No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

In re: HAROLD WAYNE NICHOLS, *Petitioner*

ORIGINAL PETITION FOR WRIT OF HABEAS CORPUS

THIS IS A CAPITAL CASE
EXECUTION SET FOR AUGUST 4, 2020, at 7:00 PM (CDT)

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Capital Case

Questions Presented

1. When a capital defendant requests from a court of appeals authorization to file in a district court a second or successive habeas petition presenting a newly-exhausted claim arising from a new, retroactive law, does a court of appeals exceed its jurisdiction under 28 U.S.C. § 2244(b) when it decides the merits of the claim?

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Original Petition for Writ of Habeas Corpus

Harold Wayne Nichols respectfully petitions this Court to exercise its original jurisdiction to issue a writ of habeas corpus.

Order Below

The Sixth Circuit's order denying Petitioner Nichols' application for authorization to file a second or successive habeas petition is unreported, but contained in the appendix to this petition. 1a-5a.

List of Proceedings

- *State v. Nichols*, No. 175504 (Hamilton Co. Crim. Ct. May 12, 1990) (judgment of conviction and sentence) Pet. App. 107a.
- *State v. Nichols*, No. 03S01-9105-CR-00047, 877 S.W.2d 722 (Tenn. May 2, 1994) (direct appeal den.) Pet. App. 6a-27a.
- *Nichols v. Tennessee*, No. 94-6136, 513 U.S. 1114 (Jan. 17, 1995) (cert. den.)
- *Nichols v. State*, No. 205863 (Hamilton Co. Crim. Ct. Mar. 18, 1998) (post-conviction den.)
- *Nichols v. State*, No. E1998-00562-SC-R11-PD, 90 S.W.3d 576 (Tenn. Oct. 7, 2002) (post-conviction appeal den.) Pet. App. 28a-60a.
- *Nichols v. Bell*, No. 1:02-cv-330, 440 F. Supp. 2d 730 (E.D. Tenn. Oct. 22, 2004) (habeas pet. den.)
- *Nichols v. Bell*, No. 1:02-cv-330, 440 F. Supp. 2d 847 (E.D. Tenn. Jul. 25, 2006) (den. in part, granted in part, certificate of appealability)
- *Nichols v. Heidle*, No. 06-6495, 725 F.3d 516 (6th Cir. Jul. 25, 2013) (habeas appeal den.)
- *Nichols v. Heidle*, No. 13-8570, 574 U.S. 1025 (Dec. 1, 2014) (cert. den.)
- *In re Harold Wayne Nichols*, No. 16-5665 (6th Cir. Aug. 15, 2016) (perm. to file second or successive habeas pet. den.) Pet App. 103a-106a.
- *Nichols v. Westbrooks*, No. 3:16-cv-00245 (E.D. Tenn. Sept. 30, 2016) (dismissing protective second habeas petition)

- *Nichols v. State*, No. 205863 (Hamilton Co. Crim. Ct. Mar. 7, 2018) (mot. to reopen post-conviction den.) Pet. App. 61a-82a.
- *Nichols v. State*, No. E2018-00626-CCA-R3-PD, 2019 WL 5079357 (Tenn. Crim. App. Oct. 10, 2019) (post-conviction appeal den.) Pet. App. 83a-101a.
- *Nichols v. State*, No. E2018-00626-SC-R11-PD (Tenn. Jan. 15, 2020) (app. perm. app. den.) Pet. App. 102a.
- *In re Harold Wayne Nichols*, No. 19-6460 (6th Cir. Feb. 13, 2020) (perm. to file second or successive habeas pet. den.) Pet. App. 1a-5a.

Jurisdiction

This Court has original jurisdiction under 28 U.S.C. § 1651(a) (All Writs Act), 28 U.S.C. §§ 2241(a), 2241(c)(3), 2254(a), and Article III of the United States Constitution, because Petitioner Nichols is in custody pursuant to a state-court conviction and scheduled to be put to death on August 4, 2020, in violation of the Constitution and laws of the United States.

To be clear, Nichols does not seek certiorari review of the Sixth Circuit's order denying him authorization to file a second or successive habeas petition. *See* 28 U.S.C. § 2244(b)(3)(E) ("The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.").

Statement Required by Supreme Court Rule 20.4(a) and 28 U.S.C. § 2242

1. State court remedy – There is no state court remedy when a circuit court acts without jurisdiction. The claim Petitioner sought to file in a second habeas petition with the district court is exhausted. On October 10, 2019, the Tennessee Court of Criminal Appeals ruled on the merits of the *Johnson* claim. Pet.

App. 83a-101a. On January 15, 2020, the Tennessee Supreme Court denied discretionary review. Pet. App. 102a.

2. Reasons for not making application to the district court – Petitioner has not filed with the district court a petition for a writ of habeas corpus because the circuit court prohibited such a filing. Pet. App. 1a-5a.

3. Exceptional Circumstances warrant this Court's review – This case provides the Court with an opportunity to ensure that circuit courts do not exceed their jurisdictional limits under Section 2244(b) and that habeas petitioners, like Petitioner Nichols, do not have their rights improperly curtailed without an appropriate opportunity for federal review. The sole aggravating circumstance justifying the death sentence for Petitioner is unconstitutionally vague under *Johnson v. United States*, ___ U.S. ___, 135 S. Ct. 2551 (2015); a new, retroactive rule of substantive criminal law. Petitioner requested from the circuit court authorization under 28 U.S.C. § 2244(b)(3)(A) to file a second habeas petition that contained the newly-exhausted *Johnson* claim. Pet. App. 120a-151a. The claim satisfied the criteria for authorization because it "relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable[.]" 28 U.S.C. § 2244(b)(2)(A). The Respondent acknowledged that Nichols' *Johnson* claim arises from a new, retroactive rule of constitutional law. Pet. App. 157a.

Circuit courts may authorize a second or successive petition only upon "a prima facie showing" of the requirements of § 2244(b)(2)(A) or (B). 28 U.S.C. §

2244(b)(3)(C). The Sixth Circuit did not find that Petitioner failed to make such a showing. The circuit court, instead, denied authorization based on the ultimate merit of Petitioner's claim--an act for which the court lacked jurisdiction. *See Miller-El v. Cockrell*, 537 U.S. 322, 335-36 (2003) ("[U]ntil a COA has been issued federal courts of appeals lack jurisdiction to rule on the merits of appeals from habeas petitioner."). One function of this Court is supervisory and this Court will intercede in the event a lower court exceeds its Congressionally-granted jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of* America, 511 U.S. 375, 377 (1994) ("Federal courts ... possess only that power authorized by Constitution and statute[.]"). The jurisdiction of federal courts is of primary importance; its authority must be zealously guarded but also its limits must be enforced.

The circuit court's improper action has also deprived Petitioner of federal review of the state court's unreasonable application of federal law to the one aggravating circumstance that would ostensibly justify Petitioner's execution on August 4, 2020. The extra-jurisdictional merits review conducted by the court of appeals before it denied Nichols permission to file a second or successive habeas petition under § 2244(b)(2)(A) constitutes a violation of the Suspension Clause of the Constitution. The circuit court's action constituted an unconstitutional restriction on federal review of Nichols' newly-exhausted federal claim. This Court's review is warranted because "there is no higher duty than to maintain" the writ of habeas corpus "unimpaired, and unsuspended, save only in the cases specified in

our Constitution." *Smith v. Bennett*, 365 U.S. 708, 712-13 (1961) (internal quotation marks and citation omitted).

4. Adequate relief cannot otherwise be obtained – The circuit court prohibited Petitioner from filing a second habeas petition with the district court. Although the circuit court was without jurisdiction to deny authorization based on the ultimate merit of Petitioner's claim, the circuit court's order is not subject to certiorari review. 28 U.S.C. § 2244(b)(3)(E). An original writ of habeas corpus from this Court is Petitioner's only means for relief from the circuit court's action in excess of its jurisdiction.

Constitutional Provisions and Statutes

U.S. CONSTITUTION, Art. I, § 9, cl. 2: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

U.S. CONSTITUTION, Art. III, § 2, in relevant part: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution[.] ... [T]he supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

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

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

28 U.S.C. § 2244. Finality of determination:

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.

* * *

(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(b)(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—

(b)(2)(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

* * *

(b)(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(b)(3)(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(b)(3)(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(b)(3)(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(b)(3)(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

Statement of the Case

Nichols pled guilty to first-degree felony murder. The sole aggravating circumstance justifying the death penalty is the prior violent felony aggravator.[1]

[1] A jury sentenced Nichols to death upon two aggravating circumstances: (1) "The defendant was previously convicted of one (1) or more felonies, other than the present charge, whose statutory elements involve the use of violence to the person;" and, (2) the murder occurred during the commission of a felony. Pet. App. 6a (citing Tenn. Code Ann. § 39-13-204(i)(2) & (7); Pet. App. 17a). On appeal, the Tennessee Supreme

The prior violent felony aggravator was supported by five convictions for the aggravated rape of four victims that took place after the capital murder. Pet. App. 35a-36a. Violence is not a necessary element of aggravated rape in Tennessee because the crime of aggravated rape can be committed in several ways, all of which do not require the use of violence: by "using a weapon to frighten the victim into submission;" by "inflicting personal injury beyond the rape itself;" or, by "using force or coercion." Tenn. Code Ann. § 39-2-603(a)(1)-(3) (1990).[2] Nichols' judgments of conviction do not specify which of the three subparts of the statute, or which alternative of subpart (3), Nichols violated. Pet. App. 108a-112a. Nichols' jury was instructed to consider the fact that:

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

Pet. App. 115a.

Court, in a 3-1 opinion, struck the felony-murder aggravator for not performing a constitutional-narrowing function. Pet. App. 19a-20a. The court, however, found the error harmless. Pet. App. 21a. Only the prior violent felony aggravator continues to support the death sentence.

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

On direct appeal, Nichols challenged the prior violent felony aggravating circumstance based on the prosecution's use of crimes that occurred after the capital murder, as well as, the fact that those convictions were not final at the time of the capital sentencing. Pet. App. 16a-19a. The state court upheld the prior violent felony aggravator. Pet. App. 17a-19a.

On June 26, 2015, this Court decided *Johnson v. United States*, 135 S. Ct. 2551 (2015). *Johnson* held that language used in the residual clause of the Armed Career Criminal Act (ACCA)—language materially identical to the language of Tennessee's prior violent felony aggravator—is unconstitutionally vague and, therefore, void. *Id.*

On April 18, 2016, this Court decided *Welch v. United States*, ___ U.S. ___, 136 S. Ct. 1257 (2016). *Welch* held that *Johnson* is a new rule of constitutional law that has retroactive effect in cases on collateral review. *Id.* at 1265, 1268.

One month later, on May 17, 2016, Nichols filed in the Sixth Circuit an Application for Leave to File a Second or Successive Habeas Petition Under 28 U.S.C. § 2244 based on *Johnson*, *supra*, and *Welch*, *supra*. On August 15, 2016, the circuit court denied the application after concluding that Tennessee's prior violent felony aggravator utilized "the same sort of 'elements clause' that *Johnson* itself refused to call into question." Pet. App.105a.

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

court review tolled the one-year statute of limitations for presenting the claim to the federal courts. 28 U.S.C. § 2244(d)(1)(C) (the one-year period begins on the date the constitutional right is recognized and made retroactive by the Supreme Court); 28 U.S.C. § 2244(d)(2) (the time during which state post-conviction review is pending shall not be counted toward the one-year period).

On October 4, 2016, the post-conviction court determined that Nichols' motion "stated a colorable claim" and the post-conviction proceedings were reopened. Pet. App. 86a. The parties subsequently agreed to settle the case and to modify Nichols' sentence to life imprisonment, but the post-conviction court subsequently rejected the proposed settlement agreement. Pet. App. 87a. The post-conviction court then entered an order summarily denying relief. Pet. App. 87a.

On October 10, 2019, the Tennessee Court of Criminal Appeals affirmed. Pet. App. 101a. The state court applied *Johnson* to the prior violent felony aggravating circumstance but found no *Johnson* violation because Tennessee courts trying capital cases are permitted to look to the facts underlying a previous conviction to determine whether it involved the use of violence. Pet. App. 91a. The state court said, "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." Pet. App. 91a. The state court held that this "case-specific approach would avoid the vagueness problems that doomed the statute[] in *Johnson*[.]" Pet. App. 90a (citing *United States v. Davis*, 139 S. Ct. 2319, 2327 (2019)).

On December 6, 2019, Nichols applied to the Tennessee Supreme Court for discretionary review. The state court denied review on January 15, 2020. Pet. App. 102a.

On December 20, 2019, while the application for permission to appeal was pending in the Tennessee Supreme Court, Nichols filed in the Sixth Circuit Court of Appeals an Application for Leave to File a Second or Successive Habeas Petition Under 28 U.S.C. § 2244 based on *Johnson*, *supra*, and *Welch*, *supra*.[3] Pet. App. 120a. The Respondent acknowledged that Nichols' *Johnson* claim arises from a new, retroactive rule of constitutional law. Pet. App. 157a. Respondent argued that authorization should be denied based on the *Johnson* claim's ultimate merit. In reply, Nichols argued that the court of appeals was limited to a prima facie review. Pet. App. 169a-173a.

On January 15, 2020, the Tennessee Supreme Court scheduled an execution date for Nichols of August 4, 2020. Pet. App. 118a.

On February 13, 2020, the Sixth Circuit denied Nichols' application for permission to file a second habeas petition. The circuit court denied the application on the merit of the *Johnson* claim, stating, "we already concluded that this argument was without merit when denying Nichols' prior application, and he

[3] Despite pendency of the discretionary appeal in the Tennessee Supreme Court, the *Johnson* claim was exhausted for federal court review because a defendant need not file an application for permission to appeal to the Tennessee Supreme Court following an adverse decision of the Court of Criminal Appeals in order to be deemed to have exhausted all available state court remedies. Tenn. Sup. Ct. R. 39; *See O'Sullivan v. Boerckel*, 526 U.S. 838, 847 (1999) ("The exhaustion doctrine … turns on an inquiry into what procedures are 'available' under state law.")

provides no basis for changing that conclusion." Pet. App. 4a. The court found that the jury did not improperly consider the underlying facts of Nichols' prior conviction. Pet. App. 5a. It further found, without any factual basis, that Nichols' priors "were for aggravated rape 'by use of force[.]'" *Compare* Pet. App. 5a, *with* Pet. App. 108a-112a (judgments of conviction).

Reasons for Granting the Writ

I. A federal court's exercise of power beyond its jurisdiction is an important constitutional issue for resolution by this Court

Exceptional circumstances warrant this Court's review because the Sixth Circuit's extra-jurisdictional action precludes the district court's review of Nichols' new habeas claim arising from the retroactive rule in *Johnson*. Nichols' claim meets the retroactive rule requirements for filing a second or successive habeas petition in the district court with the opportunity for a full and fair hearing on his *Johnson* claim. Contrary to the plain language and purpose of 28 U.S.C. § 2244(b), the circuit court instead decided the merits of Nichols' new claim.

A circuit court's denial of authorization to file a second habeas petition—despite the existence of an applicable new constitutional rule that has been made retroactive by this Court—is "one of the rare instances in which exercise of the Court's habeas jurisdiction would satisfy the stringent standards of Rule 20.4." *In re Smith*, No. 98-5804, Amicus Brief for the United States, pp.5-6 (May 6, 1999). The case of *In re Smith* raised the issue whether *Cage v. Louisiana*, 498 U.S. 39 (1990), announced a new rule that should be made retroactive to cases on collateral review, as required under the successor statute, 28 U.S.C. § 2244(b)(2)(A). The lower courts

had agreed that *Cage* was retroactive to first habeas petitions but the Fifth Circuit denied Smith authorization to file a second habeas petition because this Court had not "made" *Cage* retroactive under the successor statute. The Solicitor General, as amicus curiae, noted that those circumstances created an "anomalous result" that avoided review by a writ of certiorari due to the statutory prohibition in section 2244(b)(3)(E) against seeking certiorari review of a circuit court's decision on a request to authorize a second or successive habeas petition.[4] *In re Smith*, No. 98-5804, Amicus Brief for the United States, pp.5-6.

Early after *Johnson* was decided, defendants sought to file second or successive habeas petitions challenging their sentences under the ACCA's residual clause. Some defendants sought relief under *Johnson* via an original writ from this Court. The Solicitor General discouraged this Court's exercise of original jurisdiction because, unlike the circumstances which developed after the decision in *Cage*, *supra*, conflict over *Johnson*'s retroactivity existed among the lower courts which made review by a writ of certiorari likely. *See, e.g.*, *In re Willie B. Sharp*, No.15-646, 2015 WL 9184809, at *16-21 (Brief for the United States in Opposition Dec. 16, 2015). Subsequently, this Court granted certiorari review in *Welch* and "made" *Johnson* retroactive to cases on collateral review. *Welch*, 136 S. Ct. at 1265.

This petition arises in a posture similar to that of *In re Smith* where there is little to no alternative avenue for judicial review. Without question, *Johnson* is a

[4] The Court denied Smith's petition for an original writ, with three Justices dissenting. *In re Smith*, 526 U.S. 1157 (1999).

new rule of constitutional law, made retroactive to cases on collateral review. Pet. App. 3a (citing *Welch*, 136 S. Ct. at 1265; *In re Watkins*, 810 F.3d 375, 383-84 (6th Cir. 2015) (finding *Johnson* retroactive and authorizing a second or successive § 2255 motion)). Nichols' request for authorization to file his *Johnson* claim meets the retroactive requirements for filing a second petition, but, instead of either authorizing the petition for filing in the district court or remanding the case to the district court, the court of appeals decided Nichols' claim on the merits. The circuit court's action was not authorized by the successor statute. Its extra-jurisdictional act is also not reviewable by means of a writ of certiorari. 28 U.S.C. § 2244(b)(3)(E). This case, therefore, presents one of the rare instances in which this Court should exercise its original habeas jurisdiction. *See Illinois v. City of Milwaukee*, 406 U.S. 91, 93 (1972) (the Court exercises its original jurisdiction based on the "availability of another forum[s]" and the "seriousness and dignity of the claim").

A. The circuit court exceeded its jurisdiction when it adjudicated Nichols' new claim on the merits instead of remanding the case to the district court

The Sixth Circuit acted without jurisdiction when it denied Nichols permission to file a second habeas petition on the basis that the claim presented was without merit. *See In re Smith*, 285 F.3d 6, 7 (D.C. Cir. 2002) (the court of appeals' jurisdiction under the successor statute is limited to a prima facie inquiry). Nichols' second habeas petition met the statutory "gatekeeping" requirements for authorization under 28 U.S.C. § 2244(b)(2)(A) because Nichols made a prima facie showing that his claim arose under a new, retroactive rule. The statute, therefore, permitted the circuit court to authorize the filing of Nichols' second petition in the

district court. 28 U.S.C. § 2244(b)(3)(C). The statute did not permit the circuit court to move beyond the gatekeeping inquiry and engage in a final determination regarding the nature of Nichols' prior convictions. Moreover, the circuit court was not in a position to make a reliable determination; it is not a fact-finder and Nichols had not fully briefed the new *Johnson* claim since section 2244(b)(2)(A) requires just a prima facie showing.

The AEDPA contains another provision that similarly restricts the jurisdictional reach of the circuit courts: 28 U.S.C. § 2253. In section 2253, Congress codified the standards for issuance of a certificate of probable cause enunciated in *Barefoot v. Estelle*, 463 U.S. 880 (1983). Section 2253 provides for an appeal only upon the issuance of a certificate of appealability ("COA") and it "establishes procedural rules and requires a threshold inquiry into whether the circuit court may entertain an appeal." *Slack*, 529 U.S. at 482. "The statute sets forth a two-step process: an initial determination whether a claim is reasonably debatable, and then—if it is—an appeal in the normal course." *Buck v. Davis*, 137 S. Ct. 759, 774 (2017).

In *Miller-El v. Cockrell*, 537 U.S. 322 (2003), this Court reviewed a circuit court's decision denying a COA. The Court held that a COA "is a jurisdictional prerequisite[,]" and "until a COA has been issued federal courts of appeals lack jurisdiction to rule on the merits of appeals from habeas petitioners." *Miller-El*, 537 U.S. at 336.

> The COA determination under § 2253(c) requires an overview of the claims in the habeas petition and a general assessment of their merits.

> ... This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it. When a court of appeals sidesteps this process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction.

Miller-El, 537 U.S. at 336-37.

In another case challenging a circuit court's denial of a COA, *Buck v. Davis*, this Court found that the court of appeals had "phrased its [COA] determination in proper terms ... but it reached that conclusion only after essentially deciding the case on the merits." 137 S. Ct. at 773. The *Buck* Court emphasized that a circuit court's COA inquiry is a limited, threshold inquiry—it "is not coextensive with a merits analysis[,]"—and reiterated that a circuit court is without jurisdiction to decide the actual merits. *Id.* While the decision in *Buck* did "not mean to specify what procedures may be appropriate in every case[,]" the courts of appeals are required to engage only in acts "consonant with the limited nature of the inquiry." *Id.* at 774.

Furthermore, when the Court in *Welch*, *supra*, held that *Johnson* is retroactive to cases on collateral review, it reversed the circuit court's denial of a COA and noted that when the lower court subsequently addresses the merits of the claim it might determine that the conviction could be upheld under the ACCA's elements clause. *Welch*, 136 S. Ct. at 1258. *See also United States v. Mayo*, 901 F.3d 218, 224 (3d Cir. 2018) (holding that the movant need only "show that it is possible he was sentenced under the now-unconstitutional residual clause of the ACCA," and that he "may require resentencing") (citation omitted). In other words, the

possibility that resentencing may not ultimately result from *Johnson* error did not preclude the issuance of a COA. Such guidance provided to the lower court on remand substantively distinguished the circuit court's gatekeeping inquiry under the COA statute from the court's subsequent appellate review on the merits.

The courts of appeals' responsibilities for screening cases under the successor statute, section 2244, should be read in harmony with the COA statute, section 2253. Both sections codify established judicial procedures: section 2253 makes *Barefoot v. Estelle*, *supra*, black-letter law, and section 2244 formalizes the abuse of the writ doctrine. Both sections contain prerequisites for further court action. Section 2253 requires the petitioner to show the district court's decision is debatable before a claim can be considered on appeal by the circuit court. Section 2244 requires a habeas petitioner to make a prima facie showing of one of two "gatekeeping" circumstances before a second petition can be filed in, and considered by, the district court. Under section 2253, "a COA ruling is not the occasion for a ruling on the merit of [a] petitioner's claim," *Miller-El*, 537 U.S. at 331, because, until the threshold standard is established, the circuit court is without jurisdiction to reach the merit of the appeal. Similarly, under section 2244, it is inappropriate for a circuit court to rule on the merits when deciding whether to authorize the filing of a second habeas petition. Just as "a court of appeals should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief[,]" *Miller-El*, 537 U.S. at 337, a court of appeals should not

decline authorization to file a second or successive habeas petition on the belief that the habeas petitioner is not entitled to relief.

There is an important distinction between the COA statute and the successor statute that makes it more obvious that a court of appeals is without jurisdiction to decide the merits of a second habeas petition. Importantly, a petitioner seeking a COA has already obtained federal review of his or her federal claim(s) from the district court. Under section 2253, a COA opens the door to merits review by the court of appeals. But, a petitioner seeking authorization to file a second habeas petition has yet to receive any federal court review of his or her federal claim. Under section 2244, authorization from the court of appeals opens the door to merits review by the district court. 28 U.S.C. § 2244(b)(3)(A) ("[T]he applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application."). Although in passing the AEDPA Congress transferred the gatekeeping role for successive petitions from the district courts to the courts of appeals, *Felker v. Turpin*, 518 U.S. 651, 664 (1996), Congress also maintained the district court's crucial function of adjudicating federal constitutional claims in the first instance. Thus, the text and structure of § 2244 provides distinct roles for the circuit courts and district courts, which highlights why the court of appeals is without jurisdiction to make an initial merits decision on a second habeas petition. *In re Smith*, 285 F.3d at 7 ("only the district court has jurisdiction to determine the merits of the motion once the circuit authorizes it.").

The Eleventh Circuit Court of Appeals in *Jordan v. Sec'y, Dep't of Corr.*, 485 F.3d 1351, 1357-58 (11th Cir. 2007), examined the distinct roles of the lower federal courts as set forth in section 2244. In *Jordan*, the court found that only a threshold inquiry is appropriate for the court of appeals which "do[es] not make any factual determinations[,]" "usually do[es] not have access to the whole record[,]" and makes "only a prima facie decision" in a short amount of time. *Id.* The court observed: "Things are different in the district court." *Jordan*, 485 F.3d at 1358. The district court "has access to the record, has an opportunity to inquire into the evidence, and usually has time to make and explain a decision[.]" *Id.* Upon receipt of a second or successive habeas petition, a district court is to decide *de novo* whether a petitioner actually meets the successor requirements. If so, it proceeds to address the merits of the second petition. Thus, under section 2244, the court of appeals decides whether the habeas petitioner established a prima facie case of the successor requirements, and the district court decides whether the petitioner "actually meets" those requirements. *Id. Accord Moore v. United States*, 871 F.3d 72, 79-80, 84-85 (1st Cir. 2017); *Blow v. United States*, 829 F.3d 170, 172 (2d Cir. 2016); *United States v. Peppers*, 899 F.3d 211 (3d Cir. 2018); *In re Williams*, 330 F.3d 277, 281-82 (4th Cir. 2003); *Brown v. Lensing*, 171 F.3d 1031, 1032 (5th Cir. 1999); *Bennett v. United States*, 119 F.3d 468, 469-70 (7th Cir. 1997); *Walker v. United States*, 900 F.3d 1012, 1013-14 (8th Cir. 2018); *United States v. Villa-Gonzalez*, 208 F.3d 1160, 1164 (9th Cir. 2000); *In re Smith*, 285 F.3d at 7. Having determined that its role was limited to a prima facie inquiry into whether the successor requirements were satisfied, the

Eleventh Circuit commented: "Our first hard look at whether the § 2244(b) requirements actually have been met will come, if at all, on appeal from the district court's decision[.]" *Jordan*, 485 F.3d at 1358.

As the Tenth Circuit Court of Appeals has aptly stated:

> The distribution of judicial responsibility reflected in the plain language of the statute-by which the appellate court makes an expedited assessment of whether a new habeas claim falls within a formally defined category and, if it does, then leaves the adjudication of that claim to the district court in the first instance-is clearly in keeping with the respective roles of appellate and trial courts in our system.

Ochoa v. Sirmons, 485 F.3d 538, 542 (10th Cir. 2007)

The different functions that Congress delegated to the circuit courts and district courts indicate that Congress did not intend for a circuit court to be the first federal court to reach the merits of a claim presented in a second or successive habeas petition. Indeed, the AEDPA assigns primary federal review to the district courts and makes review by the circuit courts permissive-only. *Compare* § 2244(b)(3) *with* § 2253(a) & (b). Because Congress intended to extend habeas relief to some successive habeas petitioners, such as those, like Nichols, affected by a new retroactive rule, the statute authorized the Sixth Circuit to permit the filing of Nichols' second habeas petition in the district court. Instead, the circuit court overstepped its jurisdictional boundaries by deciding the merit of, and then disposing of, Nichols' second petition.

Nichols demonstrated below that the new, retroactive rule in *Johnson* applies to Tennessee's prior violent felony aggravator and that he may require resentencing. The circuit court's extra-jurisdictional merits review of the *Johnson*

claim deprived Nichols of federal review, to the effect that it suspended Nichols' access to the great writ. This Court should review this case to reign-in the circuit court's improper merits adjudication of the underlying issue presented in motions for authorization under § 2244(b)(3)(A).

B. Exceptional circumstances warrant review

The circuit court acted without jurisdiction and there is no remedy but for this Court to exercise its original jurisdiction over the case. The writ of habeas corpus entitles prisoners to a meaningful opportunity to demonstrate they are being held pursuant to "the erroneous application or interpretation" of law. *INS v. St. Cyr*, 533 U.S. 289, 302 (2001); *Boumediene v. Bush*, 553 U.S. 723, 779 (2008). Although the successor statute, 28 U.S.C. § 2244, restricts a prisoner's ability to bring new claims in a "second or successive" habeas petition, *Boumediene*, 553 U.S. at 774, this Court upheld these provisions against a Suspension Clause challenge in *Felker*, 518 U.S. at 662-64, mainly because the provisions "did not constitute a substantial departure from common-law habeas procedures. The provisions, for the most part, codified the longstanding abuse-of-the-writ doctrine." *Id*. at 664. And relevant to this case, Congress expressly provided federal court review of second habeas petitions in two circumstances: new claims arising from evidence of actual innocence and new claims arising from retroactive law. In each of those circumstances the prisoner has no fair opportunity to raise the claim in a prior habeas petition. *See Panetti v. Quarterman*, 551 U.S. 930 (2007).

1. Nichols' second habeas petition is neither abusive under pre-AEDPA law nor prohibited under the AEDPA's successor statute. It timely presents a

newly-exhausted constitutional claim that could not have been presented in his first habeas petition. The claim plausibly demonstrates that the only aggravating circumstance underlying the death penalty is void for vagueness under *Johnson* and its progeny.

2. In the Sixth Circuit, the Respondent acknowledged that Nichols' *Johnson* claim arises from a new, retroactive rule of constitutional law. Pet. App. 157a. Respondent, however, argued that a narrow interpretation of *Johnson* would result in Nichols' claim being denied on the merits. *Id.* (arguing that *Johnson's* holding is limited to cases involving the ACCA's residual clause). The rule in *Johnson* is not so limited. *Johnson* has been applied to, and has invalidated, other federal and state sentencing enhancements. *See, e.g., Davis,* 139 S. Ct. 2319 (holding unconstitutional a provision in § 924(c)); *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018) (holding unconstitutional the provision in 18 U.S.C. § 16(b)); *Commonwealth v. Beal*, 52 N.E.3d 998, 1008 (Mass. 2016) (holding a similar state statute unconstitutional under *Johnson*); *Commonwealth v. Rezendes*, 37 N.E.3d 672, 679-80 (Mass. App. Ct. 2015) (holding in light of *Johnson* that "unless the Commonwealth can prove, without inquiring into the manner in which the weapon was used, that a prior adjudication involved a deadly weapon, the adjudication cannot qualify as a predicate offense."). *See also Nordahl v. State*, 829 S.E.2d 99, 104-06 (Ga. 2019) (any interpretation of a state sentencing statute that allows an analysis of the conduct involved in a prior conviction—beyond consideration of only the elements of the conviction—is unconstitutional).

The statutory language of Tennessee's prior violent felony aggravating circumstance that increased the punishment in this case is just as indefinite as the language of the ACCA's residual clause that has been declared unconstitutionally vague. Any differences have no impact on the constitutional analysis. The language of the sentencing statute in *Johnson* required a conviction of a criminal statute that "*involves conduct* that presents a serious potential risk of physical injury to another." *Johnson*, 135 S. Ct. at 2555-56 (emphasis added). The language of the prior violent felony aggravator in the Tennessee death penalty statute at the time of the crime required a conviction for a felony statute that "*involve[s]* the use or threat of violence to the person." Tenn. Code Ann. § 39-2-203(i)(2) (1988) (emphasis added).[5]

The aggravating circumstance does not define a violent felony and it is not limited to prior convictions where violence is a statutory element. Instead, it asks whether the previous conviction contains elements which "involve" the use or threat of violence to the person. *Compare* Pet. App. 91a, *with Butcher v. State*, 171 A.3d 537, 540 n.16 (Del. 2017) (noting, "our General Assembly's decision to specifically enumerate those offenses deemed to be 'violent felonies' avoids the problem posed in *Johnson* of ascertaining which types of offenses are 'violent felonies.'"). The problematic inquiry into the conduct "*involved*" includes an unknowable group of offenses which might or might not involve the use or threat of violence. *State v.*

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

Sims, 45 S.W.3d 1, 12 (Tenn. 2001) (rejecting argument that the State's use of the prior violent felony aggravator was improper because the statutory elements of aggravated assault do not necessarily involve the use of violence); *State v. Moore*, 614 S.W.2d 348, 351 (Tenn. 1981). The aggravator asks the same question posed by the residual clause: whether the defendant was previously convicted of a felony that "*involves*" a certain type of conduct. The inquiry into the type of conduct a criminal statute involves does not restrict the definition of the aggravator to only the elements of that crime. Therefore, the aggravator's plain language fails to provide ordinary defendants with Constitutional notice.

The circuit court denied Nichols authorization to file his new claim in the district court maintaining—contrary to the State court's recent application of *Johnson* to the prior violent felony aggravator—that the aggravator operates like the ACCA's "elements clause." *Compare* Pet. App. 4a, *with* Pet. App. 91a ("[T]rial 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."). The circuit court concluded that: Nichols' *Johnson* claim is "without merit," the jury did not consider the underlying facts of the prior convictions, and Nichols' "convictions were for aggravated rape 'by use of force[.]'" Pet. App. 4a-5a. The court's last finding is especially troubling because Nichols' judgments of convictions are not for aggravated rape "by use of force." Pet. App. 108a-112a. The court's decision clearly extended beyond the prima facie inquiry dictated by section 2244 and was rendered in excess of its jurisdiction.

3. Nichols' second habeas petition also shows that, under 28 U.S.C. § 2254(d)(1), the state court's decision unreasonably applies Supreme Court law. The state court did not dispute that the language of Tennessee's prior violent felony aggravator is vague but it did determine that it is not unconstitutionally vague. The state court said that when a capital defendant's prior conviction does not have "violence" as a necessary element the trial court is "to look to the actual facts of the prior felony to determine the use of violence[.]" Pet. App. 91a. That language is not contained in Tennessee's prior violent felony aggravator. The state court reasoned that the aggravator "is not void for vagueness under *Johnson*[,]" Pet. App. 92a, because state court judges do not use "a judicially imagined ordinary case in applying the prior violent felony aggravating circumstance." Pet. App. 91a. The state court's decision ignores the notice aspect of Due Process and the rule announced in *Johnson*.

The *Johnson* Court distinguished the ACCA's unconstitutionally vague residual clause that asks whether the prior conviction "'involves conduct' that presents too much risk of physical injury," from the ACCA's elements clause "that asks whether the crime 'has as an element the use ... of physical force,'" and determined that the residual clause is void for vagueness because a "court's task goes beyond deciding whether creation of risk is an element of the crime." *Johnson*, 135 S. Ct. at 2557. Only an elements-based test provides a defendant with notice that a prior conviction can be used to enhance a future sentence. *Id.* Also, "an elements-focus avoids unfairness to defendants[,]" in that "[s]tatements of 'non-

elemental fact' in the records of prior convictions are prone to error precisely because their proof is unnecessary." *Mathis v. United States*, 136 S. Ct. 2243, 2253 (2016). Finally, an elements-inquiry into whether a prior conviction can enhance a future sentence avoids arbitrary enforcement by judges. *Johnson*, 135 S. Ct. at 2557.

The problem with the residual clause in *Johnson* arose when the sentencer looked beyond the elements of the prior offense to determine whether the conviction qualified for the enhancement provision. *Johnson*, 135 S. Ct. at 2557. The *Johnson* decision clearly drew a constitutional line between definitions of a past conviction that rely on the elements of the crime versus definitions of a past conviction that turn on a determination of the type of conduct that was involved in the past crime. *Johnson*, 135 S. Ct. at 2557. Thus, a sentencing enhancement based on a prior conviction that has violence *as an element* provides notice of its enhancement potential and is constitutional. *See, e.g.*, 18 U.S.C. § 924(e)(2)(B)(i) (the ACCA's "force" or "elements clause"). In contrast, Tennessee's prior violent felony aggravating circumstance requires a prior conviction of a felony that "involve[s] the use or threat of violence to the person." Tenn. Code Ann. § 39-13-204(i)(2) (1988) A sentencing enhancement—like Tennessee's prior violent felony aggravator—based on a prior conviction for a crime that *involves conduct* not identifiable by the elements of the conviction is vague and unknowable and, therefore, unconstitutional. *See, e.g.*, 18 § 924(e)(2)(B)(ii) (the ACCA's residual clause); *but cf. Shular v. United States*, ___ U.S. ___, 140 S. Ct. 779 (2020) (a sentencing provision

based on a prior conviction that involves conduct which *is* identifiable by the elements of conviction is constitutional).

Johnson's fundamental holding applies to instances where a sentencer engages in an after-the-fact consideration of conduct underlying a prior conviction based on a cold record to determine whether the prior conviction qualifies as a violent felony. *Johnson*, 135 S. Ct. at 2558. The impact of *Johnson*'s holding on Tennessee's prior violent felony aggravator is that the "wide-ranging inquiry" into the factual circumstances of a prior conviction to determine whether it is a qualifying violent felony "denies fair notice to defendants and invites arbitrary enforcement by judges." *Shuti v. Lynch*, 828 F.3d 440, 446 (6th Cir. 2016).

Both the circuit court and the state court embraced the fact that a Tennessee trial court will apply the prior violent felony aggravator based on an examination of the capital defendant's conduct underlying the prior conviction if violence is not an element of the prior conviction. Pet. App. 3a-4a; Pet. App. 91a. The state court noted that Tennessee trial courts do not use "a judicially imagined ordinary case in applying the prior violent felony aggravating circumstance." It determined that "a fact-specific approach" to determining the nature of prior convictions is not unconstitutional. Pet. App. 91a. That, however, is not what the prior violent felony aggravator says. Whereas the improperly wide-ranging inquiry undertaken by courts applying the ACCA's residual clause involved a categorical approach, the Tennessee courts applying the aggravator look beyond the elements of the prior felony conviction to the facts of the prior conviction. This distinction, however, does

not cure the lack of notice resulting from such an inquiry. A Tennessee defendant has no "principled and objective" way to know if a future sentencing body will deem violent the means of a prior conviction, and a defendant is unable to anticipate the consequences of future criminal convictions. *Shuti*, 828 F.3d at 450. "*Johnson* establishes, in other words, that even the use of impeccable factfinding procedures could not legitimate a sentence based on that clause." *Welch*, 136 S. Ct. at 1265 (quotation marks and citation omitted).

The prior violent felony aggravator is void for vagueness under *Johnson* so it cannot support the sentence of death imposed in this case.

4. Unless this Court exercises its original jurisdiction, Nichols will be executed without one full and fair opportunity for federal court review of the state court's unreasonable application of *Johnson*, despite the fact that the *Johnson* claim satisfies the prerequisites for filing a second habeas petition in the district court. The *Johnson* claim strikes at the heart of the death sentence in this case as it is supported only by the prior violent felony aggravating circumstance. The prior violent felony aggravator is the only aggravator in this case and Nichols was not on notice that it could enhance his sentence. In other words, at the time of the murder, Nichols could not know that the death penalty was an available sentence. The prior violent felony aggravator is unconstitutionally vague not only because of its language and the state court's arbitrary implementation of the aggravator—Nichols was further deprived of constitutional notice at the time he committed the capital

offense because the aggravator is supported by crimes he committed after the capital crime. Pet. App. 35a-36a.

The prior violent felony aggravating circumstance, like other unconstitutionally vague sentencing enhancements, requires an examination of the nature of a defendant's past conduct, asks whether the use or threat of violence is "involved," and requires a sentencer to determine, after the fact, whether a prior conviction qualifies as a sentencing enhancement. *See State v. Sims*, 45 S.W.3d 1 (Tenn. 2001). In other words, a defendant has no notice—at the time of the capital offense—whether a prior conviction will be deemed "violent." That determination only occurs when the judge in the capital case engages in the impermissible exercise of "reconstruct[ing], long after the original conviction, the conduct underlying that conviction." *Johnson*, 135 S. Ct. at 2652.

Conclusion

The Court should entertain this original habeas corpus petition and remand to the district court to resolve, in the first instance, the issues related to and presented by Nichols' second habeas petition. *See Illinois v. City of Milwaukee*, 406 U.S. 91, 108 (1972) (remanding to the district court "whose powers are adequate to resolve the issues"); *see also Boumediene*, 553 U.S. at 777-78 (same).

Respectfully submitted,

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