OF TENNESSEE**

**Circuit Court for Humphreys County  
No. 8850**

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**No. M2017-02272-CCA-R28-PD**

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**ORDER**

This matter is before the court on the Petitioner’s application for permission to appeal from the order of the Humphreys County Circuit Court denying his “Motion to Reopen Post-Conviction Proceedings.” *See* Tenn. Code Ann. § 40-30-117(c); *see also* Tenn. S. Ct. R. 28, § 10(B). The State has responded in opposition to the application.

On December 4, 1991, a Humphreys County Circuit Court jury convicted the Petitioner and a codefendant, William Eugene Hall, Jr., of various offenses surrounding the deaths of Myrtle and Buford Vester. As recited by our supreme court, the Petitioner and Hall

were convicted by a jury of two counts of murder during the perpetration of first degree burglary, three counts of grand larceny, one count of petit larceny and three counts of first degree burglary. For their convictions of larceny and burglary, the defendants each were sentenced to eighty years incarceration, which sentences were ordered to run consecutively to the life sentences imposed for their conviction of the first degree murder of Buford Vester. With respect to the first degree murder of Myrtle Vester, the jury found the proof established the following five aggravating circumstances: (1) the defendants were previously convicted of one or more felonies involving the use or threat of violence, Tenn. Code Ann. § 39-2-203(i)(2)(1982); (2) the murder was especially heinous, atrocious or cruel in that it involved torture or depravity of mind, Tenn. Code Ann. § 39-2-203(i)(5)(1982); (3) the murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of themselves or others, Tenn. Code Ann. § 39-2-203(i)(6)(1982); (4) the murder was

committed while the defendant was engaged in committing or was an accomplice in the commission of, or was attempting to commit, or fleeing after committing or attempting to commit, any first-degree murder, arson, rape, robbery, burglary, larceny, kidnaping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb, Tenn. Code Ann. § 39-2-203(i)(7)(1982); and (5) the murder was committed by the appellants while they were in lawful custody or in a place of lawful confinement or during their escape from lawful custody or from a place of lawful confinement, Tenn. Code Ann. § 39-2-203(i)(8)(1982).<sup>1</sup> Finding that there were no mitigating circumstances sufficiently substantial to outweigh the aggravating circumstances, the jury sentenced the defendants to death by electrocution for the murder of Myrtle Vester.

*State v. Hall*, 976 S.W.2d 121, 123 (Tenn. 1998) (footnotes omitted), *cert. denied*, 119 S. Ct. 1501 (1999). On direct appeal, this court “found that the evidence did not support dual larceny convictions and ordered that the petit larceny convictions be merged with the grand larceny convictions.” *Id.* This court “affirmed the convictions of first degree murder and sentences of life imprisonment and death by electrocution, finding the jury’s erroneous reliance upon two inapplicable aggravating circumstances, (i)(6) and (i)(7), harmless beyond a reasonable doubt.” *Id.* On automatic review to the Tennessee Supreme Court, the court “concluded that the Court of Criminal Appeals erred in finding the evidence insufficient to support the (i)(6) aggravating circumstance, and accordingly reinstate[d] the jury’s finding of that circumstance” but affirmed this court’s opinion in all other respects. *Id.* at 123-24. The Petitioner unsuccessfully sought post-conviction relief, the denial of which was affirmed on appeal to this court. *Derrick Quintero and William Eugene Hall, Jr. v. State*, No. M2005-02959-CCA-R3-PD, 2008 WL 2649637 (Tenn. Crim. App., July 7, 2008), *perm. app. denied* (Tenn. Dec. 8, 2008) (as to Quintero), *cert. denied*, 130 S. Ct. 80 (2009).

On June 24, 2016, the Petitioner filed in the post-conviction court a motion to reopen post-conviction proceedings, claiming that his post-conviction petition should be reopened in light of the United States Supreme Court’s rulings in *Johnson v. United States*, 135 S. Ct. 2551 (2015) and *Welch v. United States*, 136 S. Ct. 1257 (2016), which the Petitioner asserted rendered unconstitutional the imposition of the death penalty in his conviction for Myrtle Vester’s first degree murder and the imposition of consecutive sentences in the convictions in Buford Vester’s first degree murder and the underlying felonies. On October 14, 2016, the Petitioner filed an amended motion to reopen adding the additional claim that the Supreme Court’s opinion in *Hurst v. Florida*, 136 S. Ct. 616 (2016), announced a new constitutional rule requiring retrospective application precluding the death penalty in this case. The post-conviction court summarily denied relief. The Petitioner filed a timely application for review of the post-conviction’s court’s order.

The Post-Conviction Procedure Act of 1995 provides that a motion to reopen a prior post-conviction proceeding may raise a claim “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.” Tenn. Code Ann. § 40-30-117(a)(1). “The motion must be filed within one (1) year of the ruling of the highest state appellate court or the United States supreme court establishing a constitutional right that was not recognized as existing at the time of trial[.]” *Id.* “[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.” Tenn. Code Ann. § 40-30-122.

### Johnson Claims

The Petitioner advances two arguments relative to *Johnson*. First, he contends that the language of the prior violent felony aggravating circumstance, Tenn. Code Ann. § 39-2-203(i)(2), is “essentially the same” as the language that the Supreme Court held to be unconstitutionally vague in *Johnson*. The Petitioner focuses his argument on the word “involve,” contained in both statutes, and suggests that the trier of fact in this state “is required to apply imprecise language and determine whether the prior conviction ‘involved’ conduct of a certain type.” The Petitioner also asserts that *Johnson* extends to the trial court’s imposition of consecutive sentences based upon findings that the Petitioner “is a dangerous offender whose record of criminal activity is extensive” and “whose behavior indicates little to no regard for human life, and no hesitation about committing a crime in which the risk to human life is high.” Tenn. Code Ann. § 40-35-115(b)(2), (4).

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. §39-2-203(i)(2)(1982). The 1982 version of the prior violent felony aggravating circumstance is identical to the pre-1989 version codified at Tennessee Code Annotated section 39-13-204(i)(2)(1988). This court has previously held that “[a] comparison of the [Armed Career Criminal Act] 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.” *Donnie E. Johnson v. State*, W2017-00848-CCA-R28-PD, Order (Tenn. Crim. App. Sept. 19, 2017), *perm. app. denied* (Tenn. Jan. 19, 2018). The Petitioner is not entitled to relief as to this claim.

As to the Petitioner’s extension of *Johnson* to the imposition of consecutive sentences in his case, we conclude that the analysis of *Johnson* is inapt to an analysis of



Tennessee’s consecutive sentencing statute. In *Beckles v. United States*, 137 S. Ct. 886 (2017), the Court declined to extend the application of *Johnson* to the Sentencing Guidelines, holding that because the Sentencing Guidelines “merely guide the exercise of a court’s discretion in choosing an appropriate sentence . . . [they] are not subject a vagueness challenge under the Due Process Clause.” *Id.* at 892. Likewise, we conclude that the discretionary nature of Tennessee’s consecutive sentencing statute is not subject to a vagueness challenge under the Due Process Clause. The Petitioner is not entitled to relief as to this claim.

#### Hurst Claim

Next, the Petitioner claims that the Supreme Court’s opinion in *Hurst v. Florida*, 136 S. Ct. 616 (2016), announced a new constitutional rule requiring retrospective application precluding the death penalty in his case. This court has consistently held that the holding in *Hurst* does not constitute a new constitutional rule requiring retrospective application. *Jonathan Stephenson v. State*, No. E2017-01067-CCA-R28-PD, Order (Tenn. Crim. App. Sept. 19, 2017), *perm. app. denied* (Tenn. Jan. 18, 2018); *Dennis Wade Suttles v. State*, No. E2017-00840-CCA-R28-PD, Order (Tenn. Crim. App. Sept. 18, 2017), *perm. app. denied* (Tenn. Jan. 18, 2018); *Gary W. Sutton v. State*, No. E2017-01394-CCA-R3-PD, Order (Tenn. Crim. App. Sept. 13, 2017), *perm. app. denied* (Tenn. Jan. 18, 2018). The Petitioner is not entitled to relief as to this claim.

#### CONCLUSION

In summary, the court concludes that the post-conviction court did not abuse its discretion in denying the Petitioner’s motion to reopen post-conviction proceedings. Accordingly, the Petitioner’s application for permission to appeal from the order of the Circuit Court for Humphreys County dismissing the Petitioner’s “Motion to Reopen Post-Conviction Proceedings” is hereby DENIED. It appearing that the Petitioner is indigent, the costs of this proceeding are taxed to the State of Tennessee.

JUDGE D. KELLY THOMAS, JR.  
JUDGE NORMA MCGEE OGLE  
JUDGE ROBERT H. MONTGOMERY, JR.

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT JACKSON

FILED

09/26/2017

Clerk of the  
Appellate Courts

VINCENT SIMS v. STATE OF TENNESSEE

Criminal Court for Shelby County

No. P-25898

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No. W2016-02412-CCA-R28-PD

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ORDER

The Petitioner has filed an application for permission to appeal the trial court's denial of his motion to reopen his petition for post-conviction relief. The State has filed a response in opposition thereto. Tennessee Code Annotated section 40-30-117 provides that a motion to reopen a prior post-conviction petition may be filed in the trial court if certain limited circumstances warrant relief. "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." Tenn. Code Ann. §40-30-217(c). The application must contain copies of all documents filed by both parties in the trial court, as well as the order denying the motion. *Id.* The instant application is timely, and based upon the information included, this Court is able to consider the merits thereof.

The Post-Conviction Procedure Act imposes limits on the nature, number, and timing of petitions for post-conviction relief. *See* Tenn. Code Ann. §§40-30-102, -103. Although the Act also provides a means for reopening previously filed petitions, the types of claims which may be raised in a motion to reopen are limited. *See* Tenn. Code Ann. §40-30-117. Relief will only be granted in a motion to reopen if the claim presented is based upon a final ruling of an appellate court establishing a constitutional right not previously recognized at the time of trial, if retrospective application is required, if the claim is based upon new scientific evidence establishing that the appellant is actually innocent of the crime, or if the claim presented seeks relief from a sentence that was enhanced because of a previous conviction which has subsequently been invalidated. Tenn. Code Ann. §40-30-117(a). Furthermore, the facts underlying the claim, if true, must establish by clear and convincing evidence that the appellant is entitled to have his conviction set aside or his sentence reduced. *Id.* This Court will grant the application for permission to appeal only if we conclude that the trial court abused its discretion in denying the motion to reopen. Tenn. Code Ann. §40-30-117(c).

Petitioner was convicted of especially aggravated burglary and first degree murder in 1998 and sentenced to death. The death sentence was based on four aggravating circumstances: 1) he previously had been convicted of violent felonies; 2) the murder was especially heinous, atrocious, or cruel; 3) the murder was committed for the purpose of avoiding, interfering with, or preventing his arrest or prosecution; and 4) the murder was committed during the commission of a burglary or theft. Both the convictions and sentences were affirmed by the Court of Criminal Appeals and our Supreme Court. The Petitioner unsuccessfully pursued a petition for post-conviction relief and two subsequent motions to reopen post-conviction proceedings.

On June 23, 2016, Petitioner filed a third motion to reopen post-conviction proceedings which was denied by the trial court. The Petitioner has sought permission to appeal.

The Petitioner argues that his post-conviction petition should be reopened in light of the United States Supreme Court's ruling in *Johnson v. United States*, 135 S.Ct. 2551 (2015), the United States Supreme Court's ruling in *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015), and Justice Breyer's dissenting opinion in *Glossip v. Gross*, 135 S.Ct. 2726 (2015).

His first argument in support of his application for permission to appeal is based on *Johnson v. United States*. In that case, the Supreme Court held that the "residual clause" contained in the definition of a violent felony of the federal Armed Career Criminal Act of 1984 (ACCA) is unconstitutionally vague. *Johnson*, 135 S.Ct. at 2557. The ACCA increases the punishment of a defendant convicted of being a felon in possession of a firearm if he or she has three or more previous convictions for a violent felony. 18 U.S.C. § 924(e)(1). The ACCA defines "violent felony" as

"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 the use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." §924(e)(2)(B).

The "otherwise involves conduct that presents a serious potential risk of physical injury to another" language is known as the ACCA's "residual clause." *Johnson*, 135 S.Ct. at 2556. The court observed that, "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.* at 2557. (emphasis in original). In making its ruling, the Supreme Court reasoned that the residual clause is unconstitutionally vague because it "leaves grave uncertainty about how to estimate the risk posed by a crime" and it "leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony." *Id.* at 2557-58. In other words, "[d]eciding whether the residual clause covers a crime thus 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 physical injury.” *Id.* at 2557. That “task goes beyond deciding whether creation of risk is an *element* of the crime.” *Id.* (emphasis added). As such, the majority declined the dissent’s suggestion that looking at the particular facts underlying the prior violent felony could save the residual clause from vagueness. *Id.* at 2561-62. Importantly, however, the court’s invalidation of the residual clause did not call into question the remainder of the ACCA’s definition of a violent felony, i.e., the elements clause. *Id.* at 2563.

The Petitioner alleges that the *Johnson* decision created a new constitutional right that would provide an avenue of relief pursuant to Tennessee Code Annotated section 40-30-117(a)(1). We must first look to determine if a new constitutional right was created. Tennessee Code Annotated section 40-30-122 addresses interpretation of a new rule of constitutional law stating in part:

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.

Tenn. Code Ann. § 40-30-122. Further, the courts have determined that a “case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government [or] . . . if the result was not dictated by precedent existing at the time the defendant’s conviction became final.” *Teague v. Lane*, 489 U.S. 288, 301, 109 S.Ct. 1060, 1070 (1989) (citations omitted); *see also Van Tran v. State*, 66 S.W.3d 790, 810-11 (Tenn. 2001). On its face, the *Johnson* decision does not appear to create a new constitutional right but only applies an existing constitutional test to a statute. When referencing *Johnson*, the United States Supreme Court described the reasoning for the decision as follows:

“Last Term, this Court decided *Johnson v. United States*, 135 S.Ct. 2551 (2015). *Johnson* considered the residual clause of the Armed Career Criminal Act of 1984, 18 U.S.C. § 924(e)(2)(B)(ii). The Court held that provision *void for vagueness*.”

*Welch v. United States*, 136 S. Ct. 1257, 1260–61 (2016) (emphasis added). The court further stated:

“Less than three weeks later, this Court issued its decision in *Johnson* holding, as already noted, that the residual clause is *void for vagueness*.”

*Id.* (emphasis added). The ruling of the *Welch* court reinforces the idea that no new constitutional right was created by the *Johnson* opinion. The “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. *City of Chicago v. Morales*, 119 S.Ct. 1849 (1999) (speculation as to meaning of statute not allowed); *Maynard v. Cartwright*, 108 S.Ct. 1853 (1988) (aggravating circumstance language held as unconstitutionally vague); *Kolender v. Lawson*, 103 S.Ct. 1855 (1983) (statute held to be unconstitutionally vague by requiring “credible and reliable” identification); *Colautti v. Franklin*, 99 S.Ct. 675 (1979) (statute vague due to required interpretation of “is viable” and “may be viable”); *Smith v. Goguen*, 94 S.Ct. 1242 (1974) (due process is denied where inherently vague statutory language permits selective law enforcement); *Grayned v. City of Rockford*, 92 S.Ct. 2294 (1972) (enactment is void for vagueness if its prohibitions are not clearly defined). As such, we cannot find that the United States Supreme Court established a new constitutional right through its ruling in *Johnson*.

Although this Court finds that *Johnson* does not present a new constitutional right which should be applied retroactively upon collateral review, the Court will address the substance of Petitioner’s argument.

In his application for permission to appeal, rather than argue against the underlying ruling of the post-conviction court, the Petitioner primarily argued against the prior ruling of our Supreme Court in the Petitioner’s earlier appeal. *See State v. Sims*, 45 S.W.3d 1 (Tenn. 2001). In addition, the Petitioner bases his arguments on other cases now pending in other post-conviction courts. However, the referenced cases involved sentencing under the pre-1989 statutory aggravating circumstances statutes and not the statute in effect at the time of the crime in this case.

The trial court based its decision upon an application of the *Johnson* decision to Tennessee Code Annotated section 39-13-204(i)(2) in effect at the time of the crime in this matter. The court observed that the language of the aggravating circumstance at issue herein “focuses the court’s inquiry on the elements of the predicate conviction rather than a judicially imagined hypothetical scenario as in the residual clause of the federal act.” As a result, the post-conviction court held that the Tennessee prior violent felony aggravating circumstance does not “suffer from the vagueness problems that rendered the ACCA’s Residual Clause unconstitutional.”

*Johnson* invalidated as vague that part of the federal statutory definition of “violent felony” requiring a court to examine whether an offense could potentially involve *conduct* which poses a risk of physical injury. It left intact the language defining a “violent felony” as one having the use of physical force as a statutory *element* of the offense. As the Supreme Court later stated: “For purposes of the residual clause, then, courts were to determine whether a crime involved a ‘serious potential risk of physical injury’ by considering not the defendant’s actual conduct but an ‘idealized ordinary case of the crime.’” *Welch v. United States*, 136 S. Ct. at 1262 (citing *Johnson*, 135 S.Ct. at 2561). “The residual clause failed not because it adopted a ‘serious potential risk’ standard but because applying that standard under the categorical approach required

courts to assess the hypothetical risk posed by an abstract generic version of the offense.” *Id.*

The plain language of the (i)(2) aggravating circumstance resembles that of the ACCA held to be valid. In order to qualify as an aggravating circumstance in Tennessee, a conviction for a prior felony must be for one whose statutory elements involve the use of violence. § 39-13-204(i)(2). Whether the *statutory elements* of an offense include the use of violence to the person is a question of law for the trial court. *Sims*, 45 S.W.3d at 11. However, whether the State has proven the defendant has a prior conviction for that offense pursuant to the (i)(2) aggravating circumstance remains a matter for the trier of fact. *See State v. Ivy*, 188 S.W.3d 132, 151 (Tenn. 2006) (citing *State v. Cole*, 155 S.W.3d 885, 904 (Tenn. 2005)). The finding of the trier of fact is subject to a sufficiency of the evidence analysis. In its analysis in *Johnson*, the Supreme Court explained that “a court assesses whether a crime qualifies as a violent felony in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion.” 135 S.Ct. at 2557 (internal citation omitted). Because the ACCA refers to a person who has previous “convictions,” instead of a person who “committed” previous offenses, the Supreme Court opined that “Congress intended the sentencing court to look only to the fact that the defendant had been convicted of crimes falling within certain categories, and not to the facts underlying the prior convictions.” *Id.* at 2562 (internal citation omitted). The Petitioner’s argument in the case at hand is, therefore, misplaced and the *Johnson* ruling would have no effect on the Petitioner’s conviction or sentence.

The Petitioner further argues that the court should find that his sentence of death is unconstitutional after the decision of the United States Supreme Court in *Obergefell v. Hodges*. The *Obergefell* case held that “same-sex couples may exercise the fundamental right to marry” and that “under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and liberty.” *Obergefell*, 135 S.Ct. at 2604-05. The Petitioner argues that the death penalty, which has been imposed against him, denies him his fundamental right to life which is prohibited by *Obergefell*. However, the application of the death penalty has not been ruled unconstitutional by either the United States Supreme Court or the Tennessee Supreme Court. Therefore, the trial court did not abuse its discretion in holding that *Obergefell* did not entitle the Petitioner to relief and denying his petition as to that issue.

Relying upon a dissent by Justice Breyer in *Glossip v. Gross*, 135 S.Ct. 2726 (2015), the Petitioner argues that his sentence of death is unconstitutional. The Petitioner’s reliance upon a dissenting opinion to reopen his petition for post-conviction relief offers him no relief. To succeed in reopening a previously filed petition, the claim asserted must be “based upon a final ruling of an appellate court.” T.C.A. § 40-30-117(a)(1). The majority opinion in *Glossip* concluded that the method of execution utilized by the State of Oklahoma does not constitute cruel and unusual punishment under the Eighth Amendment. 135 S.Ct. at 2731. Accordingly, the trial court did not abuse its

discretion in denying relief to the Petitioner finding that Justice Breyer's dissent relied upon by the Petitioner did not create a new substantive rule of constitutional law as required by statute.

For these reasons, the trial court did not abuse its discretion in denying the motion to reopen. The Petitioner's application for permission to appeal is, therefore, denied. Because it appears the Petitioner is indigent, costs are taxed to the State.

PER CURIAM

JOHN EVERETT WILLIAMS, JUDGE  
ALAN E. GLENN, JUDGE  
CAMILLE R. McMULLEN, JUDGE