No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

In re: HAROLD WAYNE NICHOLS, *Petitioner*

APPENDIX TO
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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No. 19-6460

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Feb 13, 2020
DEBORAH S. HUNT, Clerk

In re: HAROLD WAYNE NICHOLS,

Movant.

O R D E R

Before: BATCHELDER, SUTTON, and COOK, Circuit Judges.

Harold Wayne Nichols, a Tennessee death row inmate represented by counsel, has filed an application for leave to file a second petition for a writ of habeas corpus under 28 U.S.C. § 2254. *See* 28 U.S.C. § 2244(b)(3)(A). In his application, Nichols relies upon the Supreme Court decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), to argue that the aggravating circumstance underlying his death sentence is unconstitutionally vague. The State of Tennessee has filed a response in opposition to Nichols's application, and Nichols has replied to that response.

Nichols pleaded guilty to first-degree felony murder, aggravated rape, and first-degree burglary. At sentencing, the jury found two aggravating circumstances: (1) the murder occurred during the commission of a felony (felony murder); and (2) Nichols previously was convicted of violent felonies. Based on these circumstances, the jury recommended that Nichols be sentenced to death. The trial court adopted this recommendation and sentenced Nichols accordingly. On direct appeal, the Tennessee Supreme Court concluded that the State's use of felony murder as an aggravating circumstance was unconstitutional, but that the error was harmless. *Tennessee v. Nichols*, 877 S.W.2d 722, 737-39 (Tenn. 1994). The court rejected all other claims and affirmed Nichols's convictions and death sentence. *Id*. at 739-40.

In 2003, Nichols filed a § 2254 petition, alleging twenty-one grounds for relief. The district court concluded that Nichols's claims were meritless and dismissed the petition. *Nichols v. Bell*,

440 F. Supp. 2d 730 (E.D. Tenn. 2006). On appeal, this court affirmed the district court's judgment. *Nichols v. Heidle*, 725 F.3d 516 (6th Cir. 2013).

In 2016, Nichols filed a previous application requesting leave to file a second § 2254 petition, but this court denied his application. *In re Nichols*, No. 16-5665 (6th Cir. Aug. 15, 2016) (unpublished order).

Also in 2016, Nichols returned to state court and moved to reopen a post-conviction petition. Although the trial court granted the motion to reopen, it subsequently denied Nichols relief. Upon review, the Tennessee Court of Criminal Appeals affirmed the trial court's decision, *Nichols v. State*, No. E2018-00626-CCA-R3-PD, 2019 WL 5079357 (Tenn. Crim. App. Oct. 10, 2019), and the Tennessee Supreme Court denied permission to appeal further.

Before Nichols can file a second § 2254 petition, he must receive authorization for the filing from this court. 28 U.S.C. § 2244(b)(3)(A); *In re Campbell*, 874 F.3d 454, 459 (6th Cir. 2017). To obtain this authorization, Nichols must make a prima facie showing that either (1) a new rule of constitutional law applies to his case that the Supreme Court made retroactive to cases on collateral review; or (2) a newly discovered factual predicate exists which, if proven, sufficiently establishes that no reasonable fact-finder would have found Nichols guilty of the underlying offense but for constitutional error. 28 U.S.C. § 2244(b)(2), (b)(3)(C); *Magwood v. Patterson*, 561 U.S. 320, 330 (2010). In this context, a prima facie showing means sufficient allegations of fact combined with some documentation that would warrant fuller exploration in the district court. *In re Wogenstahl*, 902 F.3d 621, 628 (6th Cir. 2018); *Campbell*, 874 F.3d at 459; *Keith v. Bobby*, 551 F.3d 555, 557 (6th Cir. 2009). This court does not need to find that the petitioner's claim compels relief as written, but the court must determine that his allegations are sufficient to require a district court to engage in additional analysis to ascertain whether, but for the constitutional error, no reasonable factfinder would have found him guilty. *Keith*, 551 F.3d at 557; *In re McDonald*, 514 F.3d 539, 547 (6th Cir. 2008).

In support of his current application to file a successive habeas petition, Nichols argues that, based on the Supreme Court's *Johnson* decision, the aggravating circumstance supporting his

death sentence is unconstitutionally vague. In *Johnson*, the Court reviewed the Armed Career Criminal Act ("ACCA"), which provides for a sentence enhancement if the defendant has previously been convicted of three or more violent felonies. The ACCA defines a violent felony as a crime that either: "(i) has as an element the use, attempted use, or threatened use of physical force against the person of another" or "(ii) is burglary, arson, or extortion, involves use of explosives, or *otherwise involves conduct that presents a serious potential risk of physical injury to another*." 18 U.S.C. § 924(e)(2)(B) (emphasis added). In reviewing the ACCA, the Court examined the italicized section, commonly referred to as the residual clause, and determined that it was unconstitutionally vague because it denied defendants fair notice and invited arbitrary enforcement. *Johnson*, 135 S. Ct. at 2557. The Court differentiated the abstract nature of determining whether the defendant's conduct presented "a serious potential risk of physical injury" from the more concrete determination that an "element" of the defendant's crime involved the use of physical force. *Id.* at 2557. The Court specifically noted that its conclusion regarding the unconstitutionality of the residual clause did not extend to other portions of the ACCA, including its remaining definition of a violent felony. *Id.* at 2563. In *Welch v. United States*, 136 S. Ct. 1257, 1265 (2016), the Supreme Court held that *Johnson* applies retroactively to cases on collateral review. Further, this court has concluded that *Johnson* may establish a basis for authorizing the filing of a successive habeas petition. *In re Watkins*, 810 F.3d 375, 383-84 (6th Cir. 2015).

In No. 16-5665, we rejected a previous request by Nichols to file a successive application based on *Johnson*. At the time of Nichols's trial, Tennessee Code Annotated section 39-13-204(i)(2) provided that the death penalty may be imposed when "[t]he 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." In his prior application, Nichols contended that this provision was unconstitutionally vague under *Johnson*. When denying his prior request for permission to file a successive § 2254 petition, we concluded that the Tennessee statute at issue utilized "the same sort of 'elements clause' that *Johnson* itself refused to call into question." Although Nichols argued that the Tennessee courts did not rely on the statutory elements in

considering a prior conviction but rather looked to the defendant's actual conduct, we determined that Nichols mischaracterized the practice of the Tennessee courts and, even if they did assess the underlying conduct, "nothing in *Johnson* suggests that this would be unconstitutional."

Little has changed since we previously denied Nichols's permission to file a successive habeas petition, and nothing has changed that would warrant us now granting that permission. The most significant occurrence is that, in the interim, the Tennessee courts have reviewed the merits of Nichols's *Johnson* claim and denied him post-conviction relief for that claim. Nichols devotes a considerable portion of his current application to arguing that the state courts improperly denied this claim. However, the additional fact that the state courts have now considered Nichols's *Johnson* claim does not provide a basis for granting him permission to file a successive § 2254 petition. In order to make a prima facie showing under § 2244(b)(2), (b)(3)(C), the habeas petitioner is not required to demonstrate that he has exhausted his claims in state court (although procedural default of those claims could impact a merits review if permission to file a successive petition is granted). Consequently, the Tennessee courts' recent consideration of Nichols's challenge to his death sentence under *Johnson* does not provide a basis for filing a second habeas petition.

Nichols also notes that the Tennessee statute at issue was modified between his commission of the crime and his trial. At the time that Nichols committed the underlying murder, the predecessor to § 39-13-204(i)(2) provided that the aggravating circumstance applied if 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." At trial, the court instructed the jury using the "statutory elements" language contained in the recently-amended version of section 39-13-204(i)(2). Nichols argues that either version of the statute improperly permitted the jury to take a "case-specific" approach in determining whether a prior conviction applies. However, we already concluded that this argument was without merit when denying Nichols's prior application, and he provides no basis for changing that conclusion. As we previously noted, no indication exists that

the jury improperly considered the underlying facts of Nichols's prior convictions and, since those convictions were for aggravated rape "by use of force," it was unnecessary for them to do so.

Accordingly, we **DENY** Nichols's application for permission to file a second § 2254 petition.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

877 S.W.2d 722
Supreme Court of Tennessee,
at Knoxville.

STATE of Tennessee, Appellee,
v.
Harold Wayne NICHOLS, Appellant.

May 2, 1994.
|
Order on Petition for Rehearing June 20, 1994.

Synopsis

Defendant was convicted in the Hamilton County Court, Douglas A. Meyer, J., of first-degree felony-murder and was sentenced by jury to death. He appealed. The Supreme Court, Anderson, J., held that: (1) bringing jury from another county back to county of arrest did not prejudice defendant; (2) psychologist's notes of interviews with defendant were admissible; and (3) use of felony-murder for which defendant had been convicted as aggravating circumstance was harmless error.

Affirmed.

Reid, C.J., dissented with opinion.

Attorneys and Law Firms

***725** Hugh J. Moore, Jr., Rosemarie Bryan, Chattanooga, for appellant.

Charles W. Burson, Atty. Gen. & Reporter, Stan Lanzo, Dist. Atty. Gen., Chattanooga, for appellee.

OPINION

ANDERSON, Justice.

In this capital case, the defendant, Harold Wayne Nichols, pled guilty to first-degree felony murder and was sentenced by a jury to death. At the sentencing hearing, the jury found two aggravating circumstances: (1) Nichols' five previous convictions for aggravated rape and (2) the fact that the murder occurred during the commission of a felony. Tenn.Code Ann. § 39–13–204(i)(2) & (7). The jury found that the aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt and sentenced the defendant to death. The defendant now appeals his sentence, alleging a number of errors in the sentencing phase.

We have thoroughly examined the record of this sentencing hearing and conclude that any trial errors committed during the sentencing phase were harmless error beyond a reasonable doubt and did not affect the jury's verdict of death. Although the use in this case of the aggravating circumstance that the murder occurred during the commission of a felony violated Article I, § 16, of the Tennessee Constitution and the Eighth Amendment to the United States Constitution, *see* *State v. Middlebrooks,* 840 S.W.2d 317, 346 (Tenn.1992) (Drowota and O'Brien, JJ., dissenting), we conclude that the sentencing jury's consideration of the invalid circumstance was harmless error beyond a reasonable doubt. Accordingly, we affirm the jury's sentence of death.

BACKGROUND

Because of the substantial publicity surrounding the murder and rape cases, the defendant requested a change of venue prior to trial. The trial court granted the change of venue to Sumner County, but only for the limited purpose of jury selection. The court then ordered the case back to Hamilton County for trial with the Sumner County jury. The trial reconvened in Hamilton County on May 9, 1990. Following the court's denial of the defendant's motion to suppress his videotaped confessions, the defendant entered pleas of guilty to the charges of first-degree felony murder, aggravated rape, and first-degree burglary. [1]

1 The State dismissed a charge of premeditated first-degree murder.

The trial proceeded to the penalty phase with the State relying on two aggravating ***726** circumstances: (1) the murder's occurrence during the commission of a felony and (2) Nichols' previous convictions of violent felonies. Tenn.Code Ann. § 39–13–204(i)(2) & (7). The State introduced evidence concerning the nature and circumstance of the crime, which included the defendant's videotaped confession, testimony from the medical examiner about the nature and extent of the victim's injuries and the cause of her death, and testimony from the detective who had questioned the defendant on the videotaped interview. The Hamilton County Criminal Court Clerk also testified concerning the defendant's five prior convictions for aggravated rape.

The proof showed that on the night of September 30, 1988, the defendant broke into the house where the 21–year–old–victim, Karen Pulley, lived with two roommates in the Brainerd area of Chattanooga, Tennessee. After finding Pulley home alone in her upstairs bedroom, the defendant tore her undergarments from her and violently raped her. Because of her resistance during the rape, he forcibly struck her at least twice in the head with a two-by-four he had picked up after entering the house. After the rape, the defendant, while still struggling with the victim, struck her again several times with great force in the head with the two-by-four. The next morning, one of Karen Pulley's roommates discovered her alive and lying in a pool of blood on the floor next to her bed. Pulley died the next day. Three months after the rape and murder, a Chattanooga police detective questioned the defendant about Pulley's murder while he was in the custody of the East Ridge police department on unrelated charges. It was at this point that the defendant confessed to the crime. This videotaped confession provided the only link between the defendant and the Pulley rape and murder.

The evidence showed that, until his arrest in January 1989, the defendant roamed the city at night and, when "energized," relentlessly searched for vulnerable female victims. At the time of trial, the defendant had been convicted on five charges of aggravated rape involving four other Chattanooga women. [2] These rapes had occurred in December 1988 and January 1989, within three months after Pulley's rape and murder. The convictions presented to the jury were as follows:

2 The record reveals that, prior to this capital murder trial, the defendant had been charged with the aggravated rape and attempted rape of twelve victims other than Pulley.

The defendant was indicted for feloniously engaging in sexual penetration of T.R. on December 27, 1988, by the use of force or coercion while the defendant was armed with a weapon—a cord. The defendant pled guilty to the offense of aggravated rape.

The defendant was indicted for feloniously engaging in sexual penetration—anal intercourse—with S.T. on the 3rd day of January, 1989, by the use of force or coercion while he, the defendant, was armed with a weapon—a pistol. The defendant pled guilty to aggravated rape.

The defendant was indicted for feloniously engaging in sexual penetration—fellatio—with P.A.R. on January 3, 1989, thereby causing personal injury to her. The defendant was also indicted for feloniously engaging in sexual penetration —vaginal intercourse—with P.A.R., on January 3, 1989. The defendant pled not guilty and the jury found the defendant guilty of aggravated rape in each case.

Appendix B

The defendant was indicted for feloniously engaging in sexual penetration, vaginal intercourse, with P.A.G. on December 21, 1988, by the use of force or coercion while he, the defendant, was armed with a weapon—a knife. The defendant pled not guilty and a jury convicted the defendant of aggravated rape.

***727** The primary factors in mitigation presented by the defense were the defendant's cooperation with the police and the psychological effects of his childhood. Several persons who knew the defendant testified to his good character and passive nature.

The defendant also took the stand and testified about his life and the violent crimes he had committed. After his mother died of breast cancer when he was ten years old, he and his older sister were placed in an orphanage for six years by his father, who was apparently emotionally abusive, at least to the defendant's older sister. In 1976, just as he was about to be adopted, he was returned to his father. In 1984 he pled guilty to attempted rape, was sentenced to five years in prison and served eighteen months. Thereafter, he violated parole and served an additional nine months. He was married in 1986. At the time of the killing, he was employed by Godfather's Pizza as a first assistant manager.

Defendant testified that when he committed these violent criminal acts, a "strange energized feeling" that he could not resist would come over him and result in actions that he could not stop. He explained that he had not asked for help for his affliction or told anyone about his criminal activity because he was afraid he would lose everything. He expressed remorse for his actions but testified that, if he had not been arrested, he would have continued to violently attack women.

Finally, Dr. Eric Engum, a lawyer and clinical psychologist, testified that he had diagnosed the defendant with a psychological disorder termed "intermittent explosive disorder." According to Engum, a person suffering from this disorder normally experiences an increasing, irresistible drive that results in some type of violent, destructive act. Dr. Engum opined that the defendant's condition may have grown out of his anger at abandonment in childhood but conceded that the disorder was rare. According to him, the defendant would function normally in an institutional regimented setting but, if released, would repeat the violent behavior. The State offered Dr. Engum's investigating notes to prove that he was a member of the defense team acting as a lawyer searching for a defense, rather than an objective psychologist searching for a diagnosis.

After deliberating approximately two hours, the jury returned a verdict of death based on the two statutory aggravating circumstances. The defendant now appeals that sentence, and we address hereafter the errors alleged.

I. CHANGE OF VENUE

The initial ground for appeal presents the Court with a question of first impression. As related in the preceding section, the defendant made a pretrial motion for change of venue, based on the extensive publicity that his arrest had generated in Hamilton County, Tennessee, and the surrounding area. The trial court granted the motion and moved the trial to Sumner County, some 125 miles away, but only for the limited purpose of selecting an unbiased jury. Once the Sumner County jury had been selected and sworn, the trial judge, over the defendant's objection, transferred the case and transported the jury back to Hamilton County for trial. Although the defendant originally moved for a change of venue, he now objects to what he characterizes as "two changes of venue" and contends that the trial court's procedure violated Article I, Section 9 of the Tennessee Constitution.

That provision of the state constitution grants a criminal defendant the right to trial by "an impartial jury of the County in which the crime shall have been committed." Although it literally refers to the place from which the jurors must be summoned, commonly known as the vicinage, the provision has been held to determine the venue of the trial as well. *See Chadwick v. State,* 201 Tenn. 57, 60, 296 S.W.2d 857, 859 (1956). In *State v. Upchurch,* 620 S.W.2d 540 (Tenn.Crim.App.1980), the trial court, faced with the defendant's objection to a change of venue, followed the provision's literal command by selecting a jury "of the County" where the crime occurred, but then moved the site of the trial. The Court of Criminal Appeals held that in the absence of a motion for change of venue, Article I, § 9, "has been interpreted to require that the accused be ***728** tried in the county

in which the crime has been committed." *Id.* at 542 (citing *Lester v. State,* 212 Tenn. 338, 370 S.W.2d 405 (1963); *Chadwick,* 201 Tenn. 57, 296 S.W.2d 857 (1956). Hence, Tennessee case law has interpreted the local vicinage requirement in our state constitution to include a concomitant requirement of local venue that cannot be changed except on application of or with the consent of the defendant. *Chadwick,* 296 S.W.2d at 859.

The State argues that by trying the defendant in the county in which the crime was committed, the trial court did not abuse its discretion, even though a jury was selected from a different county. The State relies on cases from two other jurisdictions in which selection of the jury from a county different than the trial venue was approved by the courts. *See* *State v. Chandler,* 324 N.C. 172, 376 S.E.2d 728, 735 (1989), and *State v. Forsyth,* 233 Mont. 389, 761 P.2d 363, 381 (1988). In both cases, however, selection of an out-of-county jury was specifically authorized by statute. Since Tennessee has no comparable statute, we must look to our constitution and rules of procedure for guidance.

The constitutional concern with the locality of trial has its origins in colonial history. When the British Parliament in 1769 attempted to try American colonists for treason in England, the Virginia House of Burgesses responded that such a plan would deprive colonists of "the inestimable Privilege of being tried by a Jury from the Vicinage, as well as the Liberty of summoning and producing Witnesses in such Trial."[3] The Declaration of Independence denounced the English monarchy "[f]or transporting us beyond Seas to be tried for pretended offenses."[4] The first Continental Congress lauded "the great and inestimable privilege of being tried by their peers of the vicinage...."[5] There can be little doubt that early Americans valued highly the right to be tried by local jurors in the place where the crime occurred.

3 *See* Blume, *The Place of Trial in Criminal Cases: Constitutional Vicinage and Venue,* 43 Mich.L.Rev. 59, 63–65 (1944); Wright, Federal Practice and Procedure: Criminal 2d § 301 (1982).

4 *See* U.S.C.A. Declaration of Independence, at 3; Blume, *supra,* at 66.

5 *See* Blume, *supra,* at 65.

These historical values are embodied in two provisions of the United States Constitution. Article III, Section 2 provides that "the trial of all crimes ... shall be held in the state where the said crimes shall have been committed." The Sixth Amendment then allows for "an impartial jury of the state and district wherein the crime shall have been committed." One court has observed that although Article III speaks to the site of the trial and the Sixth Amendment addresses the place from which the jury is selected, "[t]his distinction ... has never been given any weight, perhaps ... because the requirement that a jury be chosen from the state and district where the crime was committed presupposes that the jury will sit where it is chosen." *United States v. Passodelis,* 615 F.2d 975, 977 n. 3 (3rd Cir.1980).

Our Tennessee Constitution obviously reflects similar concerns and values. The dispositive question here is whether the defendant waived his rights under Article I, § 9, as to both venue and vicinage when he moved for a change of venue. We conclude that the change of venue motion constitutes a waiver of Article I, § 9, rights. Accordingly, unless the defendant is prejudiced, the administration of justice harmed, or the trial court abuses its discretion, no reversible error occurs when a trial court judge employs the unorthodox procedure used in this case in response to a defendant's motion for a change of venue.

Here, the trial judge attempted to solve the problem of possible taint to the jury pool from the extensive pretrial publicity that surrounded this case and the other charges against the defendant. The trial judge was, at the same time, commendably concerned that, if the trial were held in a distant county, the defendant's family and others would be prevented from attending. The decision to undergo the expense and disruption of moving the jury, rather than local witnesses and other interested persons, was obviously designed ***729** to meet the core complaint of the defendant's motion. There is no showing by the defendant that prejudice resulted from bringing a jury from Sumner County to try his case in Hamilton County.

We conclude that in this particular case the procedure used by the trial judge was not reversible error. We note, however, that a statute which addresses the issue of summoning juries from another county, where there is a motion for change of venue, would ensure uniformity and fairness across the state and avoid error from excessive experimentation. We would encourage the legislature to address this issue.

II. Psychological "Reports"

The defendant raises another difficult issue concerning the State's access to the defense psychologist's records of his interviews with Nichols and others. Dr. Eric Engum, hired by the defendant's counsel to evaluate Wayne Nichols, tested Nichols and interviewed him, his wife, his father, and his minister. After each interview, Dr. Engum wrote an extensive memorandum of the discussion and his conclusions. However, he did not write a summary report until the second day of trial, after the court had determined that the state should have access to all interview reports, as well as psychological test results, because they were prepared by a prospective witness. In this situation, we agree with the trial court's conclusion that the interview reports were properly discoverable.

The relevant reciprocal discovery provisions of Tenn.R.Crim.P. 16(b)(1)(B) are as follows:

> If the defendant requests disclosure [of the state's documents, tangible objects, reports of examinations and tests] ... the defendant, on request of the state, shall permit the state to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession or control of the defendant which the defendant intends to introduce as evidence in chief at the trial or which were prepared by a witness whom the defendant intends to call at the trial when the results or reports relate to his testimony.

On the other hand, the rule precludes discovery of "reports, memoranda, or other internal defense documents made by the defendant, or his attorneys or agents ... or of statements made by ... defense witnesses ... to the defendant, his agents or attorneys." Tenn.R.Crim.P. 16(b)(2). Thus, while the results and evaluations of the standardized psychological tests contained in Dr. Engum's files were clearly discoverable, we must determine whether the interview notes are more accurately "reports" and "results" of mental examinations pertaining to Dr. Engum's testimony, subject to discovery under Rule 16, or whether they are "statements" made to defense counsel that are not subject to disclosure prior to trial. We find that, in the absence of any other records of Dr. Engum's evaluation of the defendant, the interview records are discoverable.

Because Dr. Engum is both a licensed lawyer and a psychologist, our first inquiry under Rule 16(b)(2) is whether Dr. Engum was acting in the capacity of an attorney or of a psychologist at the time the interviews took place and the notes memorializing those interviews were taken. The problem is complicated by Dr. Engum's apparent dual role in this case. He was seemingly both an expert psychological witness and a member of the defense team who helped to form strategy and evaluate witnesses. Dr. Engum testified that he was hired to evaluate Nichols's psychological status. Moreover, in a jury-out hearing he assured the court that he was "sitting here with [his] psychologist hat on." Therefore, his reports are not the undiscoverable work product of an agent or attorney of the defendant.

Furthermore, we find that these interview notes are significantly more than the statements of a prospective witness to defense counsel. They are the only records of interviews conducted as part of an ongoing evaluation of the defendant. Because a final report was not prepared until the second day of the hearing, and then only when it became apparent that the interview reports were admissible, the memoranda of the interviews ***730** provided the most complete written psychological evaluation of Wayne

Nichols. As such, we find that the interview reports are "results or reports of ... mental examinations," not mere statements, and that these reports formed the basis for Dr. Engum's testimony.

We thus conclude that when a psychologist or psychiatrist does not prepare a summary report, but instead relies on extensive memoranda to record not only observations and hypotheses but also evaluations, such records are discoverable under Rule 16(b)(1)(B). As the Court of Criminal Appeals has correctly observed, "To allow the defendant to evade the reciprocal discovery rule [by making no formal report and claiming that mere "notes" are undiscoverable] would effectively nullify the meaning of Rule 16(b)(1)(B)." *State v. Bell,* 690 S.W.2d 879, 883 (Tenn.Crim.App.1985). In *Bell,* the trial court required the defendant's psychiatrist to submit to a deposition or to furnish a report in order to assure compliance with the reciprocal discovery provisions of Rule 16. Although we do not suggest that the trial court should require a formal report in every case, we do conclude, under the facts of this case, that Rule 16 authorized discovery of the available reports to the extent that they related to the testimony to be given at trial. [6]

6 *See State v. Vilvarajah,* 735 S.W.2d 837, 839 (Tenn.Crim.App.1987) (limiting discovery to results or reports that relate to the prospective witness's testimony).

III. Jury Verdict Form

The defendant argues that the trial court erred in refusing to declare a mistrial when the jury returned a verdict form listing nonstatutory aggravating circumstances.

After deliberating approximately two hours, the jury returned a verdict of death. Although the State had relied upon and the judge had charged the statutory aggravating circumstances of felony murder and prior violent felony convictions, Tenn.Code Ann. § 39–13–204(i)(2) and (7), the jury listed as the sole "statutory" aggravating circumstances:

(1) First degree murder of Karen E. Pulley;

(2) The unfeeling brutality of the first degree murder of Karen E. Pulley;

(3) The lack of remorse; and

(4) The lack of respect of human rights.

The defendant moved for a mistrial because of this error. Concluding that the jury had a right to clarify its verdict, the trial court recharged the jury on the aggravating factors presented by the State and instructed them that they should "not take account of any other facts or circumstances" in deciding the penalty in this case.

The jury retired again and returned fifteen minutes later with an amended verdict form on which it had crossed out the erroneous material and listed the two statutory aggravating circumstances. The trial court then determined that the jury originally had not listed these two circumstances because it had assumed it need not copy statutory aggravating circumstances on the form. Each juror answered affirmatively when asked by the court whether, before reporting the verdict the first time, he or she had found (1) that each of the two statutory aggravating circumstances had been proved beyond a reasonable doubt, and (2) that these circumstances outweighed any mitigating circumstances.

When the jury reports an incorrect or imperfect verdict, the trial court has both the power and the duty to redirect the jury's attention to the law and return them to the jury room with directions to reconsider their verdict. *State v. Mounce,* 859 S.W.2d 319, 322 (Tenn.1993); *Meade v. State,* 530 S.W.2d 784, 787 (Tenn.Crim.App.1975); *Jenkins v. State,* 509 S.W.2d 240, 248

(Tenn.Crim.App.1974). The trial court in this case was entitled to exercise this power and perform this duty and did not abuse its discretion in denying a mistrial.

The defendant argues that the verdict, as returned, indicated that the jury considered nonstatutory factors. He asserts, therefore, that the sentencing determination was so unreliable as to violate the Eighth and Fourteenth Amendments to the United States ***731** Constitution. [7] We disagree. The trial judge ascertained that, prior to the return of the initial verdict, each juror had found the existence beyond a reasonable doubt of the two statutory aggravating circumstances upon which the State sought the death penalty. Each juror also confirmed that he or she had previously found that these two aggravating circumstances outweighed any mitigating circumstances. The jury verdict itself reported that the jury found the aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt.

7 Without clarification, defendant also alleges violation of the Sixth Amendment, and Art. I, §§ 8, 9, and 10 of the Tennessee Constitution.

The initial verdict's revelation that the jury considered factors beyond the statutory aggravating circumstances does not invalidate the verdict under the Eighth Amendment. Once a capital sentencing jury finds that a defendant falls within the legislatively-defined category of persons eligible for the death penalty, the jury is free to consider a myriad of factors to determine whether death is the punishment appropriate to the offense and the individual defendant. *California v. Ramos,* 463 U.S. 992, 1005, 103 S.Ct. 3446, 3456, 77 L.Ed.2d 1171 (1983); *Barclay v. Florida,* 463 U.S. 939, 948, 103 S.Ct. 3418, 3424, 77 L.Ed.2d 1134 (1983); *Zant v. Stephens,* 462 U.S. 862, 878, 103 S.Ct. 2733, 2743, 77 L.Ed.2d 235 (1983). It is clear from the record that the jury had found that the defendant met the statutory criteria for capital punishment.

Furthermore, the factors originally listed by the jurors as bases for the sentence are not irrelevant or improper but concern the circumstances of the crime and the character of the defendant. These are factors the jury may consider under the statute. *See* Tenn.Code Ann. § 39–13–204(c). Consideration of the character and record of the individual offender and the circumstances of the particular offense is also a constitutionally indispensable part of the process of inflicting the penalty of death. *Woodson v. North Carolina,* 428 U.S. 280, 303, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976). For these reasons, we hold that the jury's consideration of the listed factors did not render the verdict invalid or unreliable under the Eighth and Fourteenth Amendments.

IV. Circumstances of the Offense—Admissibility

Because the defendant had already pled guilty to aggravated rape and felony-murder, he objected to the State's introduction of extensive evidence of the nature and circumstances of the crime. He insists that, in the sentencing hearing, only evidence relevant to aggravating and mitigating circumstances should have been allowed.

Tenn.Code Ann. § 39–13–204(c) permits, at a sentencing hearing, evidence "as to any matter that the court deems relevant to the punishment," including (but not limited to) "the nature and circumstances of the crime." In *State v. Teague,* 680 S.W.2d 785, 788 (Tenn.1984), *cert. denied,* 473 U.S. 911, 105 S.Ct. 3538, 87 L.Ed.2d 662 (1985), the defendant argued that the trial court erred by allowing the State to introduce evidence concerning the murder at the *re-sentencing hearing.* This Court approved the admission of evidence about "how the crime was committed, the injuries, and aggravating and mitigating factors." Because the defendant pled guilty, the sentencing jury here, as in *Teague,* had no information about the offense, absent the complained of evidence. A description of the crime and its circumstances was thus clearly admissible. Moreover, an "individualized [sentencing] determination" based on the defendant's character and the circumstances of the crime is constitutionally required. *See Zant v. Stephens,* 462 U.S. 862, 879, 103 S.Ct. 2733, 2744, 77 L.Ed.2d 235 (1983). In this case, the trial court permitted

the introduction of evidence tending to "individualize" the case for the jury, while carefully limiting the evidence to testimony relevant to the crime. We find no error in this regard.

V. Defendant's Confession—Admissibility

The trial court also admitted Nichols's videotaped confession to aggravated ***732** rape and to the felony-murder for which he was sentenced. Nichols contends that the tape was improperly admitted because it was irrelevant to sentencing; he also claims that it was obtained in violation of his Fifth Amendment right not to incriminate himself. We find both objections without merit.

As to the first issue, the taped confession was highly relevant to sentencing because it fully described the "nature and circumstances of the crime." Thus, the confession was properly admitted under Tenn.Code Ann. § 39–13–204(c).

With regard to the claim that the confession was involuntary, a trial court's determination at a suppression hearing will not be overturned if there is any material evidence to support it. *See State v. Harbison,* 704 S.W.3d 314, 318 (Tenn.1986), *cert. denied,* 476 U.S. 1153, 106 S.Ct. 2261, 90 L.Ed.2d 705 (1986). We find ample evidence to support the court's finding that the confession in this case was admissible. The arresting officers read *Miranda* warnings to Nichols, and Nichols signed a written waiver of those rights. The officers disputed Nichols's testimony that he requested an attorney and that they coerced him into a statement, and the judge credited the officers' testimony. Finally, the videotaped confession shows the interrogating officer reading Nichols his *Miranda* warnings and Nichols again waiving those rights. Thus, the record supports the court's finding that the confession was voluntary and, therefore, admissible.

VI. Evidence of Prior Conviction

The defendant next argues that the trial court erred by admitting evidence of his 1984 conviction for assault with intent to commit rape. The state did not list this prior conviction as an aggravating circumstance pursuant to Tenn.Code Ann. § 39–13–204(i)(2), but rather sought to use the conviction to impeach Nichols. The court admitted the evidence, not for impeachment purposes, [8] but to allow the state to rebut the defendant's argument that the 1988 and 1989 crimes were sudden deviations from his normally placid behavior.

8 The trial court presumably did not admit the conviction for impeachment purposes because the State had failed to give defense attorneys reasonable written notice of its intent to use the convictions, as required by Tenn.R.Evid. 609(a)(3).

Prior bad acts, including crimes, may be admissible for purposes other than showing conformity with a character trait displayed by the prior bad act. Tenn.R.Evid. 404(b). Pursuant to Rule 404(b), in a hearing outside the jury's presence, the court must find that a material issue exists other than the defendant's propensity for conduct in conformity with the prior bad act. Furthermore, the court must exclude the evidence if the danger of unfair prejudice outweighs the probative value of the evidence.

Here, the trial court held such a hearing at the defendant's request to review the Rule 404(b) issue as it applied to his 1984 conviction. The court noted that Nichols had clearly indicated that the murder and rape in this case were the result of a sudden feeling that overcame him and that defense counsel had attempted to show that the crime was inconsistent with the defendant's otherwise passive nature. Instead of admitting the 1984 assault conviction to prove that the murder in this case conformed to defendant's previous violent behavior, the court admitted the conviction to rebut evidence that the defendant was a docile person. Prior bad acts are admissible to rebut a defendant's claim of having led a peaceful, normal life. *State v. Patton,* 593 S.W.2d 913, 917 (Tenn.1979). We conclude that the admission of this probative evidence was not outweighed by the danger of unfair prejudice and that, with proper limiting instructions, it could be considered by the jury.

VII. Parole Argument

The defendant contends that two statements made during the State's closing argument constituted an impermissible argument that a sentence of life did not mean life imprisonment because there was the possibility that the defendant could be released early on parole. The first statement occurred during initial closing argument. In context, it appears as follows:

> ***733** But what do you do, what do you do with a man who's perpetrated that kind of crime? What do you do with a man who's committed senseless murder, and after he does it, instead of being remorseful, he rapes other women? What do you do with him? *He's been in the penitentiary. He got a five year sentence in '84 and he served eighteen months.* What do you do with him? What's left ... And you heard the psychologist say that if he's out he'll do it again. He even admitted, "Mr. Nichols, if you hadn't been arrested January 5, 1989, you would still be out there committing rapes," and he said yes.
>
> Ladies and gentlemen, justice is doing what you have to do to make sure that Harold Wayne Nichols never rapes again and that he never murders again, whatever it takes.

(Emphasis added.) No objection was made.

The second statement occurred during the State's rebuttal. In context, this argument reads:

> Mr. Moore says, "Prison is hell. Send him there." *Yeah, '84 they sent him there on a five year sentence and he served eighteen months and got out and raped again.* Sure, send him there.
>
> If the death penalty, ladies and gentlemen, isn't applied in a case like this, when does it apply? A man who's shown even in being in prison that he's not going to change, he rapes and murders, and he goes out and does it again and again and again, and if he wasn't in jail right now he'd be doing it again.

(Emphasis added.) The prosecutor then argued that one of punishment's purposes is to "remove the individual from society so that another woman won't be raped again, another woman won't be murdered again." The defendant shortly afterward objected to this argument as implying that a life sentence is not a life sentence.

Any references to parole possibilities during argument, even indirect references, are improper. *Smith v. State,* 527 S.W.2d 737, 738 (Tenn.1975); *Graham v. State,* 202 Tenn. 423, 304 S.W.2d 622 (1957). While the present argument could be interpreted as hinting at the idea that a life sentence carries with it the possibility that defendant will rape and murder again, i.e., might be released into the free world, it does not clearly mention parole possibilities for defendant in the present proceeding. In addition, the argument, perhaps more directly, raises the issues of the failure of prior incarceration to affect the defendant's behavior and of the defendant's potential for future dangerousness. It was, in part, also a response to the defendant's argument that he would be completely harmless upon incarceration. *See State v. Bates,* 804 S.W.2d 868, 881 (Tenn.1991). In any event, to whatever degree improper, these arguments did not constitute error which prejudicially affected the jury's sentencing determination. *See State v. Hines,* 758 S.W.2d 515, 520 (Tenn.1988).

VIII. Caldwell Error

The defendant contends that the prosecutor's argument that "the people of the State of Tennessee, speaking through their legislators, have asked that the death penalty be a punishment" diminished the jury's responsibility in making the sentencing decision in this case and violated *Caldwell v. Mississippi,* 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). This statement was a reply to the defendant's argument that the only reason the death penalty was being sought was because "the

prosecution wants Harold Wayne Nichols to die" and was meant to point out that the people of Tennessee through their elected representatives, not the prosecution, had determined that death was a possible punishment in such cases. The defendant made no contemporaneous objection to this argument. In its opening argument, the State emphasized that it was the jury's duty to make the sentencing decision in this case. Taken in context, the prosecution's argument did not lead the jury to believe that the responsibility for determining the appropriateness of defendant's sentence lay elsewhere. *See, e.g., State v. West,* 767 S.W.2d 387, 398–399 (Tenn.1989) (*Caldwell* error harmless beyond a reasonable doubt); *State v. Taylor,* 771 S.W.2d 387, 396 (Tenn.1989); *Teague v. State,* 772 S.W.2d 915, 926 (Tenn.Crim.App.1988).

*734 *IX. Jury Instructions*

Defendant Nichols next asserts that the jury instructions given by the trial court were deficient or erroneous in several respects.

A. Burden of Proof

The defendant first challenges the trial court's instruction on the state's burden of proof. The court instructed the jury that it must find proof "beyond a reasonable doubt" and be convinced to a "moral certainty" of the existence of the aggravating circumstances and of the fact that they outweighed the mitigating circumstances. Nichols claims that a sentence based upon the jurors' "moral certainty" is a lower burden of proof than evidentiary certainty, and thus violative of the due process clauses of the state and federal constitutions.

In *Cage v. Louisiana,* 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990), the United States Supreme Court held unconstitutional an instruction equating reasonable doubt with "grave uncertainty" or "actual substantial doubt." The Court held that, when those definitions of reasonable doubt accompany an instruction that conviction is appropriate upon the jury's "moral certainty" of guilt, then a jury might impermissibly convict on less proof than required under the due process clause. We conclude, however, that the use of the phrase "moral certainty" by itself is insufficient to invalidate an instruction on the meaning of reasonable doubt. Whereas the instruction at issue in *Cage* required the jury to have an extremely high degree of doubt before acquitting a defendant, our instruction does not require "grave uncertainty" to support acquittal. When considered in conjunction with an instruction that "[r]easonable doubt is that doubt engendered by an investigation of all the proof in the case and an inability, after such investigation, to let the mind rest easily upon the certainty of your verdict," we find that the instruction properly reflects the evidentiary certainty required by the "due process" clause of the federal constitution and the "law of the land" provision in our state constitution. *See also Odeneal v. State,* 128 Tenn. 60, 157 S.W. 419 (1913). The context in which the instruction was given clearly conveyed the jury's responsibility to decide the verdict based on the facts and the law.

Nichols also challenges the trial court for failing to instruct the jury that there is a presumption of "no aggravating circumstances" in sentencing, similar to the presumption of innocence at the guilt phase of the trial. The court did, however, instruct the jury that it must determine the existence of any aggravating circumstances beyond a reasonable doubt. This instruction clearly implies that no aggravating circumstances can be presumed.

B. Mitigating Factors

The defendant next alleges that the trial court failed to instruct the jury that it could consider nonstatutory mitigating factors. Nichols contends that the trial court's instruction specified only three statutory mitigating circumstances, leaving other mitigating factors to the jury's recollection, in violation of *Lockett v. Ohio,* 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978).

In *Lockett,* the United States Supreme Court disapproved a death penalty statute that mandated death unless at least one of three mitigating factors specified by statute was found to exist. The Court held that "[t]o meet constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating factors." *Id.* at 608, 98 S.Ct. at 2967. Unlike the statute at issue in *Lockett,* our criminal code specifically permits consideration of mitigating circumstances other than those listed in Tenn.Code Ann. § 39–13–204(j)(1)–(8). *See* Tenn.Code Ann. § 39–13–204(j)(9). Moreover, we have held that the jury must be instructed that it can consider "any other facts or circumstances that are raised by the evidence that they find to be mitigating circumstances...." *State v. Hartman,* 703 S.W.2d 106, 118 (Tenn.1985), *cert. denied,* 478 U.S. 1010, 106 S.Ct. 3308, 92 L.Ed.2d 721 (1986).

In this case, after the trial court instructed the jury on three specific statutory mitigating circumstances, it also instructed the jury to consider "[a]ny other mitigating factor which is raised by the evidence." Moreover, ***735** the defendant, although given the opportunity, offered no other specific mitigating circumstances to be charged to the jury. Thus, the court's instruction under Tenn.Code Ann. § 39–13–204(j)(9) complied with *Lockett.*

Next, the defendant argues that the court's instructions may have led the jury to believe that unanimity regarding the mitigating circumstances was required, in violation of *Mills v. Maryland,* 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988), and *McKoy v. North Carolina,* 494 U.S. 433, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990). This contention is without merit. *See State v. Smith,* 857 S.W.2d 1, 18 (Tenn.1993); *State v. Bates,* 804 S.W.2d 868, 882–83 (Tenn.1991) *cert. denied,* 502 U.S. 841, 112 S.Ct. 131, 116 L.Ed.2d 98 (1991); *State v. Thompson,* 768 S.W.2d 239, 250–52 (Tenn.1989), *cert. denied,* 497 U.S. 1031, 110 S.Ct. 3288, 111 L.Ed.2d 796 (1990).

C. Statutory Definition of Crime

The State relied upon, and the jury found, the aggravating circumstance that the murder was committed while the defendant was committing rape, etc. Tenn.Code Ann. § 39–13–204(i)(7). The trial court is required to provide the jury with the statutory definition of the felony relied upon by the State to prove aggravating circumstance (i)(7). *State v. Hines,* 758 S.W.2d 515, 521–524 (1988); *State v. Moore,* 614 S.W.2d 348, 350–351 (Tenn.1981). The trial court did not instruct the statutory definition of rape in connection with its charge on this aggravating circumstance. Earlier, however, in connection with its instruction on felony murder, it had instructed the jury on the elements of aggravated rape. It is generally harmless error where the court simply fails to repeat a definition already given, and we find that to be the case here. *See State v. Wright,* 756 S.W.2d 669, 675 (Tenn.1988); *State v. Carter,* 714 S.W.2d 241, 250 (Tenn.1986); *State v. Laney,* 654 S.W.2d 383, 388–389 (Tenn.1983); *compare State v. Hines, supra.*

D. Re–Instruction on Mitigating Circumstances

After the jury returned the initial verdict form, which did not list the statutory aggravating circumstances, the trial court reinstructed the jury regarding aggravating circumstances. The court denied the defendant's request to recharge mitigating circumstances as well. The court ascertained that the corrected verdict was the verdict the jury had reached the first time they returned the form. There was no reversible error in the failure to recharge the mitigating circumstances or to include the words

"beyond a reasonable doubt" in the questions asked the jurors. We have concluded the initial verdict was a legal verdict and the jury had a right to correct it under proper instruction.

E. Law and Facts Instruction

Finally, the defendant objects to the trial court's instruction that:

> The jury are the sole judges of the facts, and of the law as it applies to the facts in the case. In making up your verdict, you are to consider the law in connection with the facts; but the Court is the proper source from which you are to get the law. In other words, you are the judges of the law as well as the facts under the direction of the Court.

Nichols argues that this instruction violated Article I, Section 19 of the Tennessee Constitution by interfering with the jury's absolute discretion in determining the law and the facts. The issue is without merit. *State v. Bane,* 853 S.W.2d 483, 489 (Tenn.1993); *State v. Black,* 815 S.W.2d 166, 186–87 (Tenn.1991).

To summarize, we find no reversible error in connection with the jury instructions given by the trial court in this case.

X. Chronological Order

As a result of the serial rapes, the defendant faced forty charges growing out of some fourteen incidents. The murder of Karen Pulley occurred during the first such incident. The trial court denied defendant's motion to have the cases tried in chronological order. The defendant alleges that the prosecutor deliberately set out to try the cases out of chronological order solely to create an additional aggravating circumstance. The district attorney admitted that this was one reason for the order in which the cases were ***736** scheduled to be tried. The defendant contends that allowing a prosecutor the discretion "to orchestrate a series of trials" in this fashion constitutes cruel and unusual punishment and violates due process and equal protection. He particularly claims that such discretion results in arbitrary and capricious imposition of the death penalty contrary to the principles of *Furman v. Georgia,* 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

Tenn.Code Ann. § 39–13–204(i)(2) provides that the death penalty may be imposed where "[t]he 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." (Emphasis added.) For purposes of this aggravating circumstance, the order in which the crimes were actually committed is irrelevant so long as the convictions have been entered before the sentencing hearing at which they were introduced. *State v. Caldwell,* 671 S.W.2d 459, 464–465 (Tenn.1984); *cf. State v. Teague,* 680 S.W.2d 785, 790 (Tenn.1984) (conviction occurring after first capital sentencing hearing but before sentencing hearing on remand could be used to establish circumstance (i)(2) at resentencing hearing).

It goes without saying that the implementation of this aggravating circumstance may be subject to a certain degree of prosecutorial discretion; but implementation of the criminal laws against murder "necessarily requires discretionary judgments." *McCleskey v. Kemp,* 481 U.S. 279, 299, 107 S.Ct. 1756, 1769, 95 L.Ed.2d 262 (1987). Prosecutorial discretion of this nature does not offend the Eighth Amendment under *Furman,* which

> held only that, in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the criminal.

Gregg v. Georgia, 428 U.S. 153, 199, 96 S.Ct. 2909, 2937, 49 L.Ed.2d 859 (1976); *see also State v. Brimmer,* 876 S.W.2d 75 (Tenn.1994). Where this fundamental discretion is involved, it will not be assumed that "what is unexplained is invidious," *McCleskey v. Kemp,* 481 U.S. at 309, 107 S.Ct. at 1778; and "exceptionally clear proof" is required before an abuse of discretion will be found in the operation of the criminal justice process. *Id.* at 299, 107 S.Ct. at 1769. No such showing has been made in this case. We further find that the record does not support the defendant's assertion that the prosecutor's decision concerning the order of prosecution of the multiple charges facing the defendant violated either equal protection or due process. Accordingly, we find no merit in this issue.

XI. Polling the Jury

The defendant argues that the trial court's failure to ask each juror whether he or she had found that the aggravating circumstances outweighed the mitigating circumstances *beyond a reasonable doubt* when it polled the jurors upon the return of the verdict [9] violates several of his constitutional rights (Sixth, Eighth, and Fourteenth Amendments of the United States Constitution; Art. I, §§ 8, 9, and 16 of the Tennessee Constitution). This issue is essentially a challenge of the verdict's reliability. In this respect, it should be noted, first, that the jurors were instructed that they must find that aggravating circumstances outweighed mitigating circumstances beyond a reasonable doubt and, second, that the verdict form itself states that the jury unanimously found that the statutory aggravating circumstances outweigh mitigating circumstances beyond a reasonable doubt. The court was only ascertaining that this was the jurors' verdict and its omission of the phrase "beyond a reasonable doubt" in this question during the polling does not invalidate an otherwise valid verdict.

9 The defendant incorrectly alleges that the trial court did not poll each juror as to whether he or she had found the statutory aggravating facts had been proven beyond a reasonable doubt. This question was asked each juror. Also, the trial court did poll the foreperson as to her finding on the weighing of mitigating factors.

*737 *XII. Constitutionality of Tennessee Death Penalty Statute*

The defendant raises the same constitutional issues that the Court rejected in *State v. Black,* 815 S.W.2d 166 (Tenn.1991) (statute creates a mandatory death penalty and death penalty is cruel and unusual). The issues have no merit.

XIII. Notice of Aggravating Circumstance

The defendant contends he did not receive proper notice under Tenn.R.Crim.P. 12.3 of the conviction of aggravated rape (anal rape) as an aggravating circumstance. The State erroneously gave notice of Indictment 175487, alleging aggravated rape on October 24, 1989, which had been dismissed. The defendant, however, had pled guilty to Indictment 175433, aggravated rape [anal rape] of the same victim on the same day, October 24, 1989. The defendant was aware that he had pled guilty to aggravated rape on October 24, 1989, and was not misled or prejudiced by the State's error. *Cf. State v. Debro,* 787 S.W.2d 932

(Tenn.Crim.App.1989); *cf. also* *State v. Adams,* 788 S.W.2d 557 (Tenn.1990) (when a detail of required notice is incorrect, issue is whether the notice was materially misleading and defendant has duty to inquire further). [10] There is no merit in the defendant's contention.

10 *Debro* and *Adams* are decisions under Tenn.Code Ann. § 40–35–202(a) and Tenn.R.Crim.P. 12.3(a) (Notice in Noncapital Cases). Tenn.R.Crim.P. 12.3(b) (Notice in Capital Cases) requires only reference to the citation of the circumstance, not a listing of specific convictions. Technically, the material defendant complains of here was surplusage under the rule.

XIV. Admissibility of Prior Convictions

The defendant argues that none of the five prior convictions for aggravated rape could be used to prove aggravating circumstance (i)(2) because they were not "final" under Tenn.R.Crim.P. 32(e) [11] The defendant argues that the convictions were not final since no "judgments of conviction" had been entered. No judgments had been entered because the trial court had delayed sentencing at the defendant's request. The trial court held that "even under Rule 32(e) ... we do have final convictions in those cases." *Cf.* *McCrae v. State,* 395 So.2d 1145, 1153–1154 (Fla.1981) (an adjudication of guilt is not necessary for "conviction" under Florida's similar aggravating circumstance). Tenn.Code Ann. § 39–13–204(i)(2) requires only a previous "conviction." The State argues that the indictments and minutes of the trial court offered to prove these convictions were admissible under either Tenn.R.Evid. 803(b) (Records of Regularly Conducted Activity) or 893(8) (Public Records and Reports). We agree and conclude that the convictions were admissible.

11 Tenn.R.Crim.P. 32(e) requires a judgment of conviction to set forth the plea, the verdict or findings, and the adjudication and sentence and be signed by the judge and entered by the clerk. Tenn.R.Evid. 803(22) states that judgments of previous felony convictions are not excluded by the hearsay rule.

XV. Newly Discovered Evidence

The defendant contends that newly discovered evidence entitles him to a new trial. After trial, defendant's counsel received allegedly new information relating to abuse of the defendant by his father, which allegations have been kept confidential.

To obtain a new trial on the basis of newly discovered evidence, the defendant must establish (1) reasonable diligence in seeking the newly discovered evidence; (2) materiality of the evidence; and (3) that the evidence will likely change the result of the trial. *State v. Goswick,* 656 S.W.2d 355, 358–360 (Tenn.1983). The trial court found that the first prong had been met but the other two were not established. We agree that this alleged evidence, even if it could be produced as represented, would not change the results of the trial. Proof had already been introduced in the record that the defendant's father was abusive. Accordingly, we agree with the trial court's judgment denying a new trial.

XVI. Harmless Error Analysis of Middlebrooks Error

Sometime after the trial of this case, a Court majority concluded in *State v. Middlebrooks,* ***738** 840 S.W.2d 317, 346 (Tenn.1992) (Drowota and O'Brien, JJ., dissenting), that when a defendant is convicted of felony murder, the State's use of felony murder as an aggravating circumstance at the sentencing hearing violates the state and federal constitutions because the aggravating circumstance is a duplication of the crime itself and does not narrow the class of death-eligible defendants as is constitutionally required. There is no question that, in this case, the sentencing jury's consideration of the invalid felony-

murder aggravating circumstance was state constitutional error. We must now determine whether the error was harmless beyond a reasonable doubt. *See* *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *State v. Howell,* 868 S.W.2d 238 (Tenn.1993). In this particular context, an error is harmless beyond a reasonable doubt if an appellate court can conclude that the sentence would have been the same had the sentencing authority given no weight to the invalid aggravating circumstance. *Stringer v. Black,* 503 U.S. 222, ——, 112 S.Ct. 1130, 1137, 117 L.Ed.2d 367 (1992); *State v. Howell,* 868 S.W.2d at 262.

We have recently stated that it is important, when conducting harmless error review,

> ... to completely examine the record for the presence of factors which potentially influence the sentence ultimately imposed. These include, but are not limited to, the number and strength of remaining valid aggravating circumstances, the prosecutor's argument at sentencing, the evidence admitted to establish the invalid aggravator, and the nature, quality and strength of mitigating evidence.
>
> ... [E]ven more crucial than the sum of the remaining aggravating circumstances is the qualitative nature of each circumstance, its substance and persuasiveness, as well as the quantum of proof supporting it. In that respect, the Tennessee statute assigns no relative importance to the various statutory aggravating circumstances. By their very nature, and under the proof in certain cases, however, some aggravating circumstances may be more qualitatively persuasive and objectively reliable than others....

State v. Howell, 868 S.W.2d at 260–61. That is particularly true of the aggravating circumstance remaining in this case. Tenn.Code Ann. § 39–13–204(i)(2) (previous convictions of felonies involving the use of violence to the person). In addition, as the present case illustrates, the effect and qualitative persuasiveness of the remaining aggravating circumstance on the sentence increases where there is proof of more than one prior violent felony conviction.

The State, here, offered proof that the defendant had committed five similar aggravated rapes within 90 days of Pulley's murder, and in three instances was armed with weapons including a cord, a pistol, and a knife. The modus operandi of the convictions was similar to the felony resulting in Pulley's murder. The defendant, when "energized," went out night after night, roaming the city, selecting vulnerable victims, eventually breaking into their homes and violently committing rape. The evidence supporting the remaining valid aggravating circumstance is undisputed and overwhelming.

Moreover, no inadmissible or erroneous evidence was introduced to establish the invalid felony-murder aggravating circumstance. The defendant pled guilty to felony-murder. The prosecution was then properly allowed to present evidence of the nature and circumstances of the crime in order to provide the jury enough information to make an individualized sentencing determination of the appropriateness of the death penalty. Elimination of the invalid felony-murder aggravating circumstance does not "remove any evidence from the jury's total consideration." *State v. Howell,* 868 S.W.2d at 261.

An examination of the State's argument also reveals that no great emphasis was placed on the fact that the murder occurred during the course of a felony. The bulk of the argument relative to aggravating circumstances focused on the defendant's prior criminal record and the predatory nature of the crimes.

Finally, we have examined the quality and strength of the defendant's mitigation proof in our analysis to determine the effect of the invalid aggravating circumstance on the sentence. Primarily the defendant's mitigation ***739** proof related to his childhood environment, his character, and passive nature. The State offered evidence in rebuttal to show that a few years earlier, he had been convicted and sentenced to the penitentiary for an attempted rape. In addition, expert proof from Dr. Engum was offered to show that the defendant was suffering from a rare condition called intermittent explosive disorder. The State rebutted Dr. Engum's testimony, however, by offering proof that he acted in a dual role as a lawyer and member of the defense team searching for a defense, rather than as an objective psychologist.

After carefully considering the entire record, and the factors discussed above, we have determined, beyond a reasonable doubt, that the sentence would have been the same had the jury given no weight to the invalid felony-murder aggravating circumstance. Accordingly, the jury's sentence of death is affirmed.

CONCLUSION

We have carefully considered the defendant's contentions as to the alleged errors occurring during the sentencing phase and conclude the defendant's death sentence should be affirmed.

In accordance with the mandate of Tenn.Code Ann. § 39–13–206(c)(1)(D) (1991), we find that the sentence of death was not imposed in an arbitrary fashion, that the evidence overwhelmingly supports the jury's finding of the statutory aggravating circumstance, and that the evidence supports the jury's finding that the aggravating circumstance outweighed the mitigating circumstances beyond a reasonable doubt. Our comparative proportionality review reveals that the sentence in this case is neither excessive nor disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and character of the defendant. *See* *State v. Cazes,* 875 S.W.2d 253 (Tenn.1994); *State v. House,* 743 S.W.2d 141 (Tenn.1987); *State v. McNish,* 727 S.W.2d 490 (Tenn.1987); and *State v. King,* 718 S.W.2d 241 (Tenn.1986).

The dissent suggests that no meaningful comparative proportionality review is possible without a procedure that includes objective criteria to determine proportionality. We disagree. A majority of this Court recently stated in *State v. Cazes, supra,* that we do not

> take lightly our duty to conduct a comparative review in each case.... Because we do not find it necessary in every case to compare in writing, detail by detail, all the specific cases or circumstances which are considered in our proportionality review, it does *not* follow ... that we have failed to perform an effective comparative proportionality review as outlined in *State v. Barber,* 753 S.W.2d 659, 663–668 (Tenn.1988).

Id. (emphasis in original).

So it is in this case. We have performed a thorough and searching proportionality review and conclude the sentence is not excessive or disproportionate.

The dissent also argues that the defendant is not among the worst of the bad because he had "lived a normal and productive life, except for the criminal episodes." Again, we emphatically disagree. The proof demonstrates the defendant is undoubtedly "among the worst of the bad," and clearly belongs among those who are eligible for the ultimate sanction. The defendant was convicted of attempted rape in 1984, served 18 months, was placed on parole, violated it and was returned to prison. He committed five aggravated rapes within 90 days of his rape and murder of Karen Pulley and in three instances was armed with weapons. He prowled the city night after night searching out vulnerable female victims. Moreover, both the defendant and Dr. Engum testified that if released, he would continue to roam and to rape. At the most, the evidence showed only that the defendant had been able to function without violence in a prison setting. It does not show that the rape and murder of Karen Pulley and the previous rape convictions were aberrations in an otherwise productive life. Accordingly, based on the nature of the crime and the character of the defendant, we conclude that the sentence in this case is neither excessive nor disproportionate to the penalty imposed in similar cases.

We, therefore, affirm the sentence of death. The sentence will be carried out as ***740** provided by law on the 2nd day of August, 1994, unless otherwise ordered by this Court or by other proper authority. Costs of this appeal are assessed against the defendant, Harold Wayne Nichols.

DROWOTA and O'BRIEN, JJ., concur.

REID, C.J., dissents.

DAUGHTREY, J., not participating.

REID, Chief Justice, dissenting.

I dissent with regard to the majority's findings that the defendant waived his right to object to the jury under Article I, section 9 of the Tennessee Constitution, that the prosecutor's argument concerning parole was not prejudicial error, that the use of the invalid aggravating circumstance of felony murder as an aggravator was harmless error, and that death in this case is not a disproportionate punishment.

CHANGE OF VENUE

The United States Constitution and the Tennessee Constitution guarantee to every person charged with the commission of a crime the right to a trial in the county where the crime was committed by an impartial jury selected from the citizens of that county. U.S. Const. amend. VI; Tenn. Const. art. I, §§ 6, 9. The venue for the trial of a criminal case can be changed only upon the application of the accused or upon the court's own motion with the consent of the accused. Tenn.R.Crim.P. 21(a). Change of venue can be accomplished in Tennessee only by following the statutory procedure. A defendant in a criminal case is entitled to a change of venue if for "causes, then existing, he cannot have a fair and impartial trial in the county" where the case is pending. T.C.A. § 20–4–203 (1980). If, upon the application of the accused, the court finds that the accused cannot have a fair and impartial trial in the county where the charge is pending, T.C.A. § 20–4–206 (1980) requires that the case be removed "to the nearest adjoining county free from the like exception."

This statutory procedure was not followed in this case. The trial court granted the defendant's application for a change of venue upon the necessary finding that the defendant could not have a fair and impartial trial in Hamilton County. The court, however, did not grant a change of venue. Instead, over the objection of the defendant, the court moved the proceedings to Sumner County from whence a jury was selected and transported back to Hamilton County, where the trial was held. There was no showing that Sumner County was the "nearest adjoining county" in which an impartial jury could be impanelled. In fact, Sumner County is five counties removed from Hamilton County. Consequently, despite the finding that the defendant was entitled to a change of venue, he was not in fact granted a change of venue. Instead of granting a change of venue, the trial court gave the defendant a change of venire, a procedure unknown to Tennessee, but permitted in some states by statute. *Odle v. Superior Court of Contra Costa County,* 32 Cal.3d 932, 187 Cal.Rptr. 455, 654 P.2d 225, 242 (1982) (Mosk, J., dissenting).

I do not agree with the majority's recommendation that the procedure followed in this case be authorized by statute. In my opinion, the procedure provided by present law is adequate and should be followed. A defendant has the right to a change of venue only when the state cannot afford him an impartial trial guaranteed by the constitution. If the trial must be moved in order to have a fair and impartial trial, the requirement that it be moved to the nearest county in which a fair and impartial trial can be had is entirely reasonable. It accommodates the accused's right to have the trial as close to the scene of the crime as possible, and it accommodates the public's interest in conserving time and expense incident to the trial.

I would find the unauthorized departure from the plain provisions of the statute to be reversible error.

ARGUMENT CONCERNING PAROLE

The majority acknowledges that any reference to parole possibilities during argument, even indirect references, are improper. However, it characterizes the prosecution's argument as perhaps "hinting at the idea that a life sentence carries with it the possibility that defendant will rape and murder ***741** again," and concludes the argument was not prejudicial error. *Supra* at 733.

Even though parole is not specifically mentioned in the prosecutor's argument, the import of the argument is dramatically clear —unless the defendant is sentenced to death he will be released from prison and rape again. During the prosecutor's initial closing statement, he rhetorically asked: "What do you do with him? He's been in the penitentiary. He got a five year sentence in '84 and he served eighteen months. What do you do with him? What's left? ... And you heard the psychologist say that if he's out he'll do it again." During rebuttal, the prosecutor remarked, "[The defendant's lawyer] says, 'Prison is hell. Send him there.' Yeah, '84 they sent him there on a five year sentence and he served 18 months and got out and raped again. Sure, send him there." Immediately after mentioning the defendant's previous release on parole, the prosecutor quoted Dr. Engum as saying that the defendant might "do it again" if released from prison. This remark was pointless except as an attempt to tell the jury that the possibility of release was a real danger in this case. Moreover, the prosecutor's mention of the defendant's previous parole in response to defense counsel's "prison is hell" argument certainly suggests that death would be the only appropriate sentence given the possibility of parole.

The argument was a comment upon the possibility of parole and was reversible error. *See Smith v. State,* 527 S.W.2d 737, 739 (Tenn.1975).

INVALID AGGRAVATING CIRCUMSTANCE

This Court concluded in *State v. Middlebrooks,* 840 S.W.2d 317, 346 (Tenn.1992), *cert. dismissed,* 510 U.S. 124, 114 S.Ct. 651, 126 L.Ed.2d 555 (1993), that when a defendant is convicted of felony murder, the State's use as an aggravating circumstance at the sentencing hearing of the fact that the murder occurred during the commission of a felony, violates the state and federal constitutions because the aggravator is simply a duplication of the crime itself, and therefore does not sufficiently narrow the class of death-eligible defendants. The sentence in *Middlebrooks* was reversed and the case remanded for resentencing because the Court was unable to conclude beyond a reasonable doubt that the use of the invalid felony murder aggravating circumstance was harmless error, even though the Court found that the remaining aggravating circumstance, that the murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of the mind, [1] was amply supported by the evidence. *Id.* at 347.

1 Tenn.Code Ann. § 39–2–203(i)(5) (1982).

Middlebrooks was a significant decision in the evaluation of constitutional principles applicable to the sentence of death. It was decided against a background of decisions by this Court and the United States Supreme Court regarding harmless error in capital sentencing.

Prior to 1967, the federal courts assumed that harmless error analysis did not apply to federal constitutional violations, so that when a federal constitutional error occurred, reversal was the automatic remedy. James C. Scoville, Comment, *Deadly Mistakes: Harmless Error in Capital Sentencing,* 54 U.Chi.L.Rev. 740, 741–42 (1987) (hereinafter "Scoville, *Deadly Mistakes*"). Tennessee courts applied the same rule of automatic reversal to state constitutional errors as well. *See e.g. Dykes v. State,* 201 Tenn. 65, 296 S.W.2d 861, 862 (1956). In *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), the

U.S. Supreme Court approved the application of the harmless error test to federal constitutional errors in state criminal trials, but held that, in order to deem an error harmless, the reviewing court must be persuaded beyond a reasonable doubt, that the error complained of did not contribute to the verdict obtained. *Id.* at 24, 87 S.Ct. at 828. However, in *Chapman* the Court acknowledged that there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error. *Id.* at 23, 87 S.Ct. at 827 (citing *e.g., Gideon v. Wainwright,* 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) (right to counsel); ***742** *Tumey v. State of Ohio,* 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927) (right to impartial judge)).

The United States Supreme Court held in *Clemons v. Mississippi,* 494 U.S. 738, 752, 110 S.Ct. 1441, 1450, 108 L.Ed.2d 725 (1990), that the federal constitution is not violated by an appellate court's harmless error analysis when errors occur in a capital sentencing hearing, even when the error involved is the unconstitutional submission of an aggravating circumstance to the jury. The question under *Chapman,* in that context, is not whether the legally admitted evidence was sufficient to support the death sentence, but rather, whether the State has proven "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Satterwhite v. Texas,* 486 U.S. 249, 258–59, 108 S.Ct. 1792, 1798–99, 100 L.Ed.2d 284 (1988) (quoting *Chapman,* 386 U.S. at 24, 87 S.Ct. at 828); *see also State v. Cauthern,* 778 S.W.2d 39, 47 n. 1 (1989), *cert. denied,* 495 U.S. 904, 110 S.Ct. 1922, 109 L.Ed.2d 286 (1990).

Error not rising to the level of a constitutional rights deprivation are judged for harm or prejudice under Rule 52(a) of the Tennessee Rules of Criminal Procedure and Rule 36(b) of the Tennessee Rules of Appellate Procedure. In several important ways, the test for harmlessness of constitutional errors differs from that for nonconstitutional errors. First, once a constitutional error is found, the burden shifts to the state to prove that it is harmless; the burden does not shift to the state for the nonconstitutional errors. Second, the reviewing court must be persuaded "beyond a reasonable doubt" that the error did not affect the trial outcome in order to deem the error harmless—a stricter standard of persuasion than for nonconstitutional error. Finally, a most significant difference is that some constitutional errors never can be deemed harmless, whereas any nonconstitutional error may be considered harmless in a particular case. Scoville, *Deadly Mistakes,* 54 U.Chi.L.Rev. at 744.

Later, in *Sochor v. Florida,* 504 U.S. 527, 112 S.Ct. 2114, 119 L.Ed.2d 326 (1992), the Supreme Court concluded that an appellate court cannot fulfill its obligations of meaningful review by simply reciting the formula for harmless error. Justice O'Connor, concurring, observed that:

> In *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), we held that before a federal constitutional error can be held harmless, the reviewing court must find "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.* at 24, 87 S.Ct. at 828. This is a justifiably high standard, and while it can be met without uttering the magic words "harmless error," see *ante* [504 U.S. at —— – ——, 112 S.Ct.] at 2122–2123, the reverse is not true. An appellate court's bald assertion that an error of constitutional dimensions was "harmless" cannot substitute for a principled explanation of how the court reached that conclusion.

Id., 504 U.S. at ——, 112 S.Ct. at 2123 (O'Connor, J., concurring).

Tennessee courts have applied the *Chapman* constitutional harmless error analysis to both state and federal constitutional errors. *See e.g. State v. Middlebrooks,* 840 S.W.2d at 347; *State v. Cook,* 816 S.W.2d 322, 326 (Tenn.1991). The invalidation of the aggravating circumstance in *Middlebrooks* was clearly constitutionally based, and therefore any *Middlebrooks* errors are subject to constitutional harmless error analysis. While not every error occurring in a capital sentencing hearing is of constitutional dimension, the line between constitutional and non-constitutional error is often blurred

due to the Eighth Amendment requirement for a heightened need for reliability. *See* *State v. Terry,* 813 S.W.2d 420 (Tenn.1991) (quoting *Woodson v. North Carolina,* 428 U.S. 280, 305, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976) (plurality opinion), and *Lockett v. Ohio,* 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (plurality opinion)). When evidence is introduced into the sentencing calculation that potentially undermines the Eighth Amendment reliability requirement, constitutional harmless error analysis should be employed. *State v. Terry,* 813 S.W.2d at 425 (because evidence of the invalid aggravating circumstance was introduced, and the defendant introduced strong mitigation proof and only one valid aggravator remained, this Court could not conclude that the error was ***743** harmless *beyond a reasonable doubt*); *see also* *State v. Bobo,* 727 S.W.2d 945, 956 (Tenn.) *cert. denied,* 484 U.S. 872, 108 S.Ct. 204, 98 L.Ed.2d 155 (1987) (evidence of an invalid aggravator was introduced; however, because there was little evidence in mitigation, and two other valid aggravators were clearly established, the error was found harmless *beyond a reasonable doubt*); *State v. Cone,* 665 S.W.2d 87, 95 (Tenn.) *cert. denied,* 467 U.S. 1210, 104 S.Ct. 2400, 81 L.Ed.2d 357 (1984) (jury heard evidence on an aggravator held invalid by the Court, but the error was harmless *beyond a reasonable doubt* because at least three other aggravators were clearly established); *State v. Campbell,* 664 S.W.2d 281, 284 (Tenn.) *cert. denied,* 469 U.S. 920, 105 S.Ct. 302, 83 L.Ed.2d 236 (1984) (jury heard evidence of non-violent prior felony convictions, but the Court held such error was harmless *beyond a reasonable doubt* because there was no mitigating evidence and two other valid aggravators); *compare* *State v. Williams,* 690 S.W.2d 517, 533 (Tenn.1985) (probability of prejudice resulting from the consideration of the improperly admitted evidence required reversal); *State v. Johnson,* 661 S.W.2d 854, 862 (Tenn.1983) (consideration of the improperly admitted evidence requires reversal because of the probability of prejudice); *State v. Adkins,* 653 S.W.2d 708, 716 (Tenn.1983) (the probability of prejudice from the wrongfully allowed evidence is so great reversal is required).

In *State v. Howell,* 868 S.W.2d 238 (Tenn.1993), use of felony murder as an aggravating circumstance was found to be invalid pursuant to the *Middlebrooks* decision. However, even though the Court in *Middlebrooks* was unable to conclude that the use of the invalid aggravating circumstance was harmless error, 840 S.W.2d at 347, the Court began in *Howell* a harmless error analysis based on an examination of the number and weight of remaining aggravating circumstances, the jury instructions, the prosecutor's argument, the evidence admitted to establish the invalid aggravator, and the nature and quality of mitigating evidence. The Court's rationale in *Howell* was:

> In order to guarantee the precision that individualized sentencing considerations demand and provide a principled explanation for our conclusion in each case, it is important, when conducting harmless error review, to completely examine the record for the presence of [these] factors which potentially influence the sentence ultimately imposed.

State v. Howell, 868 S.W.2d at 260–61.

My concurrence in *Howell* was based on the majority's analysis of these factors, upon which it concluded that beyond a reasonable doubt, charging the invalid aggravating circumstance did not affect the jury's decision to impose the sentence of death, and also on the fact that no evidence was admitted in support of the invalid aggravating circumstance that was not admissible to show the circumstances of the crime. *Id.* at 732–733 (Reid, C.J., concurring).

In the case before the Court, no evidence was admitted in support of the invalid circumstance, but the record does not, in my view, support the conclusion that the State has shown beyond a reasonable doubt, the jury was not influenced by the aggravating

circumstance. Even under the *Howell* analysis, the admission of the invalid circumstance was not harmless error. The State relied on two aggravating circumstances to support the death penalty—previous convictions for aggravated rape, and the fact that the murder occurred during the commission of a violent felony. The jury was instructed to decide whether the aggravating circumstances were supported by the evidence, and whether they outweighed the mitigating evidence. At the sentencing hearing, evidence of the aggravating circumstances was offered, which included substantial emphasis on the circumstances of the crime itself. Evidence of mitigating circumstances was offered from the defendant, his family, co-workers, and friends as to his character, work background and attitude, and family history. He also submitted the testimony of a clinical psychologist who had diagnosed the defendant as having intermittent explosive disorder. The State's closing argument emphasized the felony murder aggravating circumstance at least as much as the aggravating ***744** circumstance of prior convictions. The most dramatic evidence of the content of the jury's instruction and deliberation, and the weight of the remaining aggravator, was their initial return of the juror death penalty verdict form. This form cited four "aggravating circumstances" concerning the murder itself, but no aggravating circumstances concerning the defendant's record of convictions. The death penalty verdict form cited the four aggravating circumstances as follows:

1. First-degree murder of Karen E. Pulley

2. Unfeeling brutality of the first-degree murder

3. Lack of remorse

4. Lack of respect of human rights

The trial judge sent the jury out to deliberate a second time, and only then did it insert the statutory language supporting the prior conviction aggravating circumstance onto the death penalty verdict form. These circumstances cast grave doubt on the jury's decision.

Our narrow task here is to determine whether the invalid aggravating circumstance of felony murder influenced the jury to impose a sentence of death. There is at the very least a reasonable possibility that the injection of the invalid felony murder aggravating circumstance into the weighing process by the jury contributed to the death sentence, and I cannot conclude that beyond a reasonable doubt the error did not contribute to the verdict. *See* *Chapman,* 386 U.S. at 24, 87 S.Ct. at 828.

Based on the same analysis, I would find that the evidence does not support the verdict that beyond a reasonable doubt the aggravating circumstance does not outweigh the mitigating circumstances. *See* *State v. Smith,* 857 S.W.2d 1, 21 (Tenn.) *cert. denied,* 510 U.S. 996, 114 S.Ct. 561, 126 L.Ed.2d 461 (1993).

COMPARATIVE PROPORTIONALITY REVIEW

The majority summarily states that the sentence of death is "neither excessive nor disproportionate." *Supra* at 739. I disagree with the majority's conclusion for two reasons. The first is that no meaningful proportionality review was done in this case. The comparative proportionality review mandated by statute requires more of this Court than its general impressions of what sentences have been imposed in similar cases. *See* *State v. Howell,* 868 S.W.2d 238, 262 (Tenn.1993) (Reid, C.J., concurring). This is the type of case that demonstrates the need for a definite and precise procedure that includes objective criteria for determining whether the sentence of death in a particular case is excessive or disproportionate in comparison to the penalties imposed in similar cases. A procedure whereby the conduct and character of criminal offenders can be categorized according to generally accepted levels of moral turpitude would provide a structure and standards needed by this Court, trial courts, defense counsel, and prosecutors to avoid the arbitrariness inherent in the present practice. *State v. Harris,* 839 S.W.2d 54, 84–85 (Tenn.1992), *cert. denied,* 507 U.S. 954, 113 S.Ct. 1368, 122 L.Ed.2d 746 (1993) (Reid, C.J., dissenting).

Appendix B

The second reason for dissenting on this issue is that the evidence is not sufficient to support a finding that the defendant is among the worst of the bad. The circumstances of the offense in this case are egregious and could qualify the defendant for the ultimate sanction if only the criminal act is considered. However, T.C.A. § 39–13–206(c)(1)(D) requires that reviewing courts consider both the nature of the crime and the character of the offender. The evidence regarding the character of the defendant is not conclusive. Expert evidence shows that the defendant suffered from substantial mental and emotional problems. The other evidence shows that he lived a normal and productive life, except for the criminal episodes. In the absence of objective criteria whereby the defendant's conduct and character can be adjudged dispassionately, I cannot say that the penalty of death is not disproportionate to the penalty imposed in similar cases in which the death penalty was rejected. *See* *State v. Cazes,* 875 S.W.2d 253, 270 (Tenn.1994), (Reid, C.J., concurring and dissenting); ***745** *State v. Middlebrooks,* 840 S.W.2d 317, 354–55 (Tenn.1992) (Reid, C.J., concurring and dissenting).

ORDER ON PETITION FOR REHEARING

PER CURIAM.

The appellant, Harold Wayne Nichols, has filed a petition for rehearing in this cause, which the Court has considered and concludes should be denied.

It is so ORDERED.

DAUGHTREY, J., not participating.

All Citations

877 S.W.2d 722, 62 USLW 2771

pute, the majority adopts an analysis that relies, initially, on a determination of whether a "material change in circumstances" has occurred since the prior custody order. Under this analysis, a change is material if it affects the child's "well-being" in a "meaningful" way. If there has been a material change, the court must then determine whether a change of custody is in the child's "best interests."

The "material change in circumstances" and the child's "best interests" analyses are fraught with danger because neither the terms nor the criteria used to construe them have fixed meanings. Consequently, in my view, this analysis is unworkable in several respects. First, by not providing a definition of what constitutes a "material change," this Court allows trial courts to rely on factors that are irrelevant to the existence of a significant threat of substantial harm to the child. Thus, every debatable decision made by the custodial parent about employment, education, medical care or social welfare is open to scrutiny as potential evidence that the decision has had a "meaningful" effect on the child's "well-being." This exposure to myriad areas of attack suggests the second problem with the unclear definition of "material change": the subjection of custodians to continued judicial scrutiny and oversight of the child's "well-being."

Third, once the court determines that a "material change" has occurred, it must move to the inherently unfair "best interests" analysis. The loose definitional structure of the "best interests" analysis ultimately favors the socioeconomically advantaged parent because the parent who can provide more opportunities for the child is often viewed as better suited to "provide" for the child. Thus, the amorphous "best interests" analysis encourages competition between parents to demonstrate which parent can do more for the child—a contest in which the sincere custodial parent with adequate parenting skills but inferior financial means, will always lose.

In my view, a change of custody must be based upon a demonstration that the child's circumstances are in danger of deterioration or have deteriorated because of the parent's conduct, thereby exposing the child to a substantial danger of harm. This is a standard that excludes attacks on reasonable, albeit arguable, parental decisions and limitations that, inevitably, will sometimes negatively affect a child's "well-being" and focuses the inquiry on whether there is just cause to change custody. This is also a standard that protects rather than abandons the established principle of promoting an end to otherwise never-ending custody disputes, provides stability in a child's placement, and keeps the courts out of ordinary family dynamics.

I cannot concur with an analysis under which the modification of custody between parents is allowed when the child is not exposed to a potential harm, and when the obvious distinguishing factor of the successful movant's evidence is access to greater financial means. Therefore, I respectfully dissent in the manner and to the extent stated above.

Harold Wayne NICHOLS

v.

STATE of Tennessee.

Supreme Court of Tennessee,
at Knoxville.

Oct. 7, 2002.

After the affirmance of his convictions for first-degree felony-murder and other

offenses and his death sentence, 877 S.W.2d 722, petitioner sought post-conviction relief. The Criminal Court, Hamilton County, D. Kelly Thomas, Jr., J., by designation, granted partial relief and ordered new sentencing hearings for the convictions for aggravated rape, first-degree burglary, and larceny. Petitioner appealed. The Court of Criminal Appeals concluded that the trial court erred by allowing the petitioner to assert his right against self-incrimination during the post-conviction proceedings, but upheld the trial court's judgment in all other respects. Appeal was granted. The Supreme Court, E. Riley Anderson, J., held that: (1) trial counsel was not ineffective regarding investigation and regarding advice that defendant should plead guilty to capital murder and aggravated rape; (2) cross-examination of defendant at penalty phase, regarding the facts of his prior rape convictions, was not improper under the circumstances; (3) instructions at penalty phase were proper; and (4) Court of Criminal Appeals should not have addressed the self-incrimination issue.

Affirmed.

Adolpho A. Birch, Jr., J., filed an opinion concurring in part and dissenting in part.

1. Criminal Law ⚿1158(1)

A trial court's findings of fact are conclusive on appeal unless the evidence in the record preponderates against them.

2. Criminal Law ⚿1158(1), 1159.2(9), 1159.4(2)

When reviewing factual issues, the appellate court will not re-weigh or re-evaluate the evidence; moreover, factual questions involving the credibility of witnesses or the weight of their testimony are matters for the trial court to resolve.

3. Criminal Law ⚿1139

When reviewing legal issues or a mixed question of law and fact such as an ineffective assistance of counsel claim, the appellate court's review is de novo with no presumption of correctness. U.S.C.A. Const.Amend. 6.

4. Criminal Law ⚿641.13(1)

To establish ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that the deficiency prejudiced the defense. U.S.C.A. Const.Amend. 6; West's T.C.A. Const. Art. 1, § 9.

5. Criminal Law ⚿641.13(1)

A failure to prove either deficient performance or prejudice provides a sufficient basis to deny relief on the ineffective assistance claim. U.S.C.A. Const.Amend. 6; West's T.C.A. Const. Art. 1, § 9.

6. Criminal Law ⚿641.13(1)

To prove a deficiency in counsel's performance, as element of ineffective assistance of counsel, a defendant must show that counsel's acts or omissions were so serious that they fell below an objective standard of reasonableness under prevailing professional norms. U.S.C.A. Const. Amend. 6; West's T.C.A. Const. Art. 1, § 9.

7. Criminal Law ⚿641.13(1)

In reviewing counsel's conduct, for purposes of a claim of ineffective assistance of counsel, a fair assessment requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. U.S.C.A. Const.Amend. 6; West's T.C.A. Const. Art. 1, § 9.

8. Criminal Law ⇐641.13(6)

Defense counsel, to provide effective counsel, must conduct appropriate investigations, both factual and legal, and must assert them in a proper and timely manner. U.S.C.A. Const.Amend. 6; West's T.C.A. Const. Art. 1, § 9.

9. Criminal Law ⇐641.13(6)

Although a defendant's statements or confessions do not eliminate counsel's duty to investigate, the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. U.S.C.A. Const.Amend. 6; West's T.C.A. Const. Art. 1, § 9.

10. Criminal Law ⇐641.13(1)

Counsel's conduct, for purposes of a claim of ineffective assistance of counsel, must be assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments. U.S.C.A. Const.Amend. 6; West's T.C.A. Const. Art. 1, § 9.

11. Criminal Law ⇐641.13(1)

To establish that a deficient performance resulted in prejudice, as element of ineffective assistance of counsel, a defendant must show that there is a "reasonable probability" that, but for counsel's unprofessional errors, the result of the proceeding would have been different, which is a probability sufficient to undermine confidence in the outcome. U.S.C.A. Const. Amend. 6; West's T.C.A. Const. Art. 1, § 9.

See publication Words and Phrases for other judicial constructions and definitions.

12. Criminal Law ⇐641.13(1)

To show ineffective assistance of counsel, a defendant must establish that the deficient performance of counsel was of such a degree that it deprived the defendant of a fair trial and called into question the reliability of the outcome. U.S.C.A. Const.Amend. 6; West's T.C.A. Const. Art. 1, § 9.

13. Criminal Law ⇐641.13(5)

In cases involving a guilty plea, a defendant alleging ineffective assistance of counsel must establish that but for counsel's deficient performance, he would have gone to trial instead of entering the plea of guilty. U.S.C.A. Const.Amend. 6; West's T.C.A. Const. Art. 1, § 9.

14. Criminal Law ⇐641.13(6)

Defendant did not establish that counsel performed deficiently, in prosecution for capital murder and aggravated rape in which defendant entered guilty plea, in failing to investigate serology evidence; testimony of former Tennessee Bureau of Investigation (TBI) serologist, at post-conviction hearing, was equivocal as to whether victim's massive bleeding may have had a cleansing action that affected the discovery of antigens, there was no expert testimony indicating that defendant was excluded as the perpetrator, and defendant had given the police a detailed confession to the crimes and had made consistent statements to counsel regarding his guilt. U.S.C.A. Const.Amend. 6; West's T.C.A. Const. Art. 1, § 9.

15. Criminal Law ⇐641.13(6)

Defendant did not establish that counsel performed deficiently, in prosecution for aggravated rape in which defendant entered guilty plea, in failing to investigate serology evidence; former Tennessee Bureau of Investigation (TBI) serologist testified, at post-conviction hearing, that presence of type B antigen did not exclude defendant as perpetrator, and defendant confessed to the offense. U.S.C.A. Const. Amend. 6; West's T.C.A. Const. Art. 1, § 9.

16. Criminal Law ⚿641.13(6)

Failure of defense counsel to investigate hair samples collected from victim at crime scene was not deficient performance, in prosecution for capital murder and aggravated rape in which defendant entered guilty plea; forensic report stated that hair is easily inadvertently picked up, transferred, or shed and that loose hair is of relatively little significance without some independent knowledge that it is related to the incident being investigated, and defendant had given the police a detailed confession to the crimes and had made consistent statements to counsel regarding his guilt. U.S.C.A. Const.Amend. 6; West's T.C.A. Const. Art. 1, § 9.

17. Criminal Law ⚿641.13(6)

Allegation that defendant had an alibi for a charged offense against another victim did not establish that counsel performed deficiently, in prosecution for capital murder and aggravated rape in which defendant entered guilty plea, in failing to investigate whether defendant had an alibi for the murder and rape charges; defendant eventually confessed and entered guilty plea as to the other offense for which he allegedly had an alibi, the victim of the other offense identified defendant as her attacked, and defendant had given the police a detailed confession to the murder and rape and had made consistent statements to counsel regarding his guilt. U.S.C.A. Const.Amend. 6; West's T.C.A. Const. Art. 1, § 9.

18. Criminal Law ⚿641.13(6)

Defendant did not establish that counsel performed deficiently, in prosecution for rape, in failing to investigate another possible suspect; victim testified at trial that she had seen a photograph of other suspect in which there were features that resembled the perpetrator but that after seeing other suspect in lineup she told the officers he was not the rapist, victim made in-court identification of defendant at trial, and defendant confessed to the offense. U.S.C.A. Const.Amend. 6; West's T.C.A. Const. Art. 1, § 9.

19. Criminal Law ⚿641.13(6)

Counsel's failure to investigate the circumstances of defendant's confessions, to determine whether police officers may have induced false confessions, was not deficient performance, in prosecution for capital murder and aggravated rape in which defendant entered guilty plea; defendant had given very detailed statements to trial counsel separate from his statements to police. U.S.C.A. Const.Amend. 6; West's T.C.A. Const. Art. 1, § 9.

20. Criminal Law ⚿641.13(5)

Defense counsel's advice that defendant should plead guilty to capital murder and aggravated rape was a reasonable strategic decision; defendant's damaging, detailed, and emotional videotaped confession described victim's house, defendant's point of entry, layout of bedroom, and the facts of the rape and murder, defendant consistently admitted his guilt to his counsel, investigator, and mental health expert, and counsel advised defendant that if he entered a guilty plea and took responsibility for his actions, the jury might take that into consideration in the penalty phase. U.S.C.A. Const.Amend. 6; West's T.C.A. Const. Art. 1, § 9.

21. Criminal Law ⚿641.13(6)

Defense counsel's failure to challenge defendant's confessions as being false was not deficient performance, in prosecution for capital murder and aggravated rape in which defendant entered guilty plea; defendant's statements to trial counsel and their investigator were consistent with his detailed confessions, and there was no evidence that defendant suffered from mental impairment, intellectual deficiency, or oth-

er condition that rendered him prone to being led to confess falsely. U.S.C.A. Const.Amend. 6; West's T.C.A. Const. Art. 1, § 9.

22. Criminal Law ⚿641.13(5)

Even if counsel performed deficiently in advising defendant to plead guilty to capital murder and aggravated rape, defendant was not prejudiced; defendant had given detailed confessions to police and had made consistent statements of guilt to his trial counsel, defendant had been well aware that the defense strategy was to accept responsibility for his actions and focus on mitigating evidence at penalty phase, and the exculpatory evidence proffered at post-conviction hearing did not exclude defendant as perpetrator. U.S.C.A. Const.Amend. 6; West's T.C.A. Const. Art. 1, § 9.

23. Sentencing and Punishment ⚿1702, 1704

The Eighth and Fourteenth Amendments mandate that a death sentence be based on a particularized consideration of relevant aspects of the character and record of each defendant. U.S.C.A. Const. Amends. 8, 14.

24. Sentencing and Punishment ⚿1737

Courts are particularly cautious in preserving a defendant's right to counsel at a capital sentencing hearing. U.S.C.A. Const.Amend. 6.

25. Criminal Law ⚿641.13(6, 7)

Although there is no requirement that defense counsel present mitigating evidence in the penalty phase of a capital trial, counsel's duty to investigate and prepare for a capital trial encompasses both the guilt and sentencing phases. U.S.C.A. Const.Amend. 6.

26. Criminal Law ⚿641.13(7)

When a defendant challenges a death sentence based on ineffective assistance of counsel in the penalty phase, he must show that there is a reasonable probability that, absent the errors, the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. U.S.C.A. Const. Amend. 6.

27. Criminal Law ⚿641.13(7)

Where the alleged prejudice involves counsel's failure to present sufficient mitigating evidence at penalty phase of capital murder trial, several factors are of significance: (1) the nature and extent of the mitigating evidence that was available but not presented; (2) whether substantially similar mitigating evidence was presented to the jury in either the guilt or penalty phase of the proceedings; and (3) whether there was such strong evidence of aggravating factors that the mitigating evidence would not have affected the jury's determination. U.S.C.A. Const.Amend. 6.

28. Criminal Law ⚿641.13(7)

Defense counsel did not perform deficiently by failing to present additional mitigation witnesses at penalty phase of capital murder trial, where the testimony of the witnesses, regarding defendant's personal history and his alleged intermittent explosive disorder, would have been cumulative to evidence presented at sentencing hearing regarding defendant's family background, abusive father, placement in children's home, and pleasant personality as a child, and his alleged intermittent explosive disorder. U.S.C.A. Const.Amend. 6.

29. Criminal Law ⚿1171.6

Prosecutor's cross-examination of defendant regarding the weapons he used to commit the prior rape offenses did not require reversal of death sentence for capital murder, which was based in part on

aggravating circumstance of prior convictions for felonies involving violence; facts of the underlying rapes were briefly cited by prosecutor and admitted by defendant without lengthy discussion or detailed description of the rapes, prosecution did not enhance the aggravating circumstance by unduly or repeatedly emphasizing the underlying facts of the prior convictions, and prosecution did not imply that jury should impose the death penalty based on facts of prior convictions in such a manner that affected the verdict. T.C.A. § 39–13–204(i)(2) (2001).

30. Sentencing and Punishment ⚿1780(3)

Neither a jury instruction on the definition of mitigation, nor an instruction on the weight to be given mitigating circumstances, was required at penalty phase of capital murder trial. West's T.C.A. § 39–13–204.

31. Sentencing and Punishment ⚿1780(3)

Instruction on the statutory mitigating circumstance, regarding youthfulness of defendant, was not warranted at penalty phase of capital murder trial; defendant was a 28–year–old high school graduate with an honorable discharge from the military. West's T.C.A. § 39–13–204(j)(7).

32. Sentencing and Punishment ⚿1780(3)

Trial court was not required, at penalty phase of capital murder trial, to charge the jury on specific, non-statutory mitigating circumstances. West's T.C.A. § 39–13–204.

33. Sentencing and Punishment ⚿1780(3)

Instruction that "the verdict must be unanimous" was proper at penalty phase of capital murder trial, though defendant contended such instruction misled the jury to believe that unanimity was required to return a life sentence.

34. Criminal Law ⚿641.13(7)

Counsel was not ineffective in failing to challenge the constitutionality of the death penalty, in capital murder prosecution; Tennessee Supreme Court had repeatedly upheld the constitutionality of the death penalty. U.S.C.A. Const.Amend. 6.

35. Criminal Law ⚿393(1)

If a defendant initiates a psychiatric examination and introduces evidence from the examination at the penalty phase of the capital murder trial, the defendant's right against self-incrimination is not violated by disclosure of the information or the prosecution's use of the information for impeachment and rebuttal. U.S.C.A. Const.Amend. 5.

36. Criminal Law ⚿1433(2)

Defendant's post-conviction motion for consideration of post-judgment facts by the Court of Criminal Appeals, regarding his request for additional DNA testing, was improper; the motion did not contain post-judgment facts, but rather reasserted matters that had been denied by the trial court in the post-conviction proceeding and that had not been appealed to the Court of Criminal Appeals. Rules App.Proc., Rule 14.

37. Criminal Law ⚿1134(3)

Court of Criminal Appeals should not have addressed the issue whether petitioner for post-conviction relief had a right against self-incrimination at trial court hearing on the petition; trial court had permitted petitioner to assert his right against self-incrimination, petitioner had not answered any questions asked by prosecutor about the offenses or the post-conviction allegations, State had opted not to appeal the trial court's ruling, and it was not clear that post-conviction trial court

had drawn negative inference from defendant's refusal to testify. U.S.C.A. Const. Amend. 5; West's T.C.A. Const. Art. 1, §§ 8, 9; Rules App.Proc., Rule 13(b).

Ardena J. Garth, District Public Defender, and Mary Ann Green, Assistant Public Defender, Chattanooga, Tennessee; Donald E. Dawson, Post Conviction Defender, and Catherine Y. Brockenborough, Assistant Post–Conviction Defender, Nashville, Tennessee, for the appellant, Harold Wayne Nichols.

Paul G. Summers, Attorney General and Reporter; Michael E. Moore, Solicitor General; Gordon W. Smith, Associate Solicitor General; Gill Robert Geldreich, Assistant Attorney General; William H. Cox, III, District Attorney General; and C. Leland Davis, C. Caldwell Huckabay, and Glenn R. Pruden, Assistant District Attorneys General, for the appellee, State of Tennessee.

David M. Eldridge and Jeanne L. Wiggins, Knoxville, Tennessee, for Amicus Curiae, The National Association of Criminal Defense Lawyers and The Tennessee Association of Criminal Defense Lawyers.

OPINION

E. RILEY ANDERSON, J., delivered the opinion of the court, in which FRANK F. DROWOTA, III, C.J., and JANICE M. HOLDER, and WILLIAM M. BARKER, JJ., joined.

The petitioner, Harold Wayne Nichols, filed post-conviction petitions seeking relief from his conviction for felony murder, his sentence of death, and his numerous convictions for aggravated rape, first degree burglary, and larceny upon the basis of ineffective assistance of counsel, as well as other legal grounds. After conducting several evidentiary hearings, the trial court denied relief as to the felony murder conviction and sentence of death, but granted partial relief by ordering new sentencing hearings as to the remaining convictions. The Court of Criminal Appeals concluded that the trial court erred by allowing the petitioner to assert his right against self-incrimination during the post-conviction proceedings, yet upheld the trial court's judgment in all other respects.

After reviewing the record and applicable authority, we conclude: (1) that the petitioner was not denied his right to the effective assistance of counsel based on the failure to investigate and challenge his confessions as false; (2) that the petitioner was not denied his right to the effective assistance of counsel based on the failure to challenge the legality of his arrest; (3) that the petitioner was not denied his right to the effective assistance of counsel at the sentencing phase of his capital trial based on the failure to present additional mitigating evidence; (4) that the petitioner was not denied his right to the effective assistance of counsel at the sentencing phase of his capital trial based on the failure to object to misconduct by the prosecution; (5) that the petitioner was not denied his right to the effective assistance of counsel at the sentencing phase of his capital trial based on the failure to request mitigating instructions; (6) that the petitioner was not denied his right to the effective assistance of counsel at the sentencing phase of his capital trial based on the failure to raise issues regarding the constitutionality of capital punishment; (7) that the petitioner was not denied his right to the effective assistance of counsel at the sentencing phase of his capital trial based on the failure to object to the discovery of notes prepared by a defense psychologist on self-incrimination grounds; (8) that the Court of Criminal Appeals did not err in

refusing to remand the case for additional DNA testing; (9) that the Court of Criminal Appeals erred by addressing the issue of whether the petitioner had a right against self-incrimination in this post-conviction proceeding but the error had no effect on the outcome; and (10) that the trial court's findings were not clearly erroneous and cumulative error did not require the reversal of the petitioner's convictions. Accordingly, we affirm the Court of Criminal Appeals' judgment.

BACKGROUND

Procedural History

The petitioner, Harold Wayne Nichols, was convicted of felony murder and sentenced to death for the 1988 killing of 21–year–old Karen Pulley in Chattanooga, Tennessee. In imposing the death penalty, the jury found that Nichols had several prior convictions for violent felonies, including five aggravated rapes committed against four different victims. To place the issues in this post-conviction appeal in the appropriate context, we first summarize the extensive background facts and procedural history.

On September 30, 1988, the petitioner, Harold Wayne Nichols, broke into a home in the Brainerd area of Chattanooga and found the victim, Karen Pulley, alone in an upstairs bedroom. After forcibly removing Pulley's clothing, Nichols raped her and struck her in the head with a board he had found in the home. After the rape, Nichols struck the victim in the head with the board at least four more times as she struggled. Although Pulley was found alive by one of her roommates, she died the following day. The cause of death was the blunt trauma to the victim's head, which resulted in skull fractures and massive brain injuries.

Several months later, on January 5, 1989, police officers arrested Nichols after receiving information that he committed several rapes in the East Ridge area near Chattanooga that were unrelated to the Pulley rape and murder. When questioned by officers of the East Ridge Police Department on January 6, 1989, Nichols confessed to several rapes that occurred in December of 1988 and early January of 1989. When questioned later by Detective Richard Heck of the Chattanooga Police Department, Nichols confessed to the rape and murder of Karen Pulley and gave a videotaped statement in which he discussed the layout of the victim's home and bedroom, his entry point into the home, the facts of the rape and murder, and his disposal of the murder weapon.

Following these confessions, Nichols was first charged with and convicted of numerous offenses involving four different victims: [1] aggravated rape and first degree burglary committed against T.R. on December 27, 1988; aggravated rape and first degree burglary committed against S.T. on January 3, 1989; two counts of aggravated rape and first degree burglary committed against P.R. on January 3, 1989; and aggravated rape, first degree burglary, and petit larceny against P.G. on December 20, 1988. Nichols pled guilty to the offenses involving T.R. and S.T., but elected to go to jury trials for the offenses involving P.G. and P.R. and was convicted.[2]

After these convictions, Nichols pled guilty to charges of felony murder, aggra-

1. We will refer to these victims by initials only.

2. The convictions for the offenses against P.G. and P.R. were affirmed by the Court of Criminal Appeals. *State v. Nichols,* No. 03C01–9108–CR–00236, 1995 WL 755957, 1995 Tenn.Crim.App. LEXIS 998 (December 19, 1995).

vated rape, and first degree burglary for the offenses against Karen Pulley. At a sentencing hearing to determine the punishment for the felony murder conviction, the prosecution sought the death penalty based upon two aggravating circumstances: that Nichols had prior convictions for felonies involving violence and that the killing of Pulley had occurred during the commission of a felony. *See* Tenn.Code Ann. § 39–13–204(i)(2) and (7). The State introduced Nichols' five prior convictions for aggravated rape against T.R., S.T., P.G., and P.R., as well as his videotaped confession to the murder and rape of Karen Pulley.

In mitigation, the defense introduced evidence of the defendant's character and background. Reverend Robert Butler testified that he had known Nichols since his childhood and that Nichols had the "best quality" of character as a child. Winston Gonia, a minister who had known Nichols since age ten, also testified that Nichols was a good person. Similarly, Reverend Charles Hawkins testified that he had visited Nichols at an orphanage on many occasions and that Nichols had been a "very fine young man." Reverend Hawkins testified that he could not associate the crimes with the person he once knew.

A co-employee, Larry Kilgore, testified that he worked with Nichols at Godfather's Pizza and considered Nichols to be a dependable employee and a friend. Kilgore testified that Nichols had received promotions leading to assistant manager and worked night shifts and did paperwork. Kilgore was shocked at Nichols' arrest and said that the person who committed these crimes was not the person that he knew.

The defendant's wife, Joanne Nichols, testified that she married Nichols in 1986 and that he was a perfect gentleman who was nice, caring, and never mean to her. The couple lived for a time with Nichols' father, whom Joanne Nichols described as harsh and unloving. She testified that her husband worked late hours and sometimes did not come home all night. She did not think that Nichols raped and killed the victim because he never showed any indication that he would act in that manner. She admitted that she told an investigating officer that Nichols had said the murder was an accident. Finally, she testified that she did not want her husband to die.

Nichols, age 29 at the time of the sentencing hearing, testified about his family background. When Nichols was ten years of age, his mother died of cancer and he was placed in an orphanage by his father. Nichols did not know why he had been placed in the orphanage and did not recall any abuse taking place while he was there. When Nichols was about to be adopted in 1976, he was instead returned to his father with whom he had a difficult relationship.

Nichols joined the army and received an honorable discharge in 1984. He married his wife, Joanne Nichols, in 1986, and he believed they had a good marriage. Nichols testified that he had a prior conviction for assault with intent to commit rape and that he had a daughter through a prior relationship for whom he paid child support up until the time of his arrest. Nichols said that he enjoyed his job and had received promotions from cook to assistant manager.

Nichols testified that when he committed acts of violence, he had a "strange energized feeling" that he could not resist or stop. He conceded that he had never sought help for or told anyone about his criminal activity. He did not know Karen Pulley and intended only to burglarize her home and not to kill her. He knew Pulley was hurt during his attack but he did nothing to help her; instead, he disposed of the murder weapon and his clothing. Although he was remorseful, he admitted

that he would have continued his violent behavior had he not been arrested.

Dr. Eric Engum, a clinical psychologist, testified that he met with Nichols five or six times and that Nichols was of "high average" intelligence and fairly articulate. He diagnosed Nichols with "intermittent explosive disorder," which is marked by an irresistible drive to commit a violent, destructive act until the act is committed. Dr. Engum testified that the condition may relate to organic factors or developmental factors such as a hostile environment, abuse, absence of love, and abandonment. In Nichols' case, there was the presence of a harsh, hostile father and the abandonment of being placed in an orphanage after his mother's death. Dr. Engum testified that Nichols was not a psychopath and was not always violent or evil; indeed, according to Dr. Engum, Nichols' confessions reflected his "good side taking responsibility for what [his] bad side did." Dr. Engum concluded that Nichols would function well in an institutionalized setting but would repeat the destructive behavior if released.

The jury imposed a sentence of death after finding that the evidence of the two aggravating circumstances outweighed the evidence of mitigating circumstances beyond a reasonable doubt. The trial court later imposed a 60–year sentence for the aggravated rape and a 15–year sentence for the first degree burglary, to be served consecutively. This Court affirmed the convictions and the sentence of death on direct appeal. *State v. Nichols,* 877 S.W.2d 722 (Tenn.1994).[3]

Post–Conviction Proceedings

In April of 1995, Nichols filed a petition for post-conviction relief seeking to set aside his felony murder conviction and death sentence. In December of 1996, he filed post-conviction petitions challenging all of the aggravated rape and related convictions in the non-capital cases. The main allegation underlying all of the post-conviction petitions was that the petitioner was denied his right to the effective assistance of counsel under the United States and Tennessee Constitutions.

The trial court conducted evidentiary hearings on the post-conviction petitions over the course of eight days, considered thousands of pages of records and documentary evidence, and heard testimony from dozens of witnesses. Nichols introduced extensive evidence in an effort to show that his trial counsel were ineffective in his capital and non-capital cases because they failed to investigate evidence of his innocence and failed to challenge his numerous confessions to all of the offenses. Nichols also introduced the testimony of numerous witnesses that he contends should have been presented as mitigating evidence in the penalty phase of his capital trial. Although the State called Nichols to testify in support of his allegations, Nichols invoked his constitutional right against self-incrimination and refused to answer questions.

The petitioner's trial counsel in all of the cases were Hugh Moore and Rosemary Bryan. Moore had defended defendants in two capital cases before representing Nichols and had published work in a capital defense manual. Bryan had worked on one prior capital case, had attended nu-

3. The Court concluded that the jury's reliance upon the felony murder circumstance to impose the death sentence for felony murder violated article I, § 16 of the Tennessee Constitution for the reasons explained in *State v. Middlebrooks,* 840 S.W.2d 317 (Tenn.1992), but that the error was harmless beyond a reasonable doubt. *See Nichols,* 877 S.W.2d at 739.

merous seminars in criminal defense, and had a practice consisting of 40 to 70 percent criminal cases. Moore and Bryan presented time records indicating that they worked over 1,300 out-of-court hours and 259 in-court hours on the Karen Pulley case, in addition to over 650 out-of-court hours and nearly 30 in-court hours on the other cases.

Following the hearings, the trial court made detailed findings of fact and conclusions of law and denied post-conviction relief by upholding the felony murder conviction, the death sentence, and all of the non-capital convictions. The trial court, however, granted partial relief by ordering new sentencing proceedings on the non-capital convictions.[4] Although the Court of Criminal Appeals concluded that Nichols should not have been permitted to invoke his right against self-incrimination in these post-conviction proceedings and that a reviewing court is allowed to draw a negative inference from such a failure to testify, it nonetheless held that the evidence supported all of the other determinations made by the trial court and affirmed its judgment.

We granted this appeal.

STANDARD OF REVIEW

The April 1995 petition challenging Nichols' conviction for felony murder and death sentence is governed by the Post–Conviction Procedure Act then in effect, which required that allegations be proven by a preponderance of evidence. *See* Tenn.Code Ann. § 40–300–101, *et seq.* (1990). The December 1996 petition challenging all of the convictions in the non-capital cases is governed by the more recent Post–Conviction Procedure Act, which requires that allegations be proven by clear and convincing evidence. *See* Tenn. Code Ann. § 40–30–210(f) (1997).

[1–3] A trial court's findings of fact are conclusive on appeal unless the evidence in the record preponderates against them. *State v. Burns,* 6 S.W.3d 453, 461 (Tenn. 1999). When reviewing factual issues, the appellate court will not re-weigh or re-evaluate the evidence; moreover, factual questions involving the credibility of witnesses or the weight of their testimony are matters for the trial court to resolve. *Henley v. State,* 960 S.W.2d 572, 579 (Tenn.1997). When reviewing legal issues, however, or a mixed question of law and fact such as an ineffective assistance of counsel claim, the appellate court's review is *de novo* with no presumption of correctness. *State v. Burns,* 6 S.W.3d at 461.

INEFFECTIVE ASSISTANCE OF COUNSEL

[4, 5] To establish ineffective assistance of counsel under the Sixth Amendment to the United States Constitution and article I, § 9 of the Tennessee Constitution, a petitioner must show that counsel's performance was deficient and that the deficiency prejudiced the defense. *See Strickland v. Washington,* 466 U.S. 668, 692, 104 S.Ct. 2052, 2067, 80 L.Ed.2d 674 (1984); *Goad v. State,* 938 S.W.2d 363, 370 (Tenn.1996). Because a petitioner must establish both prongs of the test, a failure to prove either deficiency or prejudice provides a sufficient basis to deny relief on the ineffective assistance claim. *Id.*

4. The sentences for the convictions involving T.R., S.T., P.G., and P.R. originally amounted to an effective term of 647 years in the Department of Correction. The post-conviction court found that the sentencing in these cases did not comply with the procedures in *State v. Pearson,* 858 S.W.2d 879 (Tenn.1993), and *State v. Blouvett,* 904 S.W.2d 111 (Tenn.1995). This part of the post-conviction ruling was not appealed by the State and therefore is not at issue in this appeal.

[6, 7] To prove a deficiency in counsel's performance, a petitioner must show that counsel's acts or omissions were so serious that they fell below an objective standard of reasonableness under prevailing professional norms. *Strickland,* 466 U.S. at 688, 104 S.Ct. at 2064; *Baxter v. Rose,* 523 S.W.2d 930, 936 (Tenn.1975). As this Court has observed:

> [T]he assistance of counsel required under the Sixth Amendment is counsel reasonably likely to render and rendering reasonably effective assistance. It is a violation of this standard for defense counsel to deprive a criminal defendant of a substantial defense by his own ineffectiveness or incompetence.... Defense counsel must perform at least as well as a lawyer with ordinary training and skill in the criminal law and must conscientiously protect his client's interests, undeflected by conflicting considerations....

Id. at 934–35 (quoting *Beasley v. United States,* 491 F.2d 687, 696 (6th Cir.1974) (citations omitted)). In reviewing counsel's conduct, a "fair assessment ... requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland,* 466 U.S. at 689, 104 S.Ct. at 2065.

[8–10] A key aspect of counsel's performance pertinent to the allegations raised in this case is counsel's duty to investigate. Defense counsel "must conduct appropriate investigations, both factual and legal," and "must assert them in a proper and timely manner." *Baxter,* 523 S.W.2d at 932, 935. As the United States Supreme Court has said, "counsel has the duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland,* 466 U.S. at 691, 104 S.Ct. at 2052. Although a defendant's statements or confessions do not eliminate counsel's duty to investigate, the reasonableness of counsel's actions "may be determined or substantially influenced by the defendant's own statements or actions." *Id.* at 691, 104 S.Ct. at 2066. Moreover, counsel's conduct must be "assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *State v. Burns,* 6 S.W.3d at 462.

[11–13] To establish that a deficiency resulted in prejudice, a petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland,* 466 U.S. at 694, 104 S.Ct. at 2068. In short, a petitioner must establish that the deficiency of counsel was of such a degree that it deprived the defendant of a fair trial and called into question the reliability of the outcome. *State v. Burns,* 6 S.W.3d at 463. In cases involving a guilty plea, a petitioner must establish that but for counsel's deficiency, he would have gone to trial instead of entering the plea of guilty. *Hill v. Lockhart,* 474 U.S. 52, 59, 106 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985).

ANALYSIS

I. *Ineffective Assistance of Counsel—Failure to Investigate*

A. Petitioner's Allegations

The petitioner argues that he was denied his right to the effective assistance of counsel with respect to his felony murder capital conviction and with respect to all of his non-capital convictions. His underlying arguments are two-fold: that his trial counsel failed to investigate evidence of his

innocence and failed to challenge all of his confessions in light of the evidence of his innocence. Nichols also argues that the Court of Criminal Appeals applied an incorrect standard of review by requiring him to prove his actual innocence of the offenses. We will review each of his underlying arguments and analyze them in light of trial counsel's conduct and performance.

1. Serology Evidence Regarding Karen Pulley and T.R.

[14] The petitioner argues that his counsel were ineffective for failing to investigate serology evidence that excluded him as the perpetrator of the murder and aggravated rape of Karen Pulley, notwithstanding his guilty plea to the offenses. Relying upon a report prepared in 1989 by the Tennessee Bureau of Investigation, the petitioner argues that spermatozoa found in a vaginal swab taken from the victim, which did not contain A, B or H antigens, excluded him as the perpetrator because he is a blood type O secretor who produces H antigens in his bodily fluids.

Mike VanSant, a former T.B.I. serologist, testified at the post-conviction hearing that massive bleeding and blood transfusions may affect serological tests on blood samples but not on saliva or vaginal samples. Although VanSant testified that semen from a vaginal swab is distinguishable from blood even when the vaginal swab is bloody, he agreed that the blood flow will have a "cleansing action" over a period of time. He was then asked:

> Q. [B]ut just because there's a lot of blood, that doesn't hide the fact that there's semen there, that whatever antigens you would get from the semen?
>
> A: Not necessarily.

There was no further testimony or evidence following up on this issue; accordingly, given the equivocal nature of the evidence regarding whether massive bleeding may have had a cleansing action that affected the discovery of antigens, as well as the lack of expert testimony indicating that the petitioner was excluded as the perpetrator, the Court of Criminal Appeals concluded that the evidence was inconclusive.

[15] Similarly, Nichols claims that serology evidence excluded him from the class of possible offenders in the aggravated rape of T.R., notwithstanding his guilty plea to the offense. In particular, he argues that saliva and vaginal swabs of the victim revealed the presence of a type B antigen and that he and the victim were both type O secretors who secreted only type H antigens.

VanSant testified that as a T.B.I. serologist in 1989, he tested a saliva sample taken from T.R., which revealed a B antigen, and a vaginal sample, which revealed B and H antigens in three of four tests and only an H antigen in one of the four tests. He indicated that he did not test the saliva sample for semen and that the results were therefore inconclusive. Although VanSant agreed that it was a "definite possibility" that the rapist was a type B secretor, he testified that he also found a sample of spermatozoa on the victim's bedspread that contained only type H antigens. According to VanSant, the type H antigen could only have been produced by the victim, Nichols or any other type O secretor; moreover, although the type B antigen must have been produced by someone other than the petitioner, its presence did not exclude the petitioner or anyone else as the perpetrator of the offense.

VanSant testified that he was unaware at the time he performed his analysis that the victim had sexual relations three days before the offense:

> [T]here were seven areas of stain on the bedspread.... Had I known that she had voluntary sexual intercourse previously I would have tested maybe two or three different areas to try to find something different than the H [antigen] because, you know, I can't say, that could just be hers.

Although VanSant said he would not expect to find antigens in a sample three days after sexual intercourse, he acknowledged that the relevant "literature" states that antigens may be found up to nine days later. After reviewing all of the evidence, the Court of Criminal Appeals again determined that the evidence was inconclusive.

2. Murder Weapon

The petitioner contends that his counsel were ineffective because they failed to investigate the circumstances concerning the officers' discovery of the alleged murder weapon. As stated above, Nichols' confession to the murder and rape of Karen Pulley indicates that he gave a detailed description of the route he used in fleeing the scene and of the area in which he had disposed of the two-by-four by throwing it out of his car window. According to Detective Heck, the petitioner accompanied officers to the scene and a board was found that the petitioner stated "looked like the one he threw out the window of his car."

At the post-conviction hearing, Steve Miller, an officer with the Chattanooga Police Department, testified that he did not find a two-by-four board in his search of the area where it was later found. Susan Saunders Massey, who was Karen Pulley's roommate, testified she was taken to the area by police and saw a two-by-four leaning against a tree. She did not recognize the board but believed there had been a two-by-four in their home under a washer that was being repaired. Finally, Dr. Neal Haskeall, a forensic entomologist, testified that no blood or fiber evidence was found on the two-by-four that linked Nichols to the murder of Karen Pulley. He also found no evidence of plant material even though the board was allegedly discarded by the petitioner in September of 1988 and not recovered until January of 1989.

3. Hair Evidence

[16] The petitioner argues that his counsel were ineffective for failing to investigate hair samples collected from the Karen Pulley crime scene; in particular, evidence at the post-conviction hearing indicated that two slides containing several samples from the pubic area of the victim each revealed one hair that was inconsistent with Pulley or Nichols. The petitioner argues that the evidence may have established reasonable doubt inasmuch as the evidence also showed that the victim had never had sexual intercourse before the rape.

As the Court of Criminal Appeals observed, the report prepared by Forensic Science Associates and relied upon by Nichols was not dated until after the post-conviction hearings concluded; thus, the State had no opportunity to contest the issue and no expert witness testified as to the result. In any event, the report itself stressed that because "hairs are ubiquitous in the environment, degrade very slowly, and are easily inadvertently picked up, transferred, or shed, a loose hair is of relatively little significance without some independent knowledge that it is related to the incident being investigated." The evidence showed that Karen Pulley lived with two other women from whom hair samples were not evaluated as reference samples as part of the forensic evaluation now relied upon by the petitioner.

4. Alibi Defense

[17] Nichols contends that his trial counsel were ineffective for failing to investigate evidence of alibi defenses for all of the offenses. During post conviction, Nichols cited evidence that he was at work at the time an offense was committed against T.M.—an offense not at issue in this post-conviction proceeding—and argued that the evidence of an alibi for this offense should have prompted his trial counsel into investigating defenses for all of the other offenses to which he gave false confessions. The record indicates, however, that Nichols confessed and later pled guilty to the offense against T.M., and was also identified by T.M. as the person who attacked her. Although the petitioner argues this "rock solid" alibi should have prompted trial counsel to investigate alibi defenses in the other cases, he did not present any alibi evidence at the post-conviction hearing regarding any of the offenses at issue in this proceeding.

5. Other Evidence and Suspects

The petitioner argues that his counsel were ineffective for failing to investigate that a pistol recovered from the trunk of his car did not match the description of a "blue steel revolver" used in the offense against S.T. The record reflects that Nichols confessed to the offense against S.T. and entered a guilty plea; before the plea was entered, the prosecutor stated that S.T. had identified Nichols from a photograph and that Nichols had consented to a search of his car that revealed a .38 revolver belonging to S.T.

According to Dwight Short, a witness presented at the post-conviction hearing by the petitioner, a property sheet prepared by police officers indicated that the pistol was an "Auto SST," which he interpreted to mean a stainless steel automatic. Short also testified, however, that the serial number recorded for the pistol on the property report was traced to a "three inch .38 Ross revolver with a blue finish."

[18] In addition, the petitioner argued that his counsel were ineffective for failing to investigate a suspect named Fred Coats because there was evidence that a police dog tracked a scent from P.R.'s residence following the offense to a car owned by Coats' mother and that P.R. had identified Coats. The record reveals, however, that during the aggravated rape trial of P.R., the victim testified that she saw a photograph of Coats in which there were features that resembled the perpetrator. After later seeing Coats in a lineup, however, she told the officers he was not the rapist. She also testified that she identified Nichols as the one who had raped her, and she made an in-court identification of him at trial. The petitioner asserted that the defense failed to pursue other possible suspects as well.

6. Ofshe Deposition

In addition to presenting evidence of alleged innocence, Nichols presented the deposition of Dr. Richard Ofshe, a Ph.D. in sociology, who teaches, works, and researches in the field of police interrogations and false confessions. Ofshe discussed "coercive" interrogation techniques, which can lead to false confessions through the making of threats or promises, and "persuading" interrogation techniques, which can lead to false confessions by convincing an innocent suspect that he or she committed the crimes. Ofshe testified that numerous factors must be reviewed in analyzing the nature of the interrogation and the veracity of a confession: whether a confession has been recorded in its entirety; whether the confession contains any details uniquely known to the defendant; whether the confession has been tainted or contaminated by an officer telling the suspect the facts of the offense; and whether

the confession is corroborated by other evidence.

After reviewing Nichols' confessions, Ofshe determined that there were no indications as to how the statements came about or whether they were reliable. In Ofshe's view, trial counsel should have investigated whether officers told Nichols that he would receive "treatment" in exchange for his statements, whether officers "rehearsed" Nichols' statements before recording them, and whether Nichols had requested an attorney. Ofshe testified that there were no indications in the record that trial counsel had investigated the circumstances of the confessions, despite the lack of physical evidence, and that any attorney who fails to conduct an investigation cannot competently advise a defendant on whether to plead guilty or go to trial.

Ofshe acknowledged that at the time of the offenses, confessions, and convictions in this case, his field of study was in its earliest stages with regard to research and publication. Ofshe did not testify regarding any of Nichols' traits or characteristics that may have made him susceptible to undue pressure or risk of giving a false confession under the interrogation techniques he had described. Ofshe admitted that he never met with the petitioner.

Applying Ofshe's framework, the petitioner asserts that his confessions bore several indicia of falsity and unreliability. For instance, he contends that his confessions to the offenses against T.R., S.T., P.G., and P.R. were coached by East Ridge investigators who used leading questions to elicit one-word responses in a short period of time. He also asserts that the interrogation was contaminated by the fact that investigators showed him incident reports of the offenses and prompted him with regard to details. Similarly, the petitioner now argues that his confession to the Pulley offenses was coached by Detective Richard Heck of the Chattanooga Police Department and contained details that were inconsistent with the actual facts of the investigation.

B. Counsel's Conduct

Hugh Moore, lead counsel for Nichols, testified that he reviewed files and records, talked to investigating officers, interviewed witnesses, and visited the crime scenes. He was aware the prosecution's strategy was to obtain convictions for the rapes and then to use those convictions in seeking the death penalty for the murder of Karen Pulley, and he argued at trial and on appeal that the procedure was improper because the rape offenses had occurred later in time.[5] When asked whether he had considered filing a motion for a speedy trial on the Karen Pulley charges, Moore said he was concerned such a strategy would reduce the amount of time in which they had to prepare for the capital charge.

Moore conceded that the guilty pleas were entered with respect to the charges against S.T. and T.R. before the petitioner had received an independent psychiatric examination. He stated, however, that there been no evidence to support a mental incapacity or insanity defense when Nichols was examined by state-employed mental health professionals following the charges. Moore conceded that he did not cross-examine the victims in the trials of P.G. and P.R., and therefore did not ask them about their identifications of the petitioner or other possible suspects.

5. On direct appeal, this Court found no procedural or constitutional error with respect to the prosecutor's exercise of discretion in this regard. *State v. Nichols,* 877 S.W.2d at 735–36.

Moore was questioned about the defense's consideration of various issues such as serology reports, hair samples, other possible suspects, weapon description, and other matters. He did not recall exactly why the defense had not pursued DNA testing, but expressed concern that a result adverse to Nichols could have been used against the defense. Although Moore was unable to recall some details relating to the investigation, he reiterated several times that the strategy had been shaped by Nichols' numerous confessions to the charged offenses, including the murder and rape of Karen Pulley.

Moore and his co-counsel spent nearly 70 hours meeting with Nichols in prison, during which Nichols consistently confirmed his statements to officers. Moore concluded that Nichols had said nothing to indicate the confessions were false or had been coerced and that investigation of other suspects "did not seem fruitful." When they were unsuccessful at having Nichols' statements suppressed, counsel focused upon presenting a mitigating defense to the death penalty, a strategy with which Nichols was familiar and understood. Moore did not believe that any of the evidence at the post-conviction hearing would have changed Nichols' decisions to plead guilty or the defense's mitigation strategy.

Rosemary Bryan, co-counsel, testified that her investigation included numerous conversations with Nichols, reviewing the prosecution's files, interviewing police officers, and attempting to interview the victims of the rapes, who declined to speak with her. Bryan admitted that Nichols pled guilty to two of the rapes, T.R. and S.T., because he wanted to "get them over with" and because other charges were dismissed in return. She admitted that although these guilty pleas were entered prior to Dr. Engum's examination of Nichols, the petitioner had already been examined by Dr. Nickerson, who had found no basis for a competency or insanity issue. Bryan could not recall why the cases involving P.G. and P.R. went to trial or why the victims were not asked about other possible suspects. She believed that P.R. was not asked about Fred Coats as a possible suspect because the victim's direct testimony fully explained why she had misidentified Coats.

Bryan testified that the petitioner had admitted the facts against him in "great detail" and that he never told her the confessions were false or coerced. She described Nichols' statements to her about the offenses as "very vivid," containing facts that only he and the victims would have known. Bryan testified that the defense investigated many of the issues raised by Nichols in post-conviction, such as the victims' identifications of the petitioner, the suppression of statements, and possible alibi defenses. With regard to possible alibi defenses, for example, Bryan testified:

> Another thing we were aware of is that [Nichols] was clocked in some of the times that some of the rapes were supposed to have occurred, but I talked to [Nichols] about those things....
>
> There was one, and it may have been [T.M.], where he supposedly could not have done it according to his wife. Well, I spent many, many hours talking to [Nichols and his wife] about this time thing and was this really a defense we had and it turned out it wasn't and again I don't remember why. It was either he was clocked in but he had [gone] to deliver a pizza.

Bryan testified that "there were things like that ... we looked at and tried to ascertain if they would be helpful and they weren't...." She concluded that challenging all of the confessions as false would

have been "ludicrous" and would have required that the defense "manufacture a defense."

Although she and Moore investigated all of the offenses, Bryan said that most of their work was on the death penalty case and that Nichols played a knowing, active role in formulating the defense strategy. Bryan said that the defense focus became mitigation but that she and Moore very carefully decided what witnesses to present in the penalty phase. She believed that the petitioner's family were not as cooperative with regard to testifying at trial as they appeared to be in post-conviction.

Michael Cohan testified that he worked with lawyers Moore and Bryan as an investigator. Cohan, who had years of experience in law enforcement before becoming a private investigator, recorded 163 hours locating and interviewing witnesses and over 50 hours discussing the defense with counsel. Cohan testified that Nichols told him extensive details about his attack on Karen Pulley that corroborated the facts he had told investigating officers, as well as additional facts. Cohan testified that he worked primarily on the Pulley offense but also worked on the other cases when requested to do so by trial counsel.

C. Findings and Conclusions

1. Karen Pulley Offenses

[19, 20] After reviewing all of the testimony and evidence from the trial and extensive post-conviction hearings, the trial court determined that the ineffective assistance of counsel claim with respect to the Karen Pulley offenses was without merit:

> Trial counsel and investigator Cohan testified that any allegation that counsel should have more fully researched the possibility of a false confession was 'ludicrous.' The petitioner gave very detailed statements to trial counsel separate from his statements given to the police. Trial counsel testified that they thoroughly discussed the options available with the petitioner and that the petitioner understood that his confessions would be very damaging evidence at the guilt phase. They advised him that if he entered a guilty plea and took responsibility for his actions that the jury might take this into consideration in the penalty phase despite the obviously weighty aggravating factors. Under all the circumstances, the decision to plea was a strategic decision which will not now be questioned using 20–20 hindsight. It is also noted that counsel's time records 'speak for themselves' as to the substantial amount of time expended by counsel on this case.

We agree with the Court of Criminal Appeals that the evidence in the record does not preponderate against the trial court's factual findings. With respect to the murder and rape of Karen Pulley, trial counsel testified regarding their investigation and defense strategy, which they admitted was influenced by Nichols' confessions. The petitioner's detailed and emotional videotaped confession to the murder and rape, for instance, described the victim's house, the petitioner's point of entry, the layout of the bedroom, and the facts of the rape and murder. The petitioner also consistently admitted his guilt regarding the Pulley offense to his counsel, investigator, and mental health expert. As we have noted, it is entirely reasonable for counsel's actions to be influenced by a defendant's own statements. *See Strickland v. Washington*, 466 U.S. at 691, 104 S.Ct. at 2066 (stating that reasonableness of counsel's actions "may be determined or substantially influenced by the defendant's own statements or actions").

In addition, the record reveals substantial evidence corroborating the testimony of trial counsel and the defense investigator. At the sentencing phase for the rape and murder, for example, Nichols admitted that he broke into the victim's home, raped her, and killed her when he was trying to leave. The petitioner's wife also indicated that she had asked about the Karen Pulley offense and that the petitioner told her that it was an accident. Dr. Engum's testimony at sentencing also indicated that Nichols had committed the offenses against Karen Pulley.

Nichols continued to admit his guilt even after the sentencing hearing. Bryan testified, for example, that the petitioner met with Karen Pulley's mother after the death sentence had been returned and in a brief but emotional meeting, "apologized over and over for what he had done to her daughter...." Similarly, the petitioner's uncle, Claude Nichols, testified during post conviction that he visited his nephew in prison after the Karen Pulley trial and that he admitted the crimes. Lastly, Dr. David Solovay, a clinical psychologist relied upon by the petitioner in this post-conviction proceeding, indicated that the petitioner had expressed his guilt and remorse.

[21] Despite his confessions and statements, the petitioner's main argument is that his confessions should have been challenged as false because they contained inaccuracies and omissions and because there was evidence of his innocence. The argument is immediately undercut, however, by the fact that the petitioner never refuted his confessions or his own statements to his trial counsel and others. As the Court of Criminal Appeals stated, it is in this context in which trial counsel's conduct must be viewed:

> [W]e will first consider the situation in which trial counsel found themselves at the time of the petitioner's trials. The petitioner had given multiple confessions to the offenses with which he was charged.... The petitioner's statements to both trial counsel, as well as their investigator, were consistent with his confessions to law enforcement officers. Trial counsel's motions to suppress the confessions was unsuccessful. *The petitioner has not attempted to explain how, in view of his continuing to assert that the confessions were true, trial counsel could have effectively presented a 'false confession' defense.*

(emphasis added).

The evidence presented at post-conviction did not alter the fact that the petitioner consistently admitted his guilt and never provided a basis for a false confession defense. Nichols never told his counsel, for example, that the confession to the Karen Pulley offenses was false or coerced. Moreover, there was no evidence presented at post-conviction indicating that the petitioner suffered from a mental impairment, intellectual deficiency, or other condition that rendered him prone to being led or confessing falsely. Although Dr. Ofshe discussed the issue of false confessions in general, he never met the petitioner and did not address any of the petitioner's own characteristics. Indeed, as the intermediate court noted:

> There was not, and has never been, a showing that the petitioner was susceptible to suggestions and pressure and might have been led into giving false confessions. In fact, had trial counsel tried to present such a claim, they would have been confronted by proof showing that the petitioner was twenty-eight years old and married, with three previous felony convictions and time spent in the Tennessee prison system. Thus, he could not have claimed youth and inex-

perience as reasons for falsely confessing.

Accordingly, when viewed in the appropriate context—that applicable to trial counsel at the time of their representation—we agree with the trial court's conclusion that the evidence presented during the post-conviction failed to establish that trial counsel's performance was deficient. The evidence showed that counsel and their investigator put thousands of hours into the investigation of the offenses and considered numerous issues and the viability of several possible defenses. They had numerous meetings and conversations with the petitioner, who was aware of and understood the evidence of his guilt and the strategy used in his defense. While the lens of hindsight indicates that trial counsel could have developed some of the issues more fully, such as the serology and the absence of physical evidence on the alleged murder weapon relating to Karen Pulley, Nichols still confessed and the issues were fully litigated by the post-conviction trial court. In sum, as the trial court found, nothing at post-conviction established that trial counsel's representation fell below an objective standard of reasonableness either in failing to investigate evidence of innocence or in failing to challenge the confessions as false when viewed in the context of the petitioner's own confessions and statements of guilt.

[22] In addition, we also agree with the Court of Criminal Appeals' conclusion that the petitioner failed to show any prejudice under the second prong of the analysis with respect to his guilty plea to the offenses involving Karen Pulley.[6] As we have pointed out in great detail, the record reveals that Nichols confessed to the offenses against Karen Pulley and that he knowingly and voluntarily entered pleas of guilty. The petitioner was well aware that the defense strategy was to accept responsibility for his actions and focus on mitigating evidence. Moreover, given his confessions and the consistent statements of guilt he made to his trial counsel and others, it would be speculation to find that the evidence at the post-conviction, which did not exclude Nichols as the perpetrator or otherwise establish a defense, would have resulted in a decision to proceed to trial instead of pleading guilty. *See Hill v. Lockhart*, 474 U.S. at 59, 106 S.Ct. at 370.

2. Non–Capital Convictions

The trial court's findings with respect to counsel's performance in the rape cases involving T.R., S.T., P.G., and P.R. were nearly identical to its findings with respect to counsel's performance in the Karen Pulley cases, and it concluded that the petitioner had not established his allegations by clear and convincing evidence. We again agree with the Court of Criminal Appeals that the evidence in the record does not preponderate against the trial court's factual findings and that the petitioner failed to establish that trial counsel were deficient.

As with the Karen Pulley case, trial counsel's investigation and defense were reasonably shaped by Nichols' confessions and statements to the non-capital offenses. Nichols confessed to the offenses involving T.R., S.T., P.G., and P.R. His confession to the rape of P.R. described his entry into the victim's home with a screwdriver, the

6. The petitioner vigorously asserts that the Court of Criminal Appeals applied the incorrect standard by requiring him to show "actual innocense" to establish prejudice. We disagree. The appellate court first noted that the evidence presented at the post-conviction was inconclusive and therefore failed to show that counsel's representation was deficient. The appellate court then determined that any deficiency was not prejudicial by properly finding that there was no reasonable probability of a different outcome.

location of the victim, the clothing he tore from the victim, and the circumstances of the offense. His confession to the rape of P.G. described his entry, use of a knife, the location of the victim on a couch in the living room, and the facts of the offense.

Although the petitioner now argues that his trial counsel failed to investigate evidence of his innocence and failed to challenge his confessions as false because they were given in a short period of time in response to leading questions asked by police officers, we once again observe that he never refuted his confessions or his statements to his trial counsel and never provided a basis for a false confession defense. In addition, the record reveals that substantial evidence corroborated trial counsel's testimony. By entering guilty pleas for the offenses against S.T., for example, the petitioner acknowledged the evidence of his guilt, which included S.T.'s identification of him from a photograph and the finding of a pistol belonging to S.T. in his car. In entering guilty pleas for the offenses against T.R., the petitioner conceded the evidence of his guilt and knowingly and voluntarily waived his right to a jury trial. Finally, in the trials for the offenses against P.G. and P.R., the victims made in-court identifications of the petitioner as the assailant, and the juries found that the petitioner's guilt was proven beyond a reasonable doubt.

In sum, the evidence at the post-conviction hearings did not establish the deficient performance of counsel given the petitioner's confessions and consistent statements of guilt. We conclude that trial counsel's representation did not fall below an objective standard of reasonableness either in failing to investigate any evidence of innocence or in failing to challenge the confessions as false.

In addition, we agree with the Court of Criminal Appeals' conclusion that Nichols failed to show any prejudice under the second prong of the analysis. As we have discussed, the record reveals that Nichols confessed to the offenses against T.R. and S.T. and that he knowingly and voluntarily entered pleas of guilty to the offenses. In light of his confessions and consistent statements of guilt, as well as trial counsel's testimony that the petitioner was fully aware of the defense strategy and all of his options, it would be speculation to find from any of the evidence introduced at post-conviction that he would have proceeded to trial instead of pleading guilty. *See Hill v. Lockhart*, 474 U.S. at 59, 106 S. Ct at 370. Similarly, the petitioner's confessions to the offenses committed against P.G. and P.R. were read to the jury in the trials for those offenses, and the victims identified him as the perpetrator. The evidence at post-conviction with respect to P.G. and P.R. therefore failed to establish a reasonable probability of a different outcome but for the performance of counsel.

II. *Ineffective Assistance of Counsel—Unlawful Arrest*

The petitioner argues that his trial counsel were ineffective for failing to seek suppression of his statements on the basis that he was arrested without a warrant and without probable cause on January 5, 1989. Nichols asserts that police notes indicate that it was not until after his arrest that at least three of the victims identified him from a photograph taken by police on January 6, 1989, and that the statements he made during the period of alleged illegal detention should have been suppressed. The State maintains that the police verified the anonymous tip by discovering evidence of Nichols' prior arrest for a sex crime and that an arrest was made after at least one of the victims identified Nichols from his mug shot.

The trial court reviewed the evidence in the record and the testimony of trial counsel, who recalled that they vigorously sought suppression of Nichols' statements on numerous grounds. Although the trial court determined that counsel "should have more fully pursued this issue," it found that

> [v]iewing the exhibits and records as a whole, it appears that some of the photo identifications occurred after the petitioner's arrest. This fact, however, does not establish that none of the identifications occurred before his arrest. Numerous documents and/or statements refer to some pre-arrest identifications.... No victims were called to ask at what point they had made these identifications. Although petitioner has pointed out the ambiguities, ... he has failed to establish the lack of any pre-arrest identifications and thus has failed to establish any prejudice....

We agree with the Court of Criminal Appeals' conclusion that the record does not preponderate against the trial court's factual findings inasmuch as there is evidence in the record indicating that Nichols had been identified before his arrest. An offense report dated January 6, 1989 and prepared by the East Ridge Police Department states that officers received an anonymous tip on January 5, 1989, which led to a computer check and discovery of Nichols' prior arrest for a sex offense. The report indicates that a victim identified Nichols as the perpetrator from his mug shot and that "she was the fourth victim in a row" to identify Nichols. In addition, the record reveals that at the trial of P.R., Captain Holland of the East Ridge Police Department testified that the victim identified Nichols prior to his arrest on January 5, 1989. As both the trial court and Court of Criminal Appeals observed, none of the victims were called to testify in post-conviction as to when they made an identification of Nichols. Accordingly, we conclude that the evidence in the record does not preponderate against the trial court's factual findings on this claim and that the petitioner has failed to establish that his trial counsel were deficient on this ground.

In a similar vein, Nichols argues that counsel were ineffective for failing to seek suppression of his statements on the basis that he was not taken before a judicial officer within 72 hours of his arrest. The trial court specifically rejected the basis for this claim:

> Although no paperwork on the arraignment was introduced, there was evidence of an arraignment. In the transcript of the motion to suppress, the petitioner himself referred numerous times to the fact that he was arraigned the day after he was arrested.... In addition, [the assistant district attorney's] notes refer to an arraignment before a special judge as well. Under these circumstances, petitioner has not established that he was not arraigned, that counsel was ineffective or that he was in any way prejudiced by counsel's failure to challenge the timing of the arraignment.

We agree with the Court of Criminal Appeals' conclusion that the evidence in the record does not preponderate against the trial court's factual findings on this issue. We also agree that the petitioner failed to show that suppression would not have been required given that Nichols was read his Miranda rights, that he confessed within 24 hours of his arrest, and that there appeared to be no intervening circumstances or misconduct in regard to obtaining the confessions. *See State v. Huddleston*, 924 S.W.2d 666, 674 (Tenn. 1996). In sum, we conclude that the petitioner failed to establish that he was de-

nied the effective assistance of counsel on this basis.

III. *Ineffective Assistance of Counsel—Mitigating Evidence*

A. Standards in Capital Sentencing

[23–25] The Eighth and Fourteenth Amendments to the United States Constitution mandate that a death sentence be based on a "particularized consideration of relevant aspects of the character and record of each ... defendant." *Woodson v. North Carolina*, 428 U.S. 280, 303, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976). As a result, courts are "particularly cautious in preserving a defendant's right to counsel at a capital sentencing hearing." *Goad v. State*, 938 S.W.2d 363, 369 (Tenn.1996) (quoting *Deutscher v. Whitley*, 884 F.2d 1152, 1160 (9th Cir.1989)). Although there is no requirement that defense counsel present mitigating evidence in the penalty phase of a capital trial, counsel's duty to investigate and prepare for a capital trial encompasses both the guilt and sentencing phases. *Goad v. State*, 938 S.W.2d at 369–70; *State v. Melson*, 772 S.W.2d 417, 421 (Tenn.1989).

[26, 27] When a petitioner challenges a death sentence based on ineffective assistance of counsel in the penalty phase, he or she must show that "there is a reasonable probability that, absent the errors, the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695, 104 S.Ct. at 2069. Where the alleged prejudice involves counsel's failure to present sufficient mitigating evidence, several factors are of significance: (1) the nature and extent of the mitigating evidence that was available but not presented; (2) whether substantially similar mitigating evidence was presented to the jury in either the guilt or penalty phase of the proceedings; and (3) whether there was such strong evidence of aggravating factors that the mitigating evidence would not have affected the jury's determination. *Goad v. State*, 938 S.W.2d at 371.

B. Petitioner's Allegations

The petitioner argues that his counsel were ineffective during the sentencing phase of the capital proceeding for the rape and murder of Karen Pulley for failing to present sufficient evidence of mitigating circumstances. The State maintains that the trial court properly denied relief on this claim after finding that the mitigating evidence now cited by the petitioner would have duplicated or been cumulative to that introduced by trial counsel. We will review the evidence introduced by Nichols at the post-conviction hearings.

Deborah Nichols Sullivan, the petitioner's sister, who testified by deposition, said that she loved her brother and tried to take care of him after their mother died of cancer. She described Nichols as quiet, with a mild demeanor, and recalled that he held his mother's hand while she was ill. She testified that she was afraid of her father's intense spankings, which often left welts and stripes. She was "sure" Nichols received such spankings as well. She would not confirm that she was sexually abused but did say "that would be me and not [the petitioner]." When they were placed in the children's home, she was told it was because her father could not care for them.

Deborah Nichols acknowledged that trial counsel probably tried to contact her but that she did not return their calls. Indeed, counsel Rosemary Bryan testified that she spoke to the witness two or three times and that they hoped she would testify about the family background, their abu-

sive father, and the orphanage. Counsel said, however, that Deborah Nichols "was the most unwilling witness that you would ever want to put on the stand." The witness told counsel, for example, that she would not talk about any abuse in the family and had nothing to say that would help her brother. Moreover, her husband said that she would not testify under any circumstances. Finally, counsel said that Nichols decided he did not want to make his sister testify under the circumstances.

Several other witnesses testified as to their experiences with Nichols, as well as with Nichols' family. Diana Allred testified that she and her brother lived with the Nichols' family from 1961 to 1967 following the death of their parents. She said that Nichols' father would get angry and "spank" Nichols and his sister, Deborah, and that she saw Deborah bleeding after the spankings. Allred testified that Nichols' father often undressed in front of her and once asked if he could get in bed with her. She said that although Nichols seemed like a "normal" child when she lived there, he and his sister seemed frightened and shy years later after Allred had moved out.

Royce Sampley, Diana Allred's brother, testified that the Nichols' home was a "threatening" place in that Nichols' father was often angry and cursing. Sampley testified that he never saw any sexual abuse of Nichols. Neither Allred nor Sampley had any contact with Nichols after 1971 and were not aware of the charges against Nichols at the time of the trial and sentencing. Dennis Sampley, brother of Royce Sampley and Diana Allred, testified that he was not familiar with Nichols but that he had lived in the same children's home. He testified that he received whippings in the home, as did other children, and was not permitted to tell anyone. He described it as a "hellacious home."

Juanita Herron, a cousin, said that Nichols became "disturbed" and "sad" following his mother's death. She testified that Nichols' sister had reported sexual abuse and that family members arranged to have the children placed in a children's home. Louella Wagner, also a cousin, testified that Nichols' father was strict. Margaret Crox and Linda Crox Johnson, who had been neighbors of the Nichols, said that the petitioner's father did not seem concerned about his children.

Jim Gumm testified that he went to school with Nichols until they were both sophomores in high school and that he always considered Nichols to be "one of the nicest guys around." Nancy Atchley, who taught Nichols in the seventh and eighth grades, testified that he had been a sweet, kind, and well-mannered student who was quieter than the other boys. Jacqueline Boruff, whose son was a friend of Nichols when they were teenagers, said that Nichols was "sweet" and that his father was an "ass" who was cold and uncaring. Like several of the post-conviction witnesses, Boruff said that she was not contacted before the capital sentencing proceeding.

Several witnesses testified regarding the children's home in which Nichols and his sister had been placed after their mother's death. Claude Nichols, the petitioner's uncle, testified that the petitioner's father said the children had been placed in a group home through a decision of the church. Winston Gonia, who had testified during the capital sentencing, testified that he had been a board member of the Tomlinson Children's Home; the group home was a disciplined place but he never saw any abuse take place there. Jackie Bailey, an academic and personal counselor at the Tomlinson Children's Home from 1974 to

1977, testified that she counseled Deborah Nichols but had no information about the petitioner or his background.

Linda Melton, a former house parent at the Tomlinson Children's Home, testified that the petitioner and his sister were close. She said that the 15–year–old Nichols never caused any problems and was a "sweetheart." Melton testified that the children's activities were church-related and that paddling was not used as a means of discipline.[7] Arlyne McGriff testified by deposition that she was a house parent at the home just before it closed; she recalled that Nichols talked about his mother and did not cause any problems. She testified that Nichols' father visited two or three times while she was the house parent. Neither Melton nor McGriff were contacted by trial counsel.

Finally, Nichols presented testimony from three expert witnesses. Dr. Kenneth Nickerson, a clinical psychologist, evaluated Nichols in April and May of 1989. He testified that he interviewed Nichols and reviewed notes taken by Dr. Frausto Natal, a psychiatrist who had conducted an interview and examination. Dr. Natal's notes indicated that Nichols denied murdering any of the victims. Dr. Nickerson testified that Nichols had not shown any prior signs of "intense or explosive emotions," that he was found competent to stand trial, and that he was not legally insane at the time of the offenses.

Dr. David Solovay, a clinical psychologist, testified that he reviewed the case notes, examination, assessment, reports, and testimony of Dr. Eric Engum, who had testified on Nichols' behalf in the sentencing proceeding. Dr. Solovay said that Dr. Engum did a "fine job" and that Engum's notes and data were similar to his own. He criticized Dr. Engum for failing to identify himself as a member of the defense team, however, and for failing to present the petitioner's background as a mitigating factor. Dr. Solovay did not agree with the diagnosis of intermittent explosive disorder, but instead diagnosed Nichols as having borderline personality disorder. Dr. Solovay said that Nichols had learned to "disassociate" from threatening situations. He admitted that his report revealed that Nichols had acknowledged his guilt to him and had shown remorse.

Dr. Frank Einstein testified that he is a mitigation specialist who works with defense attorneys in capital defense representation. He described that mitigation work involves examining a defendant's life, identifying life events that led up to the offense, and presenting the complete story of the defendant's life for the jury's consideration. Dr. Einstein testified that significant events in this case included Nichols' inability to remember events before the age of ten, the presence of Nichols' cousins in his home, the death of his mother and grandmother, the physical and emotional abuse in the home, and his being placed in an orphanage.

Dr. Einstein said that Dr. Engum and investigator Michael Cohan identified the major events in Nichols' life. He believed that trial counsel should have presented additional information to humanize Nichols and to illustrate the conduct of Nichols' father, the presence of physical and sexual abuse in the home, and the isolation of the family. Dr. Einstein said that although

7. However, Pamela Taylor, a part-time investigator, testified that she visited the children's home, conducted interviews, and gathered information about its operation. She learned that the home's policy was to keep children separate from those outside the church and that the home had guidelines as to how corporal punishment with a paddle was to be carried out.

trial counsel identified many of these themes, they did not present the evidence in such a way to establish a link between Nichols' background and the crimes. He admitted that some mitigation themes can have a negative effect and that it is difficult to second-guess counsel.

C. Findings and Conclusions

[28] The trial court, after considering the testimony of all of these witnesses during the post-conviction hearings and reviewing the record, made extensive findings of fact, including:

> Petitioner presented numerous relatives and acquaintances at the hearings in this matter to demonstrate the amount and type of mitigating evidence which was not presented at the sentencing hearing at the original trial.... Many of these witnesses, however, were cumulative and only expounded on issues which were raised through the evidence presented by trial counsel at the sentencing hearing.... The psychologist retained by post-conviction counsel even testified that while he may have had more personal history in conducting his evaluation, it was essentially the same kind of information Dr. Engum and trial counsel had at the original trial.

The trial court further concluded:

> Many of the witnesses testified that they were not contacted and that the petitioner probably did not know how to contact them. Some witnesses, however, testified that the petitioner knew how to contact them but that they received no contact and did not step forward on their own. Using 20–20 hindsight more witnesses may have been preferable; based upon all the evidence and documentation, however, this court finds that counsel [were] not derelict in their investigation of this case and that no prejudice has been shown.... Any additional witnesses would have been cumulative or the weight of their testimony would have been minimal. The aggravator of prior violent felonies was very substantial.

We agree with the Court of Criminal Appeals that the evidence in the record supported the trial court's findings and conclusions.

In applying the first part of the analysis in *Goad v. State,* 938 S.W.2d at 371, the trial court correctly noted that the nature and the extent of the evidence at post-conviction focused on the petitioner's family background, abusive father, placement in a children's home, and pleasant personality as a child. Although witnesses described the petitioner's father as angry and abusive, Nichols himself never testified regarding any possible abuse he suffered at home or in the children's home. Only one witness, Deborah Nichols, said that she saw her father abuse the petitioner; however, she made herself unavailable to trial counsel and refused to testify. Several witnesses testified that Nichols was a pleasant child who was quiet and well-mannered. Although one witness claimed that abuse took place in the children's home, there was no evidence that Nichols was ever abused there; indeed, several other witnesses testified that the orphanage was not an abusive environment. Finally, there was expert testimony questioning whether Nichols suffered from an explosive disorder, as diagnosed by Dr. Engum, and questioning the manner in which trial counsel presented the mitigating themes and evidence at the sentencing.

In applying the second *Goad* factor, the trial court correctly found that the evidence was cumulative to that presented by trial counsel at sentencing. Three witnesses at sentencing had testified about Nichols' background and placement in an orphanage. Several witnesses said they

had known Nichols to have been a "fine young man" and to have possessed good character as a child and as an adult. Several witnesses, including Nichols, testified about his troubled relationship with his father and the abandonment associated with being placed in an orphanage. Nichols denied, however, that he was ever physically abused by his father or at the orphanage. Finally, there was expert testimony regarding Nichols' intermittent explosive disorder and how it affected his conduct. Accordingly, the record indicates that trial counsel identified and supported the relevant mitigating themes. The evidence presented at post-conviction did not contest trial counsel's performance in this regard, but rather, second-guessed the quantity of the mitigating evidence and the manner of its presentation.

Finally, with respect to the third and final *Goad* factor, it appears that any of the evidence at post-conviction which was not cumulative or may have bolstered the evidence presented at trial would not have affected the jury's determination given the strong evidence supporting the prior violent felonies aggravating circumstance. In sum, Nichols has not established a reasonable probability that the jury would have concluded that the "balance of aggravating and mitigating circumstances did not warrant death." *Strickland,* 466 U.S. at 695, 104 S.Ct. at 2069; *see also Goad v. State,* 938 S.W.2d at 371.

IV. *Ineffective Assistance of Counsel—Prosecutorial Misconduct*

[29] The petitioner next argues that his trial counsel were ineffective for failing to object to the prosecution's misconduct in eliciting the facts of the rape offenses used to prove the prior violent felony aggravating circumstance during the sentencing phase of his capital trial. The State maintains that counsel were not ineffective because there was no misconduct by the prosecution.

The record reveals that in its cross-examination of Nichols, the prosecution asked about the rapes he committed against T.R., S.T., P.G., and P.R. In particular, the prosecutor asked whether Nichols had committed a rape on December 21, 1988, by using a knife; whether Nichols had committed a rape on December 27, 1988, by using an electrical cord; and whether Nichols had committed a rape against two victims on January 3, 1989, one of which involved the use of a knife. Nichols admitted that he committed all of the offenses.

In *State v. Bigbee,* 885 S.W.2d 797 (Tenn.1994), the prosecutor introduced the facts of a prior murder conviction it relied upon as an aggravating circumstance and strongly implied in closing argument that the jury should return a death sentence based on the facts of the prior murder conviction for which the defendant had only received a life sentence. Indeed, the prosecutor's argument contained extensive references to the facts of the prior murder, the victim of the prior murder, the family of the victim of the prior murder, and the need to impose the death penalty because of the prior murder. *Id.* at 810. We concluded that the introduction of such evidence is error where the prior conviction on its face involves violence or the threat of violence, and we held that the prosecutor's argument, which improperly enhanced the impact of the aggravating circumstance, affected the jury's determination to the prejudice of the defendant. *Id.* at 811–12.

In applying *Bigbee,* we have focused upon the nature and extent of the evidence introduced, the prosecutor's intent, and whether the evidence or argument improperly enhanced the aggravating circumstance or affected the jury's verdict to the prejudice of the defendant. *See State v.*

Stout, 46 S.W.3d 689, 701 (Tenn.2001); *State v. Chalmers*, 28 S.W.3d 913, 918 (Tenn.2000). We have, in effect, clarified that *Bigbee* involved serious prosecutorial misconduct and that not every violation of the *Bigbee* holding warrants reversible error and a re-sentencing.

Accordingly, our review of the record reveals that trial counsel did not render ineffective assistance of counsel by failing to object to the prosecutor's questioning. First, we note that *Bigbee* had not been decided at the time of the sentencing in this case; thus, counsel cannot be considered deficient for failing to object to a violation of its holding. Second, the record indicates that the facts of the underlying rapes were briefly cited by the prosecutor and admitted by Nichols without a lengthy discussion or detailed description of the rapes. Finally, the prosecution did not enhance the aggravating circumstance by unduly or repeatedly emphasizing the underlying facts of the prior convictions, nor did it imply that the jury should impose the death penalty based on the facts of the prior convictions in such a manner that affected the verdict to the prejudice of the petitioner.[8] Accordingly, we conclude that trial counsel were not deficient in failing to object to the prosecutor's conduct and that there was no reasonable probability of a different outcome even had counsel objected.

V. *Ineffective Assistance of Counsel—Jury Instructions*

The petitioner argues that his counsel were ineffective for failing to request that the trial court charge the jury with regard to the definition of mitigation, the weight to be given mitigating evidence, the mitigating circumstances in Tennessee Code Annotated § 39–13–204(j)(7) and (8), and several non-statutory mitigating circumstances. As the State asserts, each of the issues is without merit.

[30–32] First, this Court has held that a jury instruction on the definition of mitigation or the weight to be given mitigating circumstances is not required. *See State v. Brimmer*, 876 S.W.2d 75, 83 (Tenn. 1994). Next, the record did not support an instruction on the mitigating circumstance in Tennessee Code Annotated § 39–13–204(j)(7), *i.e.*, the youthfulness of the defendant, given that Nichols was a 28–year–old high school graduate with an honorable discharge from the military. Third, contrary to the petitioner's contention, the trial court did charge the jury on the mitigating circumstance in Tennessee Code Annotated § 39–13–204(j)(8), *i.e.*, that the defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was substantially impaired as a result of a mental disease or defect that substantially affected his judgment. Finally, we have held that the trial court was not required to charge the jury on specific, non-statutory mitigating circumstances at the time of this offense and trial. *See State v. Cauthern*, 967 S.W.2d 726, 747 (Tenn.1998). Accordingly, trial counsel

8. We note that both the Court of Criminal Appeals and the State rely upon Tennessee Code Annotated § 39–13–204(c), which presently states in part: "In all cases where the state relies upon the aggravating factor that 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, either party shall be permitted to introduce evidence concerning the facts and circumstances of the prior conviction." Neither the intermediate court nor the State acknowledge that this statute was not in effect until 1998, well after the offenses and trial in this case, nor do they otherwise cite reasons for applying the statute in this case.

were not deficient for failing to request these instructions.

[33] In a related issue, Nichols argues that trial counsel were deficient for failing to object to the trial court's instruction that "the verdict must be unanimous" because it misled the jury to believe that unanimity was required to return a life sentence. As the State observes, this Court has rejected arguments contesting the unanimous verdict instruction. *See State v. Nesbit,* 978 S.W.2d 872, 902–903 (Tenn.1998); *State v. Brimmer,* 876 S.W.2d at 87.

VI. *Ineffective Assistance of Counsel—Constitutional Issues*

[34] The petitioner argues that trial counsel were ineffective for failing to challenge the constitutionality of the death penalty on the basis that it cannot be administered fairly and cites the dissenting opinion in *Callins v. Collins,* 510 U.S. 1141, 1143, 114 S.Ct. 1127, 1128, 127 L.Ed.2d 435 (1994) (Blackmun, J., dissenting). This Court has repeatedly upheld the constitutionality of the death penalty in this State. *See Terry v. State,* 46 S.W.3d 147, 169 (Tenn.2001); *State v. Stout,* 46 S.W.3d at 719; *State v. Hall,* 976 S.W.2d 121, 166 (Tenn.1998).

Nichols also argues that trial counsel were ineffective for failing to challenge the constitutionality of the death penalty on the basis that it violates the fundamental right to life without serving any compelling state interest. This Court has rejected such a claim. *State v. Mann,* 959 S.W.2d 503, 536 (Tenn.1998); *State v. Bush,* 942 S.W.2d 489, 523 (Tenn.1997).

VII. *Ineffective Assistance of Counsel—Psychologist's Notes*

The petitioner argues that his trial counsel were ineffective for failing to argue that the trial court's order requiring the defense to disclose the notes of Dr. Eric Engum at trial violated his right against self-incrimination under the United States and Tennessee Constitutions. The State contends that trial counsel were not ineffective because the disclosure of the notes for the purpose of impeachment or rebuttal did not violate the petitioner's right against self-incrimination.

The record reveals that the trial court's order stemmed from the defense's failure to prepare a final report of Dr. Engum's findings until the second day of trial. On direct appeal, we held that the notes were discoverable under the circumstances of the case pursuant to the discovery provisions of Tenn. R.App. P. 16(b)(1)(B):

> We thus conclude that when a psychologist or psychiatrist does not prepare a summary report, but instead relies on extensive memoranda to record not only observations and hypotheses but also evaluations, such records are discoverable.... Although we do not suggest that the trial court should require a formal report in every case, we do conclude, under the facts of this cases, that Rule 16 authorized discovery of the available reports to the extent that they related to the testimony to be given at trial.

State v. Nichols, 877 S.W.2d at 730.

The petitioner now argues that his counsel were ineffective for failing to argue that the disclosure violated his constitutional right against self-incrimination and that the error was prejudicial because the prosecution used the notes to impeach the testimony of Dr. Engum by charging that he was a member of the defense team attempting to help Nichols avoid the death penalty. Although Moore and Bryan admitted at the post-conviction hearing that the disclosure and the prosecution's cross-examination of Dr. Engum was damaging

to the defense, they did not believe it affected the jury's verdict.

[35] As the State notes, this Court has indicated that where a defendant initiates a psychiatric examination and introduces evidence from the examination, his right against self-incrimination is not violated by disclosure of the information or the prosecution's use of the information for impeachment and rebuttal. *See State v. Martin*, 950 S.W.2d 20, 24 (Tenn.1997). The same principles apply to the sentencing proceeding of a capital trial. *State v. Reid*, 981 S.W.2d 166, 172–73 (Tenn.1998).

Moreover, although as the trial court noted, "hindsight may indicate that the failure to prepare a final report may have been imprudent," it is clear that the issue did not affect the jury's verdict. The prosecution would have been entitled to a final report that would not have violated the petitioner's right against self-incrimination; indeed, on direct appeal, we said that the notes were tantamount to a report under the facts of this case. Dr. Engum testified that he evaluated Nichols and interviewed several background witnesses and that he ultimately determined that Nichols had an intermittent explosive disorder. The prosecution's cross-examination attempted to impeach Dr. Engum's testimony by charging that Engum was a member of the defense team and by showing that Nichols acted with deliberation and in his own self interest. In sum, when the evidence is viewed along with the petitioner's confession and the overwhelming weight of the aggravating circumstance, it is clear that the petitioner has failed to show a reasonable probability of a different outcome but for counsel's failure to argue that the disclosure of the notes violated his right against self-incrimination.

VIII. *Remand for Additional DNA Testing*

[36] The petitioner argues that the Court of Criminal Appeals erred in refusing to remand the case to the trial court for additional DNA testing to establish his innocence.[9] The State maintains that the issue of additional DNA testing was not properly raised by the petitioner and was correctly denied.

The record indicates that the post-conviction trial court authorized DNA testing of evidence taken from the rape kit performed on Karen Pulley. After finding that "[n]o results which would establish any prejudice to the petitioner ... were submitted to the court at the final hearing," the trial court denied the petitioner's request for additional DNA testing. The petitioner did not challenge the trial court's denial of additional DNA testing as an issue on appeal.

Following the Court of Criminal Appeals' decision and its denial of a petition to rehear, Nichols filed a motion for consideration of post-judgment facts[10] requesting that the case be remanded for

9. DNA analysis "means the process through which deoxyribonucleic acid (DNA) in a human biological specimen is analyzed and compared with DNA from another biological specimen for identification purposes." Tenn. Code Ann. § 40–30–402.

10. An appellate court "on its own motion or on motion of a party may consider facts concerning the action that occurred after judgment. Consideration of such facts lies in the discretion of the appellate court. While neither controlling nor fully measuring the court's discretion, consideration generally will extend only to those facts, capable of ready demonstration, affecting the positions of the parties or the subject matter of the action such as mootness, bankruptcy, divorce, death, other judgments or proceedings, relief from the judgment requested or granted in the trial court, and other similar matters." Tenn. R.App. P. 14.

additional DNA testing. The motion asserted that the Court of Criminal Appeals' rejection of the serology evidence concerning Karen Pulley in effect meant that the court was requiring the petitioner to show actual innocence to establish the prejudice component of his ineffective assistance of counsel claim, and that additional DNA testing was required to meet such an "unreasonable" standard. The motion was accompanied by the records and documents regarding Nichols' initial request for DNA analysis, which had been granted by the trial court, and his motion for additional DNA testing, which had been denied. The petitioner asked that the record be supplemented and asserted that due process required consideration of this issue because his liberty interests outweigh any interest the State may have in finality of the judgments.

The Court of Criminal Appeals denied the motion for two reasons. First, the court stated that it had not required actual innocence to establish the prejudice prong of the ineffective assistance of counsel claim; instead, it applied the analysis of whether the petitioner had shown a reasonable probability of a different outcome. Second, the court found that the motion was not based on post-judgment facts as required by Tenn. R.App. P. 14. The court concluded:

> Seeking to utilize the doorway made available by [Rule 14] for consideration of 'facts concerning the action that occurred after judgment,' the petitioner asks by the motion to have this court consider arguments and supporting documents as 'facts' and rule *ex parte* on a matter which was not raised previously in his appeal.... The petitioner has recast the arguments raised in his previous petition to rehear, that this court erred in its treatment of the serology evidence presented and in its application of the standard for determining whether counsel was ineffective, and now presents them as the basis of his motion to consider post-judgment facts.

Our review of the record reveals that the Court of Criminal Appeals correctly denied the motion for consideration of post-judgment facts and the request to remand the case for additional DNA testing. The petitioner misconstrues the appellate court's analysis of the ineffective assistance claim—the court concluded that Nichols failed to show that his trial counsel were deficient inasmuch as he repeatedly admitted that he committed the offenses and the serology evidence did not exclude him as the assailant. When the court also considered the prejudice component, it properly analyzed whether the petitioner showed a reasonable probability of a different outcome.

In any event, the motion for consideration of post-judgment facts was improper given that it did not contain post-judgment facts but rather reasserted matters that had been denied by the trial court and were not appealed at all by the petitioner. In addition, as the State recognizes, relief based on DNA analysis may be sought upon making the required showing pursuant to the appropriate procedure. *See* Tenn.Code Ann. § 40–30–401 ("Post Conviction DNA Analysis Act of 2001"). In sum, the Court of Criminal Appeals did not abuse its discretion in denying relief.

IX. *Right Against Self–Incrimination*

[37] As summarized earlier, Nichols did not testify in support of his post-conviction allegations. Moreover, when called to the stand by the prosecution, the petitioner invoked his right against self-incrimination and refused to answer questions about the offenses or the post-conviction allegations.

Although the State did not appeal the issue, the Court of Criminal Appeals held that the trial court's decision to allow the petitioner to invoke his right against self-incrimination was erroneous. The intermediate court reasoned that there is no right against self-incrimination in a post-conviction case under the Fifth Amendment to the United States Constitution or article I, § 8 and 9 of the Tennessee Constitution because the petitioner had already been convicted of the offenses being challenged. The court also stated that a reviewing court may draw a negative inference from a petitioner's failure to testify in support of the post-conviction allegations.

Nichols initially argued that the Court of Criminal Appeals erred in addressing this issue because it had not been appealed by the State and was not properly before the court for review. Nichols has additionally argued that there is a right against self-incrimination in a capital post-conviction procedure due to the likelihood that a capital conviction or sentence may be reversed and remanded for new proceedings. In sum, Nichols argues that a petitioner should not be forced to make statements in a post-conviction hearing because the statements may be used in later proceedings if the petitioner is successful in obtaining post-conviction relief. The State argues that the Court of Appeals erred in addressing this issue because it was not raised on appeal and that the court's decision amounts to an improper advisory opinion.

Although we ordered the parties to file additional briefs on this issue, we now agree with the parties that the intermediate court erred in addressing this issue. *See* Tenn. R.App. P. 13(b) ("Review will generally extend only to those issues presented for review"). Nichols was permitted to assert his right against self-incrimination by the trial court and did not answer any of the questions asked by the prosecutor about the offenses or the post-conviction allegations. The State opted not to appeal the trial court's ruling in this respect.

Although the petitioner was not prevented from asserting a right against self-incrimination, he argues on this appeal that he was harmed because the intermediate court drew a negative inference from his failure to testify as it considered each issue on appeal. It is not clear from the court's language, however, whether it did in fact draw such an inference or whether it was simply observing that a court may choose to do so. ("[W]e conclude that an adverse inference could have been drawn because of the petitioner's refusal to answer questions of the State."). In either case, this Court has drawn no inference from the failure to testify, and it has not affected our conclusions that the evidence supports the trial court's findings and that the petitioner has not shown he is entitled to relief. Accordingly, our review of whether a right against self-incrimination applies in post-conviction cases under the facts and circumstances of this case would amount to an advisory opinion. We therefore hold that the Court of Criminal Appeals erred in addressing this issue, but that the error has not affected the result.

X. *Trial Court's Findings and Cumulative Error*

The petitioner argues that the trial court's findings were clearly erroneous and that the cumulative effect of all the errors in the record amounted to reversible error. Our review of all of the above issues necessarily reveals that these two contentions are without merit.

CONCLUSION

After reviewing the record and applicable authority, we conclude: (1) that the

petitioner was not denied his right to the effective assistance of counsel based on the failure to investigate and challenge his confessions as false; (2) that the petitioner was not denied his right to the effective assistance of counsel based on the failure to challenge the legality of his arrest; (3) that the petitioner was not denied his right to the effective assistance of counsel at the sentencing phase of his capital trial based on the failure to present additional mitigating evidence; (4) that the petitioner was not denied his right to the effective assistance of counsel at the sentencing phase of his capital trial based on the failure to object to misconduct by the prosecution; (5) that the petitioner was not denied his right to the effective assistance of counsel at the sentencing phase of his capital trial based on the failure to request mitigating instructions; (6) that the petitioner was not denied his right to the effective assistance of counsel at the sentencing phase of his capital trial based on the failure to raise issues regarding the constitutionality of capital punishment; (7) that the petitioner was not denied his right to the effective assistance of counsel at the sentencing phase of his capital trial based on the failure to object to the discovery of notes prepared by a defense psychologist on self-incrimination grounds; (8) that the Court of Criminal Appeals did not err in refusing to remand the case for additional DNA testing; (9) that the Court of Criminal Appeals erred by addressing the issue of whether the petitioner had a right against self-incrimination in this post-conviction proceeding, but the error had no effect on the outcome; and (10) that the trial court's findings were not clearly erroneous and cumulative error did not require the reversal of the petitioner's convictions.

Accordingly, we affirm the Court of Criminal Appeals' judgment. It appearing that the petitioner is indigent, costs are taxed to the State of Tennessee.

ADOLPHO A. BIRCH, Jr., J., filed a concurring and dissenting opinion.

ADOLPHO A. BIRCH, JR., J., concurring and dissenting.

I fully concur in the conclusion of the majority that Nichols's convictions should be affirmed. To the extent, however, that the petitioner's allegations of ineffective assistance of counsel may be interpreted to include the failure to object to the method of proportionality review, I continue to adhere to the views expressed in a long line of dissents beginning with *State v. Chalmers,* 28 S.W.3d 913, 923–25 (Tenn. 2000) (Birch, J., concurring and dissenting), and elaborated upon in *State v. Godsey,* 60 S.W.3d 759, 793–800 (Tenn.2001) (Birch, J., concurring and dissenting). Those dissents suggest, essentially, that the comparative proportionality review protocol currently embraced by the majority is inadequate to shield defendants from the arbitrary and disproportionate imposition of the death penalty. *See* Tenn.Code Ann. § 39–13–206(c) (1997). Accordingly, while I concur in the affirmance of Nichols's convictions, I cannot, for the reasons above stated, concur in the imposition of the death penalty in this case.

IN THE CRIMINAL COURT FOR HAMILTON COUNTY, TENNESSEE
DIVISION I

HAROLD WAYNE NICHOLS,	)	
Petitioner	)	
	)	**No. 205863**
v.	)	**(CAPITAL CASE)**
	)	**(POST-CONVICTION)**
STATE OF TENNESSEE,	)	**(Reopened)**
Respondent.	)	

ORDER

I. Introduction

Petitioner, Harold Wayne Nichols, by and through counsel, filed a motion to reopen June 24, 2016, pursuant to Tenn. Code Ann. § 40-30-117(a)(1), claiming he is entitled to relief based upon new rules of law as announced in Johnson v. United States, 576 U.S. , 135 S. Ct. 2251 (2015). The State filed a response on September 29, 2016, asking for summary denial of Petitioner's motion to reopen. In October 2016, this Court granted Petitioner's motion as stating a colorable claim. On January 13, 2017, Petitioner filed an Amended Petition For Post-Conviction Relief, and the State filed its response on November 2, 2017. The amended petition raises the claim pursuant to Johnson as well as several other claims. Subsequently, the parties notified this Court of a proposed agreed settlement of the case and the matter was set for hearing on January 31, 2018. Prior to the hearing, this Court reviewed all materials in preparation of an order to address all the claims in the January 2017 Amended Petition as required by statute. See Tenn. Code Ann. § 40-30-106.

After reviewing the Amended Petition, the record, the submitted agreement, and the law, this Court had concerns regarding the basis for the agreed order. On January 31, 2018, this Court addressed the parties and sought any additional information concerning the proposed agreement to set aside the sentence of death and enter an agreed upon non-capital sentence. The parties were given an opportunity to submit additional authority and argument following the hearing. This Court has now reviewed the pleadings of the parties, the record, and applicable law, and hereby enters this order pursuant to statute. See Tenn. Code Ann. § 40-30-106.

II. Procedural History

Trial

On May 9, 1990, Petitioner entered a plea of guilty to the felony murder of 21 year old Karen Pulley on September 30, 1988. The jury found the following aggravating circumstances beyond a reasonable doubt in sentencing Petitioner to death for the felony murder:

> (1) The defendant was previously convicted of one (1) or more felonies that involved the use or threat or violence; and
>
> (2) 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 was fleeing after committing or attempting to commit, any first degree murder, arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or unlawful throwing, placing, or discharging of a destructive device or bomb.

See Tenn. Code Ann. § 39-2-203(i)(2), and (7) (1982). On appeal, the Tennessee Supreme Court affirmed both his convictions and sentences after determining the erroneous application of the felony murder aggravating circumstance was harmless error. State v. Nichols, 877 S.W.2d 722 (Tenn. 1994), cert. denied, 513 U.S.1114 (1995).

Post-Conviction

Petitioner subsequently filed a timely petition for post-conviction relief which was denied by the trial court following a full hearing. The denial of post-conviction relief was affirmed on appeal. Nichols v. State, 90 S.W.3d 576 (Tenn. 2002); see also, Nichols v. State, 2001 WL 55747 (Tenn. Crim. App. Jan. 19, 2001).

Federal Habeas Corpus Proceedings

Petitioner filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 which was denied by the federal district court and then affirmed on appeal. Nichols v. Heidle, 725 F.3d 516 (6th Cir. 2013), cert. denied, 135 U.S. 704 (2014); see also, Nichols v. Bell, 440 F. Supp. 2d 730 (E.D. Tenn. 2006) and Nichols v. Bell, 440 F. Supp. 2d 847 (E.D. Tenn. 2006).

III. Post-Conviction Standards

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) (2014). 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)(2014). 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).

IV. Analysis of *Johnson* Claim

Petitioner argues in his Motion to Reopen and 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 statute. As previously stated, the appellate courts have now addressed this issue and determined Petitioner is not entitled to relief on this issue. Accordingly, this Court finds this issue is appropriate for disposition without a hearing.[1]

[1] In his motion to approve the settlement agreement, Petitioner asserts "[b]y finding that Petitioner demonstrated a colorable claim regarding the application of Johnson to his prior violent felony conviction aggravator, this Court recognized that the Johnson claim has merit." This Court does not agree. If true, this would mean every colorable claim in a petition would entitle a petitioner to relief without a hearing, and this is certainly not the law. Otherwise, no hearings would be necessary because relief would be established merely upon the pleadings.

V. Analysis of Non-*Johnson* Claims Raised In January 2017 Petition

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

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

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

Claim II

In Claim II, Petitioner asserts Hurst v. Florida, 136 S. Ct. 616 (Tenn. 2016), 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 (1) the trial court rather than the jury made the critical finding Petitioner was previously convicted of one or more felonies, other than the charged offense, which

involved the use of violence to the person which was required for the imposition of the death penalty, and (2) the appellate court rendered findings required for the imposition of the death penalty when it struck down one of the two aggravating circumstances and then it, rather than a jury, reweighed the evidence to determine any error in the application of the inapplicable sentencing factor was harmless.

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.

As stated previously, a jury convicted Petitioner of first degree murder and sentenced him to death based upon its finding of two aggravating circumstances proven beyond a reasonable doubt. Subsequently, the appellate court struck down the (i)(7) aggravating factor and performed a harmless error analysis of the record to determine if the application of the inapplicable factor was or was not a harmless error as it related to sentencing.

At the hearing on January 31, 2018, the parties submitted Petitioner's claim as it related to Hurst entitled him to relief. This Court, however, finds the law does not support the parties' position.

Initially, this 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 first issue raised here by Petitioner. In Suttles, the court held the decision in Hurst did not announce a new constitutional rule requiring retrospective application.

In Cauthern v. State, 145 S.W.3d 571 (Tenn. 2004), a very similar argument to the issue raised by Petitioner related to the appellate court's decision was raised and also found not to require retroactive application of Apprendi or Ring. In Cauthern, the petitioner collaterally attacked the harmless error analysis undertaken on his direct appeal from his 1995 resentencing trial. The Tennessee Supreme Court had found the instruction given on one of the aggravating circumstances in 1995 to have been the wrong instruction. The court, however, had gone further to find the error was harmless. On collateral review, petitioner Cauthern argued the harmless error finding improperly substituted the court's judgment for one of a correctly-charged jury and thus

violated Ring. The Tennessee Supreme Court, however, found neither Apprendi nor Ring provided the petitioner any relief on his post-conviction claims.

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.

Although this Court does not find Hurst presents a claim under Tennessee law which should be applied retroactively on collateral review, this Court will address the substance of the claim as well.

In Tennessee at the time of Petitioner's offense, a capital trial was bifurcated into two phases. See Tenn. Code Ann. § 39-2-203. In the first phase of the trial, often referred to as the guilt phase, the jury determined whether the defendant was guilty of first degree murder as charged.[2] If the jury found the defendant guilty of first degree murder, and the State had filed a notice of death eligible aggravating factors, the second phase of the trial, referred to as the penalty phase or sentencing phase, began. Tenn. Code Ann. § 39-2-203(a). At the penalty phase, the parties could present to the jury any evidence relevant to sentencing, particularly relating to the statutory aggravating circumstances[3] contained in the State's notice, and any mitigating circumstances as listed in §39-2-203(j), or as raised by the evidence during either phase of the trial. Tenn. Code Ann. § 39-2-203(c).

Pursuant to statute, the jury was required to find the existence of at least one statutory aggravating circumstance beyond a reasonable doubt before it could consider a sentence of death. If no aggravating factor was found, the jury was instructed to return a sentence of life imprisonment. Tenn. Code Ann. § 39-2-203(f). If the jury unanimously found one or more

[2] First degree murder may be either premeditated first degree murder or first degree felony murder.

[3] Tenn. Code Ann. §39-2-203(i).

aggravating circumstances existed, but found they did not outweigh the mitigating circumstances, the jury was required to sentence the defendant to a sentence of life imprisonment. Id. If the jury unanimously found one or more aggravating circumstances existed and found they outweighed any mitigating circumstances, the jury was required to return a sentence of death. Tenn. Code Ann. § 39-2-203(g).

Therefore, in Tennessee a capital defendant such as Petitioner became eligible for the death penalty upon the finding of at least one of the aggravating circumstances found in §39-2-203(i) and noticed by the State. There is a distinction between when a person is "eligible" for the death penalty and whether or not the death penalty is "appropriate" in a particular case for a capital defendant who *is* eligible for the death penalty.

Ring and Hurst both require any factual finding which exposes a defendant to or makes a defendant eligible for a sentence of death must be proven to a jury beyond a reasonable doubt. However, once the jury unanimously finds the fact or facts which expose a defendant to imposition of the death penalty, i.e. an aggravating circumstance, Ring and Hurst have no further application. Under Apprendi, the trial court may "exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing ... sentence within statutory limits in the individual case." Apprendi, 530 U.S. at 481.

Here, Petitioner first argues when the trial court instructed the jury certain offenses constituted offenses involving the use or threat of violence to the person it impermissibly constituted a "finding" of the (i)(2) aggravating circumstance and, therefore, rendered his death sentence unconstitutional.

The Tennessee Supreme Court examined the same issue in State v. Cole, 155 S.W.3d 885 (Tenn. 2005), pre-Hurst. The appellate court examined the relevant case law as follows:

> The defendant's death sentence is based upon aggravating circumstance (i)(2), which applies when "[t]he 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) (1999)....

The defendant maintains that by instructing the jury that the statutory elements of these felonies involve the use of violence to the person, the trial court violated the Fifth and Sixth Amendments to the United States Constitution. Relying upon *Apprendi v. New Jersey,* 530 U.S. 466, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000) and *Ring v. Arizona,* 536 U.S. 584, 122 S. Ct. 2428, 153 L.Ed.2d 556 (2002), the defendant maintains that when the prosecution is relying upon the (i)(2) aggravating circumstance to support imposition of the death penalty, the United States Constitution mandates that the jury, not the judge, determine whether "the statutory elements" of the prior felony conviction "involve the use of violence to the person." The defendant concedes that the trial court followed the procedure enunciated by this Court in *State v. Sims,* 45 S.W.3d 1 (Tenn. 2001), and applied in more recent decisions of this Court. Nonetheless, the defendant maintains that the *Sims* procedure is not constitutionally sound in light of the United States Supreme Court decisions in *Apprendi* and *Ring.* The State, in contrast, maintains that the trial court's jury instruction and the procedure enunciated by this Court in *Sims* do not violate *Apprendi* and *Ring.*

* * *

We begin our analysis with *Sims,* in which this Court considered how trial courts should proceed when the prior felony convictions upon which the prosecution relies to establish the (i)(2) aggravating circumstance include alternative statutory elements that do not necessarily involve the use of violence to the person. In *Sims,* after carefully considering the language of the aggravating circumstance as well as the procedure utilized by the trial court, this Court held that in determining whether the statutory elements of a prior felony conviction involve the use of violence against the person, "the trial judge must necessarily examine the facts underlying the prior felony...." 45 S.W.3d at 11–12. We explained that

> [t]o hold otherwise would yield an absurd result, the particular facts of this case being an ideal example. A plain reading of the statute indicates that the legislature intended to allow juries to consider a defendant's prior violent crimes in reaching a decision during the sentencing phase of a first degree murder trial. The underlying facts of Sims's prior felony convictions involve his shooting two people sitting in a car. To hold that these prior convictions do not involve use of violence against a person would be an absurd result contrary to the objectives of the criminal code. We cannot adhere to a result so clearly opposing legislative intent.

Id. at 12.

This Court has since reaffirmed the procedure developed in *Sims.* For example, in *State v. McKinney,* 74 S.W.3d 291, 305 (Tenn. 2002), we pointed out that, the "critical issue" for purposes of the (i)(2) aggravating circumstance is "whether the statutory elements of [the prior felony] involve the use of violence to the person *by definition.*" (Emphasis added.) We reiterated that *Sims* provided the "appropriate analytical framework" for resolving this important issue. *Id.* at 306. In rejecting the defendant's challenge to the sufficiency of the evidence and in concluding that McKinney's prior conviction for aggravated robbery had been premised upon statutory elements that involve the use of violence to the person, this Court stated:

> Here, the defendant testified during sentencing that he did not participate in the aggravated robbery that served as the basis of the aggravating circumstance. The defendant admitted, however, that his co-defendant was armed with a weapon and that he waited in the getaway car while the co-defendant carried out the robbery. Moreover, as the State observes, the defendant pled guilty to an indictment alleging that he and his co-defendant "violently by the use of a deadly weapon" robbed the victim. This Court has frequently held that the entry of an informed and counseled guilty plea constitutes an admission of all of the facts and elements necessary to sustain a conviction and a waiver of any non-jurisdictional defects or constitutional irregularities.

Id. at 306 (citations omitted). The following summary of the *Sims* procedure from *State v. Powers,* 101 S.W.3d 383, 400–01 (Tenn. 2003), also provides guidance on the issue presented in this appeal:

> In *Sims,* the State introduced evidence of two prior convictions for aggravated assault to establish the prior violent felony circumstance. We recognized that the statutory elements of aggravated assault do not necessarily involve the use of violence. Accordingly, we approved a procedure in which the trial judge, outside the presence of the jury, *considers the underlying facts of the prior assaults to determine whether the elements of those offenses involved the use of violence to the person. If the trial court determines that the statutory elements of the prior offense involved the use of violence, the State may introduce evidence that the defendant had previously been convicted of the prior offenses. The trial court then would instruct the jury that those convictions involved the use of violence to the person.*

Id. at 400–01 (emphasis added).

Having summarized *Sims* and its progeny, we turn to *Apprendi* and *Ring.* In *Apprendi,* the defendant had been convicted of second-degree unlawful possession of a firearm, an offense carrying a maximum penalty of ten years imprisonment. 530 U.S. at 469–70, 120 S. Ct. 2348. On the prosecutor's motion, the sentencing judge found by a preponderance of the evidence that the crime had been committed "'with a purpose to intimidate ... because of race, color, gender, handicap, religion, sexual orientation or ethnicity.'" *Id.* at 468–69, 120 S. Ct. 2348 (quoting N.J. Stat. Ann. § 2C:44–3(e) (West Supp. 1999–2000)). This judicial finding of racial motivation had the effect of doubling from ten years to twenty years the maximum sentence to which Apprendi was exposed. *Id.* at 469, 120 S. Ct. 2348. The judge sentenced Apprendi to twelve years in prison, two years more than the maximum that would have applied but for the judicial finding of racial motivation. Apprendi challenged the constitutionality of his sentence, arguing that under the Due Process Clause of the Fourteenth Amendment and the notice and jury trial guarantees of the Sixth Amendment, he was entitled to have a jury determine on the basis of proof beyond a reasonable doubt whether his crime had been racially motivated. *Id.* at 471–72, 120 S. Ct. 2348.

The United States Supreme Court concluded that Apprendi's constitutional

challenge had merit. After commenting that its answer to the question presented had been "foreshadowed by [its] opinion in *Jones v. United States,* 526 U.S. 227, 119 S. Ct. 1215, 143 L.Ed.2d 311 (1999)," the Court in *Apprendi* held, "[o]ther 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 a jury, and proved beyond a reasonable doubt." *Id.* at 490, 120 S. Ct. 2348. Applying this rule, the Court struck down the challenged New Jersey procedure as "an unacceptable departure from the jury tradition that is an indispensable part of our criminal justice system." *Id.* at 497, 120 S. Ct. 2348.

Two years later, in *Ring,* the Court applied *Apprendi* to the Arizona capital sentencing statutes. 536 U.S. at 588–89, 122 S. Ct. 2428. The narrow question presented in *Ring* was "whether [an] aggravating factor may be found by the judge, as Arizona law specifies, or whether the Sixth Amendment's jury trial guarantee, made applicable to the States by the Fourteenth Amendment, requires that the aggravating factor determination be entrusted to the jury." *Id.* at 597. The Court emphasized the limited nature of the issue presented, noting that of the thirty-eight states with capital punishment, twenty-nine, including Tennessee, "commit sentencing decisions to juries." *Id.* at 608 n. 6, 122 S. Ct. 2428. Overruling its prior decision in *Walton v. Arizona,* 497 U.S. 639, 110 S. Ct. 3047, 111 L.Ed.2d 511 (1990), the Court in *Ring* held that, because Arizona's enumerated aggravating factors operate as "'the functional equivalent of [ ] element[s] of a greater offense,' " the Sixth Amendment requires that they be found by a jury, rather than by a judge. *Id.* at 609, 122 S. Ct. 2428 (quoting *Apprendi,* 530 U.S. at 494 n. 19, 120 S. Ct. 2348); *see Holton,* 126 S.W.3d at 863 (discussing the decision in *Ring*). Explaining its holding, the Court stated:

> The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the *factfinding* necessary to increase a defendant's sentence by two years, but not the *factfinding* necessary to put him to death. We hold that the Sixth Amendment applies to both.

536 U.S. at 609, 122 S. Ct. 2428 (emphasis added). Thus, the holdings of *Apprendi* and *Ring* were succinctly described by the following language from *Ring:* "If a State makes an increase in a defendant's authorized punishment contingent on the *finding of a fact,* that *fact*—no matter how the State labels it—must be found by a jury beyond a reasonable doubt." *Ring,* 536 U.S. at 602, 122 S. Ct. 2428 (emphasis added).

More recently, in *Blakely v. Washington,* 542 U.S. 296, [301], 124 S. Ct. 2531, 2536, 159 L.Ed.2d 403 (2004), the United States Supreme Court "appl[ied] the rule [ ] expressed in *Apprendi.*" The petitioner in *Blakely* had been:

> sentenced to more than three years above the 53–month statutory maximum of the standard range because he had acted with "deliberate cruelty." The facts supporting that finding were neither admitted by petitioner nor found by a jury. The State [of Washington] nevertheless contends that there was no *Apprendi* violation because the relevant "statutory maximum" is not 53 months, but the 10–year maximum for class B felonies in [Wash. Rev.Code Ann.] § 9A.20.021(1)(b). It observes that no exceptional sentence may exceed that limit. *See* [Wash. Rev. Code Ann.] §

> 9.94A.420. Our precedents make clear, however, that the "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. See Ring, supra,* at 602, 122 S. Ct. 2428 (" 'the maximum he would receive if punished according to the facts reflected in the jury verdict alone' " (quoting *Apprendi, supra,* at 483, 120 S. Ct. 2348)); *Harris v. United States,* 536 U.S. 545, 563, 122 S. Ct. 2406, 153 L.Ed.2d 524 (2002) (plurality opinion) (same); *cf. Apprendi, supra,* at 488, 120 S. Ct. 2348 (facts admitted by the defendant). In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment," [1 J.] Bishop, [Criminal Procedure] § 87, at 55, and the judge exceeds his proper authority.
>
> *Id.* at [303-04], 124 S. Ct. at 2537.
>
> Clearly, *Apprendi* and its progeny preclude judges from finding "additional facts," *id.,* that increase a defendant's sentence beyond the "statutory maximum," *id.,* which is defined as the maximum sentence a judge may impose "*solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" *Id.* Equally as clear is that *Apprendi* and its progeny do not limit a judge's authority to make *legal* determinations that precede a jury's fact-finding and imposition of sentence.

Cole, 155 S.W.3d at 899-903. Applying this case law to Mr. Cole's stated issue, the Court concluded,

> The *Sims* procedure involves a legal determination, and as such this procedure does not transgress the dictates of *Apprendi* and its progeny. The (i)(2) aggravating circumstance requires only that the *statutory elements* of the prior felony involve the use of violence to the person. The *Sims* procedure authorizes trial judges merely to examine the facts, record, and evidence *underlying* the prior conviction to ascertain which "statutory elements" served as the basis of the prior felony conviction. This is a legal determination that neither requires nor allows trial judges to make factual findings as to whether the prior conviction involved violence. This legal determination is analogous to the preliminary questions trial judges often are called upon to decide when determining the admissibility of evidence. *See* Tenn. R. Evid. 104.
>
> Furthermore, by making this legal determination, the trial court neither inflicts punishment nor usurps or infringes upon the jury's role as fact-finder. Once the trial court determines as a matter of law that the statutory elements of the prior convictions involve the use of violence, the jury must then determine as matters of fact whether the prosecution has proven the (i)(2) aggravating circumstance beyond a reasonable doubt and whether aggravating circumstances outweigh

> mitigating circumstances beyond a reasonable doubt. The jury alone must decide these factual questions, and these are the factual questions that determine whether the maximum sentence of death will be imposed. Additionally, the facts underlying prior convictions are themselves facts that either were found by a jury's verdict of guilt or facts that were admitted by a plea of guilty. Permitting the trial judge to examine such facts merely to determine which of the *statutory elements* formed the basis of the prior conviction does not violate *Apprendi* and its progeny.

Id. at 904.

After carefully considering the record, the issue raised and the applicable law, this Court finds the trial court's determination the prior offenses which the State relied upon in Mr. Nichols's case involved the use or threat of violence to the person was a legal determination which did not violate Petitioner's rights under the Sixth Amendment or Hurst. Therefore, Petitioner is not entitled to the relief sought on this issue.

Petitioner's alternative position here asserts a capital defendant is not eligible for the death penalty in Tennessee unless the jury finds the aggravating circumstances outweigh the mitigating circumstances. This assertion is simply incorrect. A Tennessee jury need only unanimously find the existence of a statutory aggravating circumstance beyond a reasonable doubt to render a capital defendant *eligible* for the death penalty. Whether the aggravating circumstance or circumstances outweigh the mitigating circumstances is not a finding of fact necessary to make a capital defendant eligible for the death penalty. After a defendant has already been found to be death penalty eligible, any subsequent weighing processes for sentencing purposes do not implicate Apprendi and Ring; weighing is *not* a fact-finding process subject to the Sixth Amendment, because "[t]hese determinations cannot increase the potential punishment to which a defendant is exposed as a consequence of the eligibility determination." State v. Belton, 74 N.E. 3d 319 (Ohio April 20, 2016)(quoting and citing State v. Gales, 265 Neb. 598, 628, 658 N.W.2d 604 (2003); see, e.g., State v. Fry, 138 N.M. 700, 718, 126 P.3d 516 (2005); *Ortiz v. State,* 869 A.2d 285, 303–305 (Del.2005); Ritchie v. State, 809 N.E.2d 258, 268 (Ind.2004)). "Instead, the weighing process amounts to "a complex moral judgment" about what penalty to impose upon a defendant who is

already death-penalty eligible." Belton, (quoting United States v. Runyon, 707 F.3d 475, 515–516 (4th Cir.2013) (citing cases from other federal appeals courts).

In addition, the United States Supreme Court has recently denied certiorari in two cases which raised issues pursuant to Hurst.

In Burnside v. State, 352 P.3d 627 (Nev. June 25, 2015), rehearing denied, (Nev. Oct. 22, 2015), the Nevada Supreme Court invalidated one of two statutory aggravating circumstances, reweighed the evidence, found the remaining aggravator outweighed the mitigation, and affirmed the sentence of death. Subsequently, Burnside cited Ring and Hurst in his petition for a writ of certiorari to the United States Supreme Court. Burnside attempted to present the same argument presented here concerning whether a reweighing of evidence on appeal after invalidating one of the aggravating circumstances was a violation of the Sixth Amendment. The United States Supreme Court, however, denied certiorari on March 21, 2016. Burnside v. Nevada, 136 S. Ct. 1466 (2016).

In Davila v. Davis, 650 Fed. Appx. 860 (5th Cir. 2016), petitioner was denied a certificate of appealability in federal habeas proceedings on the issue of whether the Sixth Amendment and Hurst placed a burden on the State to prove a lack of mitigating evidence beyond a reasonable doubt. The jury did make the finding under the statute; however, it was not required to be beyond a reasonable doubt. Petitioner Davila filed a petition for writ of certiorari in the United States Supreme Court presenting the following question: "In light of Hurst v. Florida, 136 S. Ct. 616, 622 (2016), must Texas' second punishment special issue,[4] which is a necessary finding for a sentence of death, be decided by the jury beyond a reasonable doubt?" The United States Supreme Court again did not find Hurst established any right which warranted hearing the issue and denied

[4] The "second punishment special issue" referred to is "Taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, do you find that there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed?" Tex. Code Crim. Pro. art. 37.071.

certiorari. Davila v. Davis, __ U.S. __, 137 S. Ct. 810 (January 13, 2017)(certiorari granted as to separate issue).

After carefully considering the record, the issue raised and the applicable law, and for the reasons stated above, this Court finds Petitioner is not entitled to the relief sought on this issue.

Claim III

Claim III asserts the State committed prosecutorial misconduct in its closing statements at trial in violation of his constitutional rights, and counsel was ineffective as it related to this issue. Specifically, he alleges the State made an improper argument concerning Petitioner's future dangerousness if subsequently released on parole, and counsel failed to object. Petitioner has also submitted several affidavits from jurors on this claim. Claim III is not newly discovered and would clearly be time-barred under Tenn. Code Ann. § 40-30-102.

In addition, the issues raised in Claim III were either raised unsuccessfully on direct appeal or post-conviction making them previously determined, and/or they are waived as not having been previously raised when available. This Court does not agree this Court should reconsider the issue as asserted by Petitioner based upon affidavits from jurors who could have been interviewed at any time post trial. This Court finds Claim III does not entitle Petitioner to any relief sought.

Claim IV

In Claim IV, 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 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 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.

In addition to not being a cognizable issue here, this Court would find this issue has been waived by not having been previously raised. Petitioner is not entitled to relief on this issue.

Claim V

Petitioner claims he is entitled to relief based upon the cumulative effect of the errors

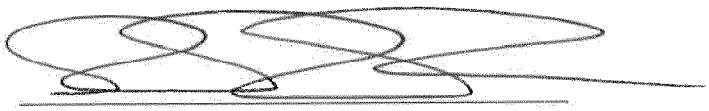
contained in his Claims I through V. This Court, however, already has found Claims II-IV are time-barred, previously determined, and/or waived. The only issue remaining for consideration by this Court is Claim I. This Court finds no basis for a claim of cumulative error which would warrant consideration here.

VI. Conclusion

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

For the reasons stated above, Petitioner's Motion to Approve Settlement Agreement is DENIED, and this matter is DISMISSED.

IT IS SO ORDERED this the 7 day of March, 2018.



Don R. Ash
Senior Judge

CERTIFICATE OF SERVICE

I, _____, Clerk, hereby certify I have mailed a true and exact copy of same to Counsel of Record for Petitioner, and the State this the _____ day of _____, 20___.

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
March 26, 2019 Session

HAROLD WAYNE NICHOLS v. STATE OF TENNESSEE

Appeal from the Criminal Court for Hamilton County
No. 205863 Don R. Ash, Senior Judge

No. E2018-00626-CCA-R3-PD

Petitioner, Harold Wayne Nichols, pled guilty to first degree murder in 1990. A jury imposed the death penalty. In June of 2016, Petitioner moved to reopen his post-conviction petition on the basis that the Supreme Court's decision in *Johnson v. United States*, __ U.S. __, 135 S. Ct. 2551 (2015), announced a new rule of constitutional law requiring retroactive application. The post-conviction court granted the motion to reopen, but after Petitioner amended his petition and asserted additional claims, the post-conviction court denied relief without a hearing. On appeal, Petitioner argues (1) that the sole aggravating circumstance supporting his death sentence is unconstitutionally vague under *Johnson*; (2) that a judge, rather than a jury, determined facts in imposing the death penalty in violation of *Hurst v. Florida*, __ U.S. __, 136 S. Ct. 616 (2016), a new rule of constitutional law requiring retroactive application; (3) that the State committed prosecutorial misconduct at Petitioner's sentencing hearing, along with a related ineffective assistance of trial counsel claim; (4) that the post-conviction court erred in canceling the scheduled evidentiary hearing without notice and a fair opportunity to be heard; (5) that the post-conviction court erred in denying the parties' proposed settlement agreement to vacate the death sentence and enter a judgment of life imprisonment; and (6) that Petitioner's death sentence is invalid due to the cumulative effect of the asserted errors. 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 is Affirmed.

TIMOTHY L. EASTER, J., delivered the opinion of the court, in which NORMA MCGEE OGLE and CAMILLE R. MCMULLEN, JJ., joined.

Deborah Y. Drew, Deputy Post-Conviction Defender; Andrew L. Harris, Assistant Post-Conviction Defender, Nashville, Tennessee, for the appellant, Harold Wayne Nichols.

Herbert H. Slatery III, Attorney General and Reporter; Nicholas W. Spangler, Senior Assistant Attorney General; Neal Pinkston, District Attorney General; and Crystle Carrion, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual and Procedural Background

On May 9, 1990, Petitioner pled guilty to first degree felony murder, aggravated rape, and first degree burglary with his sentence to be determined by a jury. The Tennessee Supreme Court summarized the evidence presented at the sentencing hearing as follows:

> The proof showed that on the night of September 30, 1988, [Petitioner] broke into the house where the 21-year-old-victim, Karen Pulley, lived with two roommates in the Brainerd area of Chattanooga, Tennessee. After finding Pulley home alone in her upstairs bedroom, [Petitioner] tore her undergarments from her and violently raped her. Because of her resistance during the rape, he forcibly struck her at least twice in the head with a two-by-four he had picked up after entering the house. After the rape, [Petitioner], while still struggling with the victim, struck her again several times with great force in the head with the two-by-four. The next morning, one of Karen Pulley's roommates discovered her alive and lying in a pool of blood on the floor next to her bed. Pulley died the next day. Three months after the rape and murder, a Chattanooga police detective questioned [Petitioner] about Pulley's murder while he was in the custody of the East Ridge police department on unrelated charges. It was at this point that [Petitioner] confessed to the crime. This videotaped confession provided the only link between [Petitioner] and the Pulley rape and murder.
>
> The evidence showed that, until his arrest in January 1989, [Petitioner] roamed the city at night and, when "energized," relentlessly searched for vulnerable female victims. At the time of trial, [Petitioner] had been convicted on five charges of aggravated rape involving four other Chattanooga women. These rapes had occurred in December 1988 and January 1989, within three months after Pulley's rape and murder. . . .

State v. Nichols, 877 S.W.2d 722, 726 (Tenn. 1994) (footnotes omitted), *cert. denied*, 513 U.S. 1114 (1995). In three of those prior rapes, Petitioner had been armed with a weapon (a cord, a knife, and a pistol, respectively), and he caused personal injury to the victim in the fourth. *Id.*

In support of the death penalty, the State relied upon two aggravating circumstances: (1) that Petitioner had one or more prior convictions for violent felonies, namely the five convictions for aggravated rape, and (2) that the murder occurred during the commission of a felony. *See* T.C.A. § 39-2-203(i)(2) & (7). The jury imposed the death penalty after finding both aggravating circumstances were proven beyond a reasonable doubt and that the aggravating circumstances outweighed any mitigating circumstances beyond a reasonable doubt.[1] On direct appeal, the Tennessee Supreme Court concluded, among other issues, that the application of the felony murder aggravating circumstance was harmless error and affirmed Petitioner's convictions and death sentence. *Id*. at 738-39.

On April 20, 1995, Petitioner filed a petition for post-conviction relief, raising multiple claims of ineffective assistance of trial counsel. Following an extensive evidentiary hearing spanning eight days, the post-conviction court upheld Petitioner's convictions and death sentence.[2] On appeal to this Court, we held that the trial court erred in allowing Petitioner to assert his right against self-incrimination at the post-conviction hearing but affirmed the post-conviction court's denial of relief. *Harold Wayne Nichols v. State*, E1998-00562-CCA-R3-PD, 2001 WL 55747 (Tenn. Crim. App. Jan. 19, 2001). The Tennessee Supreme Court held that this Court should not have addressed the self-incrimination issue but affirmed the post-conviction court's denial of relief. *Nichols v. State*, 90 S.W.3d 576 (Tenn. 2002). Petitioner was subsequently unsuccessful in his attempt to seek federal habeas corpus relief. *See Nichols v. Heidle*, 725 F.3d 516 (6th Cir. 2013), *cert. denied*, 135 S. Ct. 704 (2014).

On June 24, 2016, Petitioner filed a motion to reopen his post-conviction petition, alleging that *Johnson v. United States* announced a new constitutional rule requiring retrospective application. In *Johnson*, the United States Supreme Court held that the "residual clause" of the Armed Career Criminal Act ("ACCA"), which defined prior violent felony for the purpose of sentence enhancement as an offense that "otherwise involves conduct that presents a serious potential risk of physical injury to another," was void for vagueness. *See* 135 S. Ct. at 2557-58. Petitioner argued that pursuant to the

[1] The trial court subsequently imposed consecutive sentences of 60 years for aggravated rape and 15 years for first degree burglary.

[2] Petitioner also filed a post-conviction petition challenging his non-capital convictions for the rapes of the four other victims, which had served as the basis of the prior violent felony aggravating circumstance. The post-conviction court granted partial relief in the form of a new sentencing hearing in the non-capital rape cases. *See Nichols v. State*, 90 S.W.3d 576, 586-87 (Tenn. 2002). Petitioner ultimately received an effective sentence of 25 years in those four cases, as well as an effective sentence of 225 years for the rapes or attempted rapes of five other victims. *See State v. Harold Wayne Nichols*, No. E2008-00169-CCA-R3-CD, 2009 WL 2633099, at *3 (Tenn. Crim. App. Aug. 27, 2009), *perm. app. denied* (Tenn. Mar. 1, 2010).

ruling in *Johnson*, Tennessee's prior violent felony aggravating circumstance – the sole aggravating circumstance supporting his death sentence – was similarly void for vagueness. On September 29, 2016, the State filed a response to the motion to reopen, arguing that the ruling in *Johnson* did not apply to the language of Tennessee's prior violent felony aggravator, which was more akin to the "elements clause" of the ACCA that was held to be constitutional in *Johnson*. *See* 135 S. Ct. at 2563.

At an October 4, 2016 hearing, the post-conviction court found that Petitioner had stated a "colorable claim" for reopening post-conviction proceedings. In its order granting the motion to reopen, the post-conviction court noted that Petitioner's case was unusual due to the timing of his offense and the amendment of the sentencing statutes in 1989. Even though the pre-1989 statute[3] should have applied to Petitioner's case, the jury was actually instructed on the post-1989 aggravating factor.[4] The post-conviction court noted that challenges to the post-1989 aggravating factor "would likely fail to state a claim in a motion to reopen" because it specifically referred to the "statutory elements" of the prior offense, similar to the "elements clause" that was upheld in *Johnson*. However, the post-conviction court found that the pre-1989 aggravating factor "contained language which arguably was similar to the federal statutory clause recently found unconstitutionally vague in *Johnson*." The post-conviction court stated that its finding that Petitioner's motion to reopen stated a colorable claim was based in part on the "alleged lack of guidance regarding the trial court's application of the pre-1989 prior violent felony conviction statutory aggravating circumstance" as well as "upon the differing conclusions federal and state courts have reached in applying the *Johnson* holding to non-ACCA cases." The order directed Petitioner's counsel "to investigate all possible constitutional grounds for relief for the purpose of filing an amended petition" and that the amended petition should address "any additional issues counsel deems necessary."

On January 12, 2017, Petitioner filed an amendment to the post-conviction petition reasserting the *Johnson* claim as well as adding the following additional claims: (1) that Petitioner's death sentence was invalid under the United States Supreme Court's decision in *Hurst v. Florida*, a new rule of constitutional law requiring retrospective application, because a judge made findings of fact rather than the jury; (2) that the State committed prosecutorial misconduct during closing argument at the sentencing hearing by alluding to the possibility of Petitioner's release if the death penalty were not imposed as well as a related claim that trial counsel were ineffective for failing to object to the argument and

[3] "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." T.C.A. § 39-13-204(i)(2) (1988).

[4] "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." T.C.A. § 39-13-204(i)(2) (Supp. 1990). As noted below, Petitioner has not challenged this jury instruction as error.

failing to interview jurors regarding the effect of the argument; (3) that Tennessee's death penalty system is "broken"; and (4) that Petitioner's constitutional rights were abridged by the cumulative effect of the errors.

During a December 8, 2017 teleconference with the post-conviction court, the parties announced that they were engaged in settlement negotiations to modify Petitioner's sentence to life imprisonment. At a January 31, 2018 hearing, Petitioner argued that the State could concede that error had occurred in the imposition of the death sentence and could modify the sentence to life imprisonment. The District Attorney General responded that the State was prepared to concede error and enter into an agreement whereby Petitioner's sentence would be modified and his petition withdrawn. The post-conviction court, concerned that a basis to grant post-conviction relief had not been established, opined that a valid basis for post-conviction relief had to be found as a prerequisite to the parties entering a settlement agreement modifying the sentence. The post-conviction court, however, permitted the parties to submit additional authority concerning the propriety of the settlement agreement and rescheduled the hearing for March 14, 2018. On February 12, 2018, the Petitioner filed a motion to approve the settlement agreement, citing similar agreements in other death penalty cases and Petitioner's record of good behavior while incarcerated.

On March 7, 2018, one week prior to the rescheduled hearing, the post-conviction court entered an order summarily denying relief. The post-conviction court stated that it had "reviewed the pleadings of the parties, the record, and applicable law" in accordance with the provisions of the Post-Conviction Procedure Act. The post-conviction court noted that at the time it granted the motion to reopen on the basis that Petitioner had stated a colorable claim, no appellate court had determined whether *Johnson* applied to Tennessee's prior violent felony aggravator. Since then, the Court of Criminal Appeals had rejected such a claim. *See Donnie E. Johnson v. State*, No. W2017-00848-CCA-R28-PD, Order (Tenn. Crim. App. Sept. 11, 2017), *perm. app. denied* (Tenn. Jan. 19, 2018). The post-conviction court concluded that based on the *Donnie E. Johnson* decision, "this issue is appropriate for disposition without a hearing." As to the additional claims raised in the amended petition, the post-conviction court concluded based on its preliminary review that *Hurst* did not announce a new rule of constitutional law that required retrospective application and was inapplicable to this case and that the remaining claims were previously determined, waived, and/or time-barred. Finally, the post-conviction court concluded that it was "not appropriate to accept . . . [the] proposed settlement agreement under the circumstances of this case where there is no claim for post-conviction relief before this Court which should survive this Court's statutorily required preliminary order." On April 6, 2018, Petitioner filed a notice of appeal pursuant to Rule 3 of the Tennessee Rules of Appellate Procedure.

Analysis

In *Case v. Nebraska*, 381 U.S. 336 (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 ligation 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 ideation, 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).

A motion to reopen post-conviction proceedings should be granted 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.

T.C.A. § 40-30-117(a). The motion should set out the factual basis underlying the claim, supported by affidavit. T.C.A. § 40-30-117(b). Once the post-conviction court grants the motion to reopen,[5] "the procedure, relief and appellate provisions of this part shall apply." *Id*.; *see* T.C.A. § 40-30-101 ("This part shall be known and may be referred to as the 'Post-Conviction Procedure Act.'"). The appellate provisions of the Post-Conviction Procedure Act allow for an appeal as of right under Tennessee Rule of Appellate Procedure 3(b) from a final order granting or denying post-conviction relief. T.C.A. § 40-30-116; Tenn. Sup. Ct. R. 28, § 10(A).[6] We review the lower court's summary denial of post-conviction relief de novo. *Arnold v. State*, 143 S.W.3d 784, 786 (Tenn. 2004).

I. Johnson Claim

In *Johnson*, the Supreme Court held that the "residual clause" contained in the definition of a violent felony under the ACCA was 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 has three or more previous convictions for a violent felony. 18 U.S.C. § 924(e)(1). The ACCA defined a "violent felony" as

[5] We note that even though the post-conviction court in this case applied the "colorable claim" standard, which is less stringent than the clear and convincing evidence standard that should be applied to motions to reopen under section 40-30-117(a), *see Howell v. State*, 151 S.W.3d 450, 460 (Tenn. 2004), the State has not challenged the propriety of the post-conviction court's decision to grant the motion to reopen on the *Johnson* claim.

[6] Noting that this matter was initiated as a motion to reopen post-conviction proceedings, this Court directed the parties to submit supplemental briefing addressing whether we had jurisdiction to hear this appeal. *See Timothy Roberson v. State*, No. W2007-00230-CCA-R3-PC, 2007 WL 3286681, at *9 (Tenn. Crim. App. Nov. 7, 2007) (holding that there is no appeal as of right from the denial of a motion to reopen under Tenn. R. App. P. 3(b) and that the failure to follow the procedural requirements for seeking permission to appeal under T.C.A. § 40-30-117(c) "deprives this Court of jurisdiction to entertain such matter"), *perm. app. denied* (Tenn. Apr. 14, 2008). Both parties agreed that the post-conviction court's March 7, 2018 order was not a denial of the motion to reopen but was a denial of post-conviction relief on the merits. We agree that this Court has jurisdiction over this appeal under Tennessee Code Annotated section 40-30-117(b) and Tennessee Rule of Appellate Procedure 3. *Accord. Michael Angelo Coleman v. State*, No. W2007-02767-CCA-R3-PD, 2010 WL 118696 (Tenn. Crim. App. Jan. 13, 2010), *aff'd in part, vacated in part*, 341 S.W.3d 221 (Tenn. 2011); *Byron Lewis Black v. State*, No. M2004-01345-CCA-R3-PD, 2005 WL 2662577 (Tenn. Crim. App. Oct. 19, 2005), *perm. app. denied* (Tenn. Feb. 21, 2006); *contra Floyd Lee Perry, Jr. v. State*, No. W2013-00901-CCA-R3-PC, 2014 WL 1377579, at *4 (Tenn. Crim. App. Apr. 7, 2014) (holding that there was "a procedural error in bringing this appeal before this court" when the petitioner filed a Rule 3 notice of appeal rather than an application for permission to appeal under section -117(c) even though the post-conviction court determined that the motion to reopen presented a colorable claim, appointed counsel, allowed amendment of the motion, and held a hearing prior to denying relief), *perm. app. denied* (Tenn. Sept. 18, 2014).

> any crime punishable by imprisonment for a term exceeding one year . . . that – (i) has as an element the use, attempted use, or threatened use of physical force against the person of another, or (ii) is burglary, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another*.

18 U.S.C. § 924(e)(2)(B) (emphasis added). The "otherwise involves conduct" 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). Because of prior precedent holding that the statute required a categorical rather than a fact-specific approach, federal courts were required "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*. (citing *James v. United States*, 550 U.S. 192, 208 (2007)). The Supreme Court determined this judicial assessment of risk under the residual clause, which was not tied to either real-world facts or statutory elements, was unconstitutionally vague because it "leaves grave uncertainty about how to estimate the risk posed by a crime" and "about how much risk it takes for a crime to qualify as a violent felony." *Id*. at 2557-58. However, the Court clarified that its decision "does not call into the question . . . the remainder of the [ACCA]'s definition of a violent felony." *Id*. at 2563. Thus, the elements clause of the ACCA's violent felony definition survived constitutional scrutiny. *See Stokeling v. United States*, __ U.S. __, 139 S. Ct. 544, 550 (2019) (applying the elements clause to Florida's robbery statute).

While the concept of a statute being unconstitutionally void for vagueness is not new, *see, e.g.*, *Maynard v. Cartwright*, 486 U.S. 356 (1988) (holding a statutory aggravating factor void for vagueness), the Supreme Court subsequently clarified that *Johnson* did announce a new substantive rule which applied retroactively on collateral review. *Welch v. United States*, __ U.S. __, 136 S. Ct. 1257, 1265 (2016) (applying the retroactivity standard set out in *Teague v. Lane*, 489 U.S. 288 (1989), and its progeny); *cf. Van Tran v. State*, 66 S.W.3d 790, 810-11 (Tenn. 2001) (applying the *Teague* retroactivity standard to a motion to reopen). The Court explained that the residual clause was deemed void for vagueness because "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.'" *Id*. at 1262 (quoting *Johnson*, 135 S. Ct. at 2561). In applying *Johnson* to other federal statutes similarly defining violent felony, the Supreme Court held that "the imposition of criminal punishment can't be made to depend on a judge's estimation of the degree of risk posed by a crime's imagined 'ordinary case.'" *United States v. Davis*, __ U.S. __, 139 S. Ct. 2319, 2326 (2019). However, "a case-specific approach would avoid the vagueness problems that doomed the statute[] in *Johnson*[.]" *Id.* at 2327.

The aggravating circumstance applicable at the time Petitioner committed his crime provides that "[t]he defendant was previously convicted of one or more felonies, other than the present charge, which involve the use or threat of violence to the person." T.C.A. § 39-13-204(i)(2) (1988). However, as noted by the post-conviction court, the jury in Petitioner's capital sentencing hearing was instructed on the post-1989 version of the prior violent felony aggravator, which looks to whether the "statutory elements [of the prior conviction] involve the use of violence to the person." T.C.A. § 39-13-204(i)(2) (Supp. 1990). Though Petitioner refers to his jury as having been "erroneously instructed," he has never challenged this instruction as error, *see generally Nichols v. State*, 90 S.W.3d 576 (Tenn. 2002); *State v. Nichols*, 877 S.W.2d 722 (Tenn. 1994), and he does not do so now. Instead, Petitioner argues that either version of the prior violent felony aggravator would be void for vagueness under *Johnson* because "the addition of the word 'elements' to the statute did not significantly alter the meaning of the statute."

However, this Court has rejected *Johnson* claims with respect to both the pre- and post-1989 statutory language in prior cases denying permission to appeal from the denial of a motion to reopen. *See Donnie E. Johnson v. State*, No. W2017-00848-CCA-R28-PD, Order (Tenn. Crim. App. Sept. 11, 2017) (upholding pre-1989 aggravating factor), *perm. app. denied* (Tenn. Jan. 19, 2018); *Gary W. Sutton v. State*, No. E2016-02112-CCA-R28-PD, Order (Tenn. Crim. App. Jan. 23, 2017) (upholding post-1989 aggravating factor), *perm. app. denied* (Tenn. May 18, 2017). This is 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. *See State v. Sims*, 45 S.W.3d 1, 12 (Tenn. 2001) (holding that under the post-1989 aggravating factor, 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"); *State v. Moore*, 614 S.W.2d 348, 351 (Tenn. 1981) (holding that the State was required "to show that there was in fact either violence to another or the threat thereof" for prior felonies that did not "by their very definition involve the use or threat of violence to a person").[7] Thus, our precedent has never required the use of a judicially imagined ordinary case in applying the prior violent felony aggravating circumstance. The fact that the federal statues invalidated by *Johnson* and its progeny could not be saved by applying a fact-specific approach due to the language of those statutes and the precedent interpreting that language does not mean that a fact-specific approach is itself unconstitutional. *See Davis*, 139 S. Ct. at 2327 (recognizing that a case-specific approach would avoid a vagueness problem but rejecting it based on "the statute's text, context, and history"); *cf. State v. Crank*, 468 S.W.3d 15, 22-23 (Tenn. 2015) ("In evaluating a statute for vagueness, courts may consider the plain

[7] The pre-1982 aggravating factor applied in *Moore* contained identical language to the pre-1989 aggravating factor at issue herein.

meaning of the statutory terms, the legislative history, and prior judicial interpretations of the statutory language."). Thus, regardless of which version of the statute did or should have applied to Petitioner, Tennessee's prior violent felony aggravating circumstance is not void for vagueness under *Johnson*. Petitioner is not entitled to relief on this claim.

II. Additional Claims and Scope of Amendment

The next question we must determine is the permissible scope of amendment once a post-conviction court grants a motion to reopen. Despite directing counsel to "investigate all possible constitutional grounds for relief for the purpose of filing an amended petition" in the order granting the motion to reopen, the post-conviction court noted that the additional claims raised in the amended petition were "beyond the intended scope of the current proceedings"; however, the post-conviction court addressed all of Petitioner's claims on the merits. Petitioner contends that because the post-conviction court granted his motion to reopen, the additional claims raised in his amended petition are "part of the initial post-conviction petition proceedings" and are, therefore, not procedurally defaulted. The State argues that because the post-conviction court only granted Petitioner's motion to reopen with respect to the *Johnson* claim and Petitioner's additional claims do not qualify under any of the exceptions to the one-petition rule under Tennessee Code Annotated section 40-30-102(c), the additional claims are procedurally barred.

In *Coleman v. State*, the Tennessee Supreme Court addressed the procedural limitations of raising claims in a motion to reopen and subsequent amendments, which include "the statute of limitations, the restrictions on re-opening petitions for post-conviction relief once they have been ruled on, and the prohibition against re-litigating issues that have been previously determined." 341 S.W.3d 221, 255 (Tenn. 2011). The Post-Conviction Procedure Act "contemplates the filing of only one (1) petition for post-conviction relief," T.C.A. § 40-30-102(c), which must be done within the one-year statute of limitations. *Id*. at (a). The motion to reopen stands as an exception to the one-petition rule. *See id.* at (c) (citing T.C.A. § 40-30-117). The grounds to reopen post-conviction proceedings correspond with the statutory grounds for tolling the statute of limitations. T.C.A. §§ 40-30-102(b), -117(a). Moreover, a claim for relief must not have been previously determined or it will be summarily dismissed. *See* T.C.A. § 40-30-106(f). Failure to overcome these hurdles results in claims that are procedurally barred. *Coleman*, 341 S.W.3d at 257-58. Thus, 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. *See id.* (holding that ineffective assistance of counsel claim was procedurally barred even though the post-conviction court granted motion to reopen with respect to intellectual disability claim); *Corey Alan Bennett v. State*, No. E2014-01637-CCA-R3-PC, 2015 WL 12978648, at *4 (Tenn. Crim. App. June 29, 2015) ("The only way in which the petitioner may reach back to his original petition is through a

motion to reopen the original petition, and, even then, only the new issues raised will be addressed."), *perm. app. denied* (Tenn. Nov. 24, 2015).

A. Hurst Claim

Petitioner argues that the United States Supreme Court's decision in *Hurst v. Florida* is a new rule of constitutional law requiring retrospective application, which, if true, would bring this claim under an exception to the one-year statute of limitations and the one-petition rule.[8] *See* T.C.A. §§ 40-30-102(b)(1), -117(a)(1). In *Hurst*, the United States Supreme Court held that "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death." 136 S. Ct. at 619. Petitioner argues that this rule was violated in his case because "the trial judge made independent factual findings regarding the existence of the prior violent felony aggravating circumstance necessary for the imposition of the death penalty." Petitioner argues that this rule was further violated when the appellate court, after striking the felony murder aggravating circumstance, reweighed the remaining aggravating circumstance against the mitigation evidence in determining that the error was harmless. *See Nichols*, 877 S.W.2d at 737-39. The State responds that *Hurst* did not announce a new rule of constitutional law requiring retrospective application and, thus, consideration of the issue is procedurally barred.

In order to determine whether an appellate court ruling creates a new constitutional rule that must be applied retroactively to cases on collateral review, the Post-Conviction Procedure Act provides the following guidance:

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

[8] We note there was some discussion at the October 4, 2016 hearing regarding the possibility of filing either an amended or a second motion to reopen, presumably with regard to the *Hurst* claim, depending on the post-conviction court's ruling on the pending motion to reopen with respect to the *Johnson* claim. There is no limit on the number of motions to reopen that may be filed, only a limit on the types of claims that may be brought. *See* T.C.A. § 40-30-117. If Petitioner had raised this claim as a separate motion to reopen and it had been denied by the post-conviction court, our jurisdiction to hear the appeal would be dependent on whether Petitioner followed the proper procedure for seeking permission to appeal pursuant to Tennessee Code Annotated section 40-30-117(c). *See Timothy Roberson*, 2007 WL 3286681, at *9. Additionally, our standard of review would be abuse of discretion rather than de novo. *See* T.C.A. § 40-30-117(c); *Fletcher v. State*, 951 S.W.2d 378, 383 (Tenn. 1997).

> to proscribe or requires the observance of fairness safeguards that are implicit in the concept of ordered liberty.

T.C.A. § 40-30-122. The United States Supreme Court has stated 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*, 489 U.S. at 301 (citations omitted). The Tennessee Supreme Court has applied the *Teague* retroactivity standard to motions to reopen under Tennessee Code Annotated section 40-30-117(a)(1). *See Van Tran*, 66 S.W.3d at 810-11.

In *Hurst*, the United States Supreme Court held that Florida's capital sentencing scheme was unconstitutional under the Sixth Amendment because it "required the judge alone to find the existence of an aggravating circumstance" while the jury merely provided an advisory sentence without making any specific findings. 136 S. Ct. at 624. In reaching this conclusion, the Court relied heavily on its previous decisions in *Apprendi v. New Jersey*, 530 U.S. 466, 494 (2000) (holding that any fact that "expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict" must be submitted to a jury), and *Ring v. Arizona*, 536 U.S. 584, 604 (2002) (applying *Apprendi* to capital sentencing and the finding of aggravating circumstances). *See Hurst*, 136 S. Ct. at 621-22. Specifically, the Court held that "[t]he analysis the *Ring* Court applied to Arizona's sentencing scheme applies equally to Florida's [because l]ike Arizona at the time of *Ring*, Florida does not require the jury to make the critical findings necessary to impose the death penalty." *Id*. Thus, "[i]n light of *Ring*, we hold that Hurst's sentence violates the Sixth Amendment." *Id*. at 622.

Hurst is clearly derivative of *Apprendi* and *Ring*; it did not expand upon their holdings or otherwise break new ground. The fact that the *Hurst* Court expressly overruled pre-*Apprendi* cases upholding Florida's capital sentencing scheme does not mean that the decision was not dictated by precedent or was susceptible to reasonable debate; those cases were overruled precisely because they were irreconcilable with *Apprendi*. *See Hurst*, 136 S. Ct. at 623 (overruling *Hildwin v. Florida*, 490 U.S. 638 (1989) and *Spaziano v. Florida*, 468 U.S. 447 (1984)). The United States Supreme Court has previously held that its decision in *Ring* "announced a new procedural rule that *does not apply retroactively* to cases already final under direct review," *Schriro v. Summerlin*, 542 U.S. 348, 358 (2004) (emphasis added), even though it too overruled a pre-*Apprendi* case. *See Ring*, 536 U.S. at 603 (overruling *Walton v. Arizona*, 497 U.S. 639 (1990)). Moreover, this Court has held that neither *Ring* nor *Apprendi* required retrospective application to cases on collateral review. *See, e.g.*, *Anthony Darrell Hines v. State*, No. M2004-01610-CCA-RM-PD, 2004 WL 1567120, at *37 (Tenn. Crim. App. July 14, 2004), *perm. app. denied* (Tenn. Nov. 29, 2004). Thus, it follows that *Hurst* likewise does not require retrospective application. This Court has consistently held as such in

previous cases denying permission to appeal from the denial of a motion to reopen raising a *Hurst* claim. *See, e.g.*, *Charles Rice v. State*, No. W2017-01719-CCA-R28-PD, Order (Tenn. Crim. App. Nov. 14, 2017), *perm. app. denied* (Tenn. Mar. 15, 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). Because *Hurst* did not announce a new rule of constitutional law that must be applied retrospectively, this claim is procedurally barred by both the one-year statute of limitations and the one-petition rule. *See* T.C.A. §§ 40-30-102(b), -117(a). Petitioner is not entitled to relief.

B. Prosecutorial Misconduct and Ineffective Assistance of Counsel Claims

Petitioner argues that during closing argument at the capital sentencing hearing, the State committed prosecutorial misconduct by commenting on the possibility of parole and Petitioner's future dangerousness if released, thereby tainting the jury's verdict and rendering his death sentence unconstitutional. He argues that the majority's conclusion on direct appeal that the argument did not "prejudicially affect[] the jury's sentencing determination," *Nichols*, 877 S.W.2d at 733, was wrong based on affidavits from jurors indicating that they voted for death based on the belief that "the State of Tennessee would never actually execute anyone sentenced to death" and that "a death sentence served as a de facto life in prison without the possibility of parole (LWOP) sentence." In a closely related argument, Petitioner alleges that trial counsel were ineffective for failing to object to the improper argument and for "failing to interview jury members about the State's closing argument prior to litigating the motion for a new trial."

Regardless of whether this issue is framed as one of prosecutorial misconduct or ineffective assistance of counsel, it has been previously determined. "A ground for relief is previously determined if a court of competent jurisdiction has ruled on the merits after a full and fair hearing." T.C.A. § 40-30-106(h). Regardless of whether a petitioner actually does so, "[a] full and fair hearing has occurred where the petitioner is afforded the opportunity to call witnesses and otherwise present evidence[.]" *Id.*; *see also* Tenn. Sup. Ct. R. 28, § 2(E). Petitioner raised this exact claim of prosecutorial misconduct on direct appeal. *See Nichols*, 877 S.W.2d at 732-33. Additionally, Petitioner raised several claims of ineffective assistance of trial counsel during his original post-conviction proceedings. *See Nichols*, 90 S.W.3d at 587-605. Because ineffective assistance of counsel is a single ground for relief that may not be relitigated by presenting additional factual allegations, *see Cone v. State*, 927 S.W.2d 579, 581-82 (Tenn. Crim. App. 1995), the issue cannot be relitigated through a motion to reopen after having been presented in the original post-conviction proceedings. *See Coleman*, 341 S.W.3d at 257-58. Because Petitioner's claim of prosecutorial misconduct during closing argument, as well as the related claim of ineffective assistance of counsel, cannot overcome the hurdle of having been previously determined, consideration of these issues is procedurally barred. T.C.A. § 40-30-106(f).

Acknowledging the post-conviction court's determination that these issues were previously determined, Petitioner argues that due process concerns and the exceptions to the "law of the case" doctrine overcome the Post-Conviction Procedure Act's bar on previously determined issues. While this Court has previously recognized that due process concerns may "overcome the Act's bar on previously determined issues in some instances," *William G. Allen v. State*, No. M2009-02151-CCA-R3-PC, 2011 WL 1601587, at *7 (Tenn. Crim. App. Apr. 26, 2011), *perm. app. denied* (Tenn. Aug. 25, 2011), Petitioner has pointed us to no case where it has successfully been invoked. *See id.* at *9 (concluding that due process did not require relaxation of the bar against previously determined issues). As interpreted in the context of tolling the statute of limitations, due process requires that petitioners "be provided an opportunity for the presentation of claims at a meaningful time and in a meaningful manner" before claims may be terminated for failure to comply with procedural requirements. *See Harris v. State*, 301 S.W.3d 141, 145 (Tenn. 2010). However, by their very definition, previously determined issues have been presented at a "full and fair hearing." *See* T.C.A. § 40-30-106(h); Tenn. Sup. Ct. R. 28, § 2(E). Even if due process may be invoked to overcome the bar on previously determined issues, Petitioner has not alleged how he was prevented from presenting these claims at a meaningful time and in a meaningful manner. *Cf. Whitehead v. State*, 402 S.W.3d 615, 631 (Tenn. 2013) (holding that due process tolling of the statute of limitations requires a showing of "some extraordinary circumstance" that prevented timely filing).

Moreover, the law of the case doctrine prevents the reconsideration of claims that have been decided in a prior appeal of the same case. *See State v. Jefferson*, 31 S.W.3d 558, 560-61 (Tenn. 2000). Although it has been cited in some opinions by this Court to support a post-conviction court's refusal to reconsider previously determined issues, the exceptions to the law of the case doctrine have never been applied in a post-conviction context. *William G. Allen*, 2011 WL 1601587, at *8; *see Jefferson*, 31 S.W.3d at 561 (stating that the limited exceptions to the law of the case doctrine include substantially different evidence, a clearly erroneous resulting in manifest injustice, and a change in the controlling law). Even if the exceptions did apply, Petitioner's claim of substantially different evidence is based on inadmissible juror affidavits about the effect of the prosecutor's argument on their deliberation, which would not justify reconsideration of the issue. *See Hutchison v. State*, 118 S.W.3d 720, 740-41 (Tenn. Crim. App. 2003) (citing Tenn. R. Evid. 606(b)) (holding post-conviction court's exclusion of juror affidavit regarding effect missing evidence would have had on verdict was proper).

Finally, even if Petitioner could overcome the procedural hurdle of these claims having been previously determined, they do not fall under one of the exceptions to either the one-year statute of limitations or the one-petition rule. *See* T.C.A. §§ 40-30-102(b), -117(a). Petitioner's claims of prosecutorial misconduct and ineffective assistance of

counsel are procedurally barred under the Post-Conviction Procedure Act. Petitioner is not entitled to relief on either claim.

III. Canceling the Evidentiary Hearing

At the conclusion of the January 31, 2018 hearing, the post-conviction court reset the hearing to March 14, 2018, for either the entry of the proposed settlement agreement or an evidentiary hearing on the merits of Petitioner's claims. However, one week prior to the rescheduled hearing, the post-conviction court entered its order summarily denying post-conviction relief on all of Petitioner's claims. On appeal, Petitioner argues that the post-conviction court violated his right to due process by failing to provide him with notice and an opportunity to be heard. The State responds that Petitioner had multiple opportunities to be heard and that the Post-Conviction Procedure Act compelled summary dismissal of a petition that failed to raise meritorious claims.

The Post-Conviction Procedure Act details the review process that precedes an evidentiary hearing. First, the post-conviction court considers the petition itself to determine whether it asserts a colorable claim for relief. T.C.A. § 40-30-106(f). A colorable claim is "a claim that, if taken as true, in the light most favorable to the petitioner, would entitle petitioner to relief under the Post-Conviction Procedure Act." Tenn. Sup. Ct. R. 28, § 2(H). If the facts alleged in the petition, taken as true, fail to show that the petitioner is entitled to relief, the petition shall be dismissed. T.C.A. § 40-30-106(f). Additionally, the post-conviction court must determine whether the petition has been timely filed and whether any claims for relief have been waived or previously determined. T.C.A. § 40-30-106(b), (f). If the petition survives this initial review, the post-conviction court may afford an indigent pro se petitioner the opportunity to have counsel appointed and to amend the petition, if necessary. T.C.A. § 40-30-107(b)(1). The State then has an opportunity to file a response. T.C.A. § 40-30-108. In the final stage of the process preceding an evidentiary hearing, the post-conviction court reviews the entire record, including the petition, the State's response, and any other files and records before it. T.C.A. § 40-30-109(a). If, upon reviewing these documents, the post-conviction court determines conclusively that the petitioner is not entitled to relief, the petition shall be dismissed. *Id*. Thus, "the Post-Conviction Procedure Act clearly affords the [post-conviction] court the authority to dismiss a petition without holding an evidentiary hearing, notwithstanding the fact that the petition may have survived earlier dismissal." *Burnett v. State*, 92 S.W.3d 403, 407 (Tenn. 2002); *see also Swanson v. State*, 749 S.W.2d 731, 736 (Tenn. 1988) (holding that when a colorable claim for relief has been presented, a hearing may not be necessary after the petitioner has had the assistance of counsel to amend the petition, by which the court may then fully evaluate the merits of the claim); *Andre Benson v. State*, No. W2016-02346-CCA-R3-PC, 2018 WL 486000, at *3 (Tenn. Crim. App. Jan. 19, 2018) ("A post-conviction court may also

dismiss the petition later in the process but still prior to a hearing . . . on the basis that a petitioner is conclusively not entitled to relief."), *no perm. app. filed*.

In this case, the post-conviction court determined that Petitioner, who was already represented by counsel, raised a colorable claim for relief in his motion to reopen and allowed Petitioner the opportunity to submit an amended petition. At the January 31, 2018 hearing, the post-conviction court indicated its concern that Petitioner had not asserted a meritorious ground for relief and allowed Petitioner the opportunity to submit supplemental briefing. Thereafter, the post-conviction court "reviewed the pleadings of the parties, the record, and applicable law" and determined that Petitioner's claims were "appropriate for disposition without a hearing." As we have already concluded, 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. *See Sowell v. State*, 724 S.W.2d 374, 378 (Tenn. Crim. App. 1986) (affirming post-conviction court's dismissal of petition without a hearing when "[t]he only valid issue raised was a legal question which has been decided adversely to defendant's contention by the case law of this State"). 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. *See Burnett*, 92 S.W.3d at 407; *Swanson*, 749 S.W.2d at 736.

IV. Proposed Settlement Agreement

Petitioner argues that the post-conviction court erred by denying the proposed settlement agreement wherein Petitioner's sentence would be modified from death to life imprisonment. According to Petitioner, "post-conviction courts are empowered to settle a case for less than death without determining a likelihood of prevailing on a specific claim." Petitioner asserts that the post-conviction court abused its discretion and acted arbitrarily and without legal authority in concluding that it was "not appropriate to accept such a proposed agreement under the circumstances of this case where there is no claim for post-conviction relief before this Court which should survive this Court's statutorily required preliminary order." Despite the fact that the District Attorney General was prepared to enter into this settlement agreement and concede relief on the *Johnson* and *Hurst* claims in the post-conviction court, the State argues on appeal that these claims are meritless and that "only the Governor has the authority to unwind a criminal judgment absent a judicial finding that the judgment is infirm." We agree with the State's position on appeal that the post-conviction court lacked jurisdiction to entertain the settlement agreement.

Under the Post-Conviction Procedure Act,

> [i]f the court finds that there was such a denial or infringement of the rights of the prisoner as to render the judgment void or voidable, . . . the court shall vacate and set aside the judgment or order a delayed appeal as provided in this part and shall enter an appropriate order and any supplementary orders that may be necessary and proper.

T.C.A. § 40-30-111(a). Petitioner focuses on the portion of the statute regarding the entry of "an appropriate order" and argues that this language gives the post-conviction court the authority to accept a settlement agreement in a capital case without making any findings as to the merits of the post-conviction claims. Relying heavily upon several trial court orders in other capital post-conviction cases wherein the court accepted the parties' agreement to modify a death sentence, Petitioner argues that there is a consistent practice among trial courts of granting the requested relief without hearing any proof, requiring the State to make any concessions, or making any findings regarding the merits of the underlying post-conviction claims. However, these unappealed trial court orders hold no binding precedential value upon our Court or any other court. *See State v. Candra Ann Frazier*, No. 03C01-9904-CC-00146, 1999 WL 1042322, at *2 (Tenn. Crim. App. Nov. 18, 1999) (noting that "the circuit court's opinion merely constitutes persuasive authority and is not binding, under the theory of stare decisis, upon other judicial circuits").

More importantly, Petitioner's argument overlooks and completely ignores the first clause of the statute: "*If* the court finds that there was such a denial or infringement of the rights of the prisoner as to render the judgment void or voidable . . . ." T.C.A. § 40-30-111(a) (emphasis added). Clearly, the post-conviction court's authority to vacate a judgment, order a delayed appeal, or enter any other "appropriate order" is contingent upon the court's finding that the judgment is void or voidable due to an infringement of the petitioner's constitutional rights. *See Wilson v. State*, 724 S.W.2d 766, 768 (Tenn. Crim. App. 1986) (holding that trial court's grant of delayed appeal was inappropriate where there was no finding of constitutional deprivation on the face of the order). Only upon a finding that either the conviction or sentence is constitutionally infirm can the post-conviction court vacate the judgment and place the parties back into their original positions, whereupon they may negotiate an agreement to settle the case without a new trial or sentencing hearing. *See State v. Boyd*, 51 S.W.3d 206, 211-12 (Tenn. Crim. App. 2000). As this Court has noted, "the post-conviction law is not for the purpose of providing sentence modifications" but for remedying constitutional violations. *Leroy Williams v. State*, No. 03C01-9209-CR-00306, 1993 WL 243869, at *3 (Tenn. Crim. App. July 6, 1993) (citing *State v. Carter*, 669 S.W.2d 707 (Tenn. Crim. App. 1984)).

Moreover, the post-conviction court did not abuse its discretion in refusing to accept the District Attorney General's concession of error on Petitioner's post-conviction claims. *See State v. Hester*, 324 S.W.3d 1, 69 (Tenn. 2010) (holding that a court is not

required to accept the State's concession). Indeed, the post-conviction court acted well within its authority by independently analyzing the issues to determine whether the concession reflected an accurate statement of the law. *See Barron v. State Dep't of Human Servs.*, 184 S.W.3d 219, 223 (Tenn. 2006); *see also State v. Shepherd*, 902 S.W.2d 895, 906 (Tenn. 1995) (independently analyzing the defendant's death sentence after finding "no legal basis in this record for outright modification of the sentence to life," despite the State's concession at oral argument). The Post-Conviction Procedure Act requires the post-conviction court to "state the findings of fact and conclusions of law with regard to each ground" in its final order disposing of the post-conviction petition, regardless of whether it is granting or denying relief. T.C.A. § 40-30-111(b); Tenn. Sup. Ct. R. 28, § 9(A); *see State v. Swanson*, 680 S.W.2d 487, 489 (Tenn. Crim. App. 1984) (noting that this is a mandatory requirement designed to facilitate appellate review of the post-conviction proceedings). The post-conviction court did not act arbitrarily or abuse its discretion in following the statutory requirements of the Post-Conviction Procedure Act.

In the absence of a finding of constitutional violation sufficient to grant post-conviction relief, the post-conviction court is without jurisdiction to modify a final judgment. *See Delwin O'Neal v. State*, No. M2009-00507-CCA-R3-PC, 2010 WL 1644244, at *2 (Tenn. Crim. App. Apr. 23, 2010) (affirming trial court's finding that it lacked jurisdiction over a post-conviction petitioner's request for a reduction of sentence after constitutional claims were abandoned), *perm. app. denied* (Tenn. Sept. 3, 2010). Petitioner's reliance on case law addressing a trial court's authority to accept a plea agreement to resolve pending charges pre-trial is misplaced given that Petitioner's convictions have long since become final. "[O]nce the judgment becomes final in the trial court, the court shall have no jurisdiction or authority to change the sentence in any manner[,]" T.C.A. § 40-35-319(b), except under certain limited circumstances "authorized by statute or rule." *State v. Moore*, 814 S.W.2d 381, 383 (Tenn. Crim. App. 1991); *see, e.g.*, T.C.A. § 40-35-212; Tenn. R. Crim. P. 35, 36, 36.1; *see also Taylor v. State*, 995 S.W.2d 78, 83 (Tenn. 1999) (noting the availability of habeas corpus and post-conviction to collaterally attack a conviction or sentence that has become final). "[J]urisdiction to modify a final judgment cannot be grounded upon waiver or agreement by the parties." *Moore*, 814 S.W.2d at 383 (citing *State v. Hamlin*, 655 S.W.2d 200 (Tenn. Crim. App. 1983)). "It is well-settled that a judgment beyond the jurisdiction of a court is void." *Boyd*, 51 S.W.3d at 210 (citing *State v. Pendergrass*, 937 S.W.2d 834, 837 (Tenn. 1996)); *see also Lonnie Graves v. State*, No. 03C01-9301-CR-00001, 1993 WL 498422, at *1 (Tenn. Crim. App. Dec. 1, 1993) (citing *State v. Bouchard*, 563 S.W.2d 561, 563 (Tenn. Crim. App. 1977)) (holding that "[t]he purported modification of an order that has 'ripened' into a final judgment is void" despite the agreement of the parties). To hold otherwise would effectively allow the trial court to exercise the pardoning and commutation power, which is vested solely in the Governor under Article 3, section 6 of the Tennessee Constitution. *See Workman v. State*, 22 S.W.3d 807, 808

(Tenn. 2000); *State v. Dalton*, 72 S.W. 456, 457 (Tenn. 1903). Thus, the post-conviction court did not err in refusing to accept the proposed settlement agreement and modify a final judgment when it lacked the statutory authority to do so under the Post-Conviction Procedure Act.

V. Cumulative Error

Finally, Petitioner argues that "all claims of error coalesced into a unitary abridgment of [Petitioner's] constitutional rights." "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 Petitioner has not established any error in the post-conviction proceedings, he is not entitled to relief via the cumulative error doctrine.

Conclusion

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

_____

TIMOTHY L. EASTER, JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

HAROLD WAYNE NICHOLS v. STATE OF TENNESSEE

Criminal Court for Hamilton County
No. 205863

No. E2018-00626-SC-R11-PD

ORDER

Upon consideration of the application for permission to appeal of Harold Wayne Nichols and the record before us, the application is denied.

PER CURIAM

No. 16-5665

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re: HAROLD WAYNE NICHOLS,

Movant.

ORDER

Before: BATCHELDER, SUTTON, and COOK, Circuit Judges.

Harold Nichols, a Tennessee death row inmate represented by counsel, has filed an application for leave to file a second petition for a writ of habeas corpus under 28 U.S.C. § 2254. *See* 28 U.S.C. § 2244(b)(3)(A). In his application, Nichols relies upon two recent Supreme Court decisions, *Johnson v. United States*, 135 S. Ct. 2551 (2015), and *Welch v. United States*, 136 S. Ct. 1257 (2016), to argue that the aggravating circumstance underlying his death sentence is unconstitutionally vague. The State of Tennessee has filed a response in opposition to Nichols's application, and Nichols has replied to that response.

Nichols pleaded guilty to first-degree felony murder, aggravated rape, and first-degree burglary. At sentencing, the jury found two aggravating circumstances: (1) the murder occurred during the commission of a felony (felony murder); and (2) Nichols previously was convicted of violent felonies. Based on these circumstances, the jury recommended that Nichols be sentenced to death. The trial court adopted this recommendation and sentenced Nichols accordingly. On direct appeal, the Tennessee Supreme Court concluded that the State's use of felony murder as an aggravating circumstance was unconstitutional, but that the error was harmless. *Tennessee v. Nichols*, 877 S.W.2d 722, 737-39 (Tenn. 1994). The court rejected all other claims and affirmed Nichols's convictions and death sentence. *Id.* at 739-40.

In 2003, Nichols filed a § 2254 petition in federal district court, alleging twenty-one grounds for relief. The court concluded that Nichols's claims were meritless and dismissed the

petition. *Nichols v. Bell*, 440 F. Supp. 2d 730 (E.D. Tenn. 2006). On appeal, this Court affirmed the district court's judgment. *Nichols v. Heidle*, 725 F.3d 516 (6th Cir. 2013).

Before Nichols can file a second § 2254 petition, he must receive authorization for the filing from this Court. 28 U.S.C. § 2244(b)(3)(A); *In re Salem*, 631 F.3d 809, 812 (6th Cir. 2011). To obtain this authorization, Nichols must make a prima facie showing either that: (1) a new rule of constitutional law applies to his case that the Supreme Court made retroactive to cases on collateral review; or (2) a newly discovered factual predicate exists which, if proven, sufficiently establishes that no reasonable fact-finder would have found Nichols guilty of the underlying offense but for constitutional error. 28 U.S.C. §§ 2244(b)(2) and 2244(b)(3)(C).

In support of his application to file a successive habeas petition, Nichols argues that, based on the *Johnson* and *Welch* decisions, the remaining aggravating circumstance supporting his death sentence is unconstitutionally vague. In *Johnson*, the Court reviewed the Armed Career Criminal Act ("ACCA" or "Act"), which provides for a sentence enhancement if the defendant has previously been convicted of three or more violent felonies. The Act defines a violent felony as a crime that either: "(i) has as an element the use, attempted use, or threatened use of physical force against the person of another" or "(ii) is burglary, arson, or extortion, involves use of explosives, or *otherwise involves conduct that presents a serious potential risk of physical injury to another*." 18 U.S.C. § 924(e)(2)(B). In reviewing the Act, the Court examined the italicized section, commonly referred to as the residual clause, and determined that it was unconstitutionally vague because it led to unpredictable and arbitrary applications, thereby violating the Due Process Clause. *Johnson*, 135 S. Ct. at 2557-58. The Court differentiated the abstract nature of determining whether a crime categorically presents "a serious potential risk of physical injury" from the more concrete determination that an "element" of the defendant's crime involved the use of physical force. *Id.* at 2557. The Court specifically noted that its conclusion regarding the unconstitutionality of the residual clause did not extend to other portions of the ACCA, including the Act's remaining definition of a violent felony. *Id.* at 2563. In *Welch*, 136 S. Ct. at 1265, the Supreme Court held that *Johnson* applies retroactively to cases

on collateral review. Further, this Court has concluded that *Johnson* establishes a basis for authorizing the filing of a successive habeas petition to challenge a sentence under the residual clause. *In re Watkins*, 810 F.3d 375, 383-84 (6th Cir. 2015).

In sentencing Nichols to death, the trial court relied on the statutory aggravating circumstance set forth in Tennessee Code Annotated § 39-13-204(i)(2), which provides that the death penalty may be imposed when "the defendant was previously convicted of one or more felonies whose statutory elements involve the use of violence to the person." Nichols argues that this aggravating circumstance uses unconstitutionally vague language similar to that found in the ACCA's residual clause, and thus that he has made a prima facie showing that the new rule announced in *Johnson* and made retroactive in *Welch* entitles him to relief.

The prima facie standard is not difficult to meet. *In re Lott*, 366 F.3d 431, 432 (6th Cir. 2004). But low though the bar may be, Nichols cannot clear it by attempting to use *Johnson* to invalidate the same sort of "elements clause" that *Johnson* itself refused to call into question. If our gatekeeping role is to have any meaning, we cannot permit every successive petitioner who manages to cite a new retroactive rule to proceed to the district court. Because there is no "fair-minded argument" that *Johnson* dictates a result it explicitly disavowed, Nichols's challenge never even gets off the ground. *See In re Embry*, No. 16-5447, 2016 WL 4056056, at *4 (July 29, 2016).

Nichols attempts to distinguish the Tennessee statute from the elements clause by arguing that in practice the Tennessee courts defy the statute's reference to the "statutory elements" of a prior conviction, and instead direct the jury to assess the defendant's actual conduct. This sort of inquiry, Nichols argues, raises due process concerns by forcing the defendant to defend against characterizations of "potentially decades-old conduct." This response fails for two reasons. First, it mischaracterizes the practice of the Tennessee courts: Juries consider only the underlying facts of a prior conviction "if the statutory elements of that felony may be satisfied either with or without proof of violence." *State v. Sims*, 45 S.W.3d 1, 12 (Tenn. 2001). There is no indication that this happened in Nichols's case, and given that his prior convictions were for

"aggravated rape" "by the use of force," we doubt it. *Nichols*, 877 S.W.2d at 726 (Tenn. 1994). Second, even if Tennessee juries did assess the underlying conduct of prior convictions before imposing the death penalty, nothing in *Johnson* suggests that this would be unconstitutional. The Supreme Court's "categorical approach" to predicate offenses is not mandated by the Due Process Clause. *See Mathis v. United States*, 136 S. Ct. 2243 (2016); *Taylor v. United States*, 495 U.S. 575 (1990).

Finally, Nichols indirectly suggests for the first time in a notice of additional citation that he was actually sentenced under an earlier version of § 39-13-204(i)(2) that made no reference to statutory elements, and that the present version only came into force after his trial in 1990. Nichols provides no citations to support this claim. The Tennessee Supreme Court considered the present version of the provision when it reviewed Nichols' sentence in 1994, *see Nichols*, 877 S.W.2d at 736, and it appears that the present provision entered into force in 1989, several months before Nichols's trial. On this belated argument too, Nichols has not made a prima facie showing of merit.

Accordingly, we **DENY** Nichols's application for permission to file a second § 2254 petition.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

JURY VERDICT
JUDGMENT
ORDER ALLOWING 30 DAYS TO PERFECT APPEAL

IN THE CRIMINAL COURT OF HAMILTON COUNTY, TENNESSEE = DIVISION I

MAY 12, 1990

Court met pursuant to adjournment, present and presiding the Honorable DOUGLAS A. MEYER, Judge, etc., when the following proceedings were had, to-wit:

* * * * * * * * * * * * *

175423 State v. Harold Wayne Nichols - Aggravated Rape

175425 State v. Harold Wayne Nichols - First Degree Burglary

The above cases are hereby ordered passed to July 26, 1990, for sentencing hearing.

175504 State v. Harold Wayne Nichols - Murder in First Degree

Again came the Attorney General and the defendant in person with his attorneys, Mr. Hugh Moore and Mrs. Rosemarie Bryan, and the same sworn jury, to-wit: Eudona E. Thornton, Jackie O. Brewington, Ronald A. Shoulders, Emma Kathy Sircy, Charles R. Talley, Patsy R. Shaw, Cherlyn A. Thomason, Roy Clyde Woodard, Cynthia Elizabeth Settle, Vickie Lee Thompson, Walter M. Stephenson, and Nathleene M. Witt, after having been respited on last evening under authority of Tennessee Code Annotated, Section 40-18-116, and the jury reitred to begin their deliberations and in due time were returned into open Court, and upon their oaths say that they fix the punishment for the defendant, Harold Wayne Nichols, at Death by Electrocution with each juror signing said Sentencing Charge given to them by the Court, as required by law.

Upon the verdict of the jury as to sentencing, it is the judgement of the Court that the defendant, Harold Wayne Nichols, be sentenced to Death by Electrocution, and the date of execution set on May 31, 1991 unless stayed by appropriate Court order. Execution will issue against the defendant.

Defendant is allowed 30 days within which to file a Motion for New Trial in this case.

Thereupon, Court adjourned pending further business of the Court.

/s/ Douglas A. Meyer
JUDGE

JUDGMENT 175433

IN THE CRIMINAL /CIRCUIT COURT OF HAMILTON COUNTY, TENNESSEE

CASE #: 175433
JUDICIAL DISTRICT: ELEVEN
JUDICIAL DIVISION: [illegible]

STATE OF TENNESSEE
VS.

DEFENDANT: NICHOLS, HAROLD WAYNE
DATE OF BIRTH: 12/31/[illegible] SEX: M RACE: W
FROM INDICTMENT #

COUNT #:
ATTORNEY FOR THE STATE: [illegible]
COUNSEL FOR DEFENDANT: [illegible]
( ) RETAINED ( ) APPOINTED ( ) PUBLIC DEFENDER

ALIAS:
SSN: [illegible]
WARRANT #

* JUDGMENT *

COMES THE DISTRICT ATTORNEY GENERAL FOR THE STATE AND THE DEFENDANT WITH COUNSEL OF RECORD FOR ENTRY OF JUDGMENT. ON THE [illegible] DAY OF [illegible], 19[illegible], THE DEFENDANT:

(X) PLED GUILTY

IS FOUND:
( ) GUILTY
( ) JURY VERDICT
( ) BENCH TRIAL
( ) NOLO CONTENDERE
( ) NOT GUILTY
( ) NOT GUILTY BY REASON OF INSANITY

INDICTMENT: CLASS (CIRCLE ONE): 1ST (A) B C D E
OFFENSE: AGGRAVATED RAPE

AMENDED CHARGE:
OFFENSE DATE: 1-3-[illegible] COUNTY: HAMILTON
CONVICTION OFFENSE: Aggravated rape

TCA #: 39-2-[illegible]
CONVICTION CLASS (CIRCLE ONE): 1ST (A) B C D E
SENTENCE IMPOSED-DATE [illegible]
(X) FELONY ( ) MISDEMEANOR

AFTER CONSIDERING THE EVIDENCE, THE ENTIRE RECORD, AND ALL FACTORS IN T.C.A. TITLE 40, CHAPTER 35, ALL OF WHICH ARE INCORPORATED BY REFERENCE HEREIN, THE COURT'S FINDINGS AND RULINGS ARE:

( ) THE 1982 [illegible]
( ) DETERMINATE
( ) INDETERMINATE
FROM ___ YRS. TO ___ YRS.
( ) CLASS X 1979 - 1982: 35%
( ) 1ST DEGREE MURDER

( ) SENTENCE REFORM ACT 1982
( ) ESPECIALLY MITIGATED 20% RANGE 1
( ) STANDARD 30% RANGE 1
( ) PERSISTENT 35% RANGE 2
( ) ESPECIALLY AGGRAVATED 35% RANGE 2
( ) ESPECIALLY AGGRAVATED AND PERSISTENT 40% RANGE 2
( ) HABITUAL
( ) 1ST DEGREE MURDER

( ) SENTENCE REFORM ACT 1989
( ) [illegible] 20%
( ) MITIGATED 20%
( ) STANDARD 30% RANGE 1
( ) MULTIPLE 35% RANGE 2
(X) PERSISTENT 45% RANGE 3
( ) CAREER 60%
( ) 1ST DEGREE MURDER

SENTENCED TO: SENTENCE LENGTH:

(X) TDOC — 40 YEARS ___ MONTHS ___ DAYS ___ LIFE
( ) COUNTY JAIL — ___ YEARS ___ MONTHS ___ DAYS ___ HOURS ___ WEEK-ENDS ___ PERIODIC: (______)
___ % MIN. SVC. PRIOR TO PROBATION OR WORK RELEASE — ___ % MIN. SVC. PRIOR TO RELEASE (MISDEMEANOR ONLY)
( ) WORKHOUSE — ___ YEARS ___ MONTHS ___ DAYS ___ HOURS ___ WEEK-ENDS ___ PERIODIC: (______)
___ % MIN. SVC. PRIOR TO PROBATION OR WORK RELEASE — ___ % MIN. SVC. PRIOR TO RELEASE (MISDEMEANOR ONLY)
( ) WORK RELEASE — ___ YEARS ___ MONTHS ___ DAYS ___ HOURS ___ WEEK-ENDS
( ) PROBATION — ___ YEARS ___ MONTHS ___ DAYS EFFECTIVE:
( ) COMMUNITY BASED ALTERNATIVE — ___ YEARS ___ MONTHS ___ DAYS ___ HOURS ___ WEEK-ENDS
SPECIFY:

PRETRIAL JAIL CREDIT PERIOD: FROM 1-2-[illegible] TO DATE FROM ___ TO ___ OR [illegible] OF DAYS ___

COURT ORDERED FEES:
$50.00 [illegible] FEE $___ [illegible] FEE
$96.00 [illegible] TAX $___ [illegible] FEE
$___ SUPERVISION $___ [illegible] FEE
$___ CHILD SUPPORT
$451.00 COURT COSTS
$___ COURT FINES
$___ CIR. IMP. FEE

RESTITUTION:
VICTIM NAME:
ADDRESS:
TOTAL AMOUNT $___ $___ PER MONTH
UNPAID COMMUNITY SERVICE:
___ HOURS, ___ DAYS, ___ WEEKS, ___ MONTHS

(X) THE DEFENDANT HAVING BEEN FOUND GUILTY IS RENDERED INFAMOUS.

TIME: [illegible]
CONCURRENT WITH:
CONSECUTIVE TO: 175432

SPECIAL CONDITIONS:

THOMAS A. MEYER
JUDGE [illegible]

Douglas A. Meyer — JUDGE SIGNATURE (DATE SIGNED) — 1-2-91 DATE OF ENTRY OF JUDGMENT

[signature] ATTORNEY FOR THE STATE/SIGNATURE (OPTIONAL)

DEFENDANT'S ATTORNEY/SIGNATURE (OPTIONAL)

TOTAL P.09

JUDGMENT 180537

IN THE CRIMINAL / CIRCUIT COURT OF HAMILTON COUNTY, TENNESSEE

CASE #: 180537
JUDICIAL DISTRICT: ELEVEN
JUDICIAL DIVISION: 1

COUNT #: ______
ATTORNEY FOR THE STATE: H.C. Bright
COUNSEL FOR DEFENDANT: Hugh Moore
( ) RETAINED (✓) APPOINTED ( ) PUBLIC DEFENDER

STATE OF TENNESSEE
VS.

DEFENDANT: NICHOLS, HAROLD WAYNE
DATE OF BIRTH: 12/31/60 SEX: M RACE: W
FROM INDICTMENT #: ______

ALIAS:
SSN: [illegible]
WARRANT #: ______

* JUDGMENT *

CAME THE DISTRICT ATTORNEY GENERAL FOR THE STATE AND THE DEFENDANT WITH COUNSEL OF RECORD FOR ENTRY OF JUDGMENT. ON THE 21st DAY OF February, 19 90, THE DEFENDANT:

( ) PLED GUILTY

IS FOUND:
(✓) GUILTY ( ) NOT GUILTY
(✓) JURY VERDICT ( ) NOT GUILTY BY REASON OF INSANITY
( ) BENCH TRIAL
( ) NOLO CONTENDERE

INDICTMENT: CLASS (CIRCLE ONE): 1ST (A) B C D E
OFFENSE: AGGRAVATED RAPE

AMENDED CHARGE: AGGRAVATED RAPE
OFFENSE DATE: 12/21/88 COUNTY: HAMILTON
CONVICTION OFFENSE: Agg. Rape
TCA #: [illegible]
CONVICTION CLASS (CIRCLE ONE): 1ST (A) B C D E
SENTENCE IMPOSED DATE: [illegible]/90
(✓) FELONY ( ) MISDEMEANOR

AFTER CONSIDERING THE EVIDENCE, THE ENTIRE RECORD, AND ALL FACTORS IN T.C.A. TITLE 40, CHAPTER 35, ALL OF WHICH ARE INCORPORATED BY REFERENCE HEREIN, THE COURT'S FINDINGS AND RULINGS ARE:

( ) PRE 1982 SENTENCE:
( ) DETERMINATE
( ) INDETERMINATE
FROM ___ YRS. TO ___ YRS.
( ) CLASS X 1979 - 1982: 35%
( ) 1ST DEGREE MURDER

( ) SENTENCE REFORM ACT 1982
( ) ESPECIALLY MITIGATED 20% RANGE 1
( ) STANDARD 30% RANGE 1
( ) PERSISTENT 35% RANGE 2
( ) ESPECIALLY AGGRAVATED 35% RANGE 2
( ) ESPECIALLY AGGRAVATED AND PERSISTENT 40% RANGE 2
( ) HABITUAL
( ) 1ST DEGREE MURDER

( ) SENTENCE REFORM ACT 1989
( ) MITIGATED 20%
( ) MITIGATED 30%
( ) STANDARD 30% RANGE I
( ) MULTIPLE 35% RANGE II
( ) PERSISTENT 45% RANGE III
( ) CAREER 60%
( ) 1ST DEGREE MURDER

SENTENCED TO: SENTENCE LENGTH:
(✓) TDOC 60 YEARS ___ MONTHS ___ DAYS ___ LIFE
( ) COUNTY JAIL ___ YEARS ___ MONTHS ___ DAYS ___ HOURS ___ WEEK-ENDS ___ PERIODIC: (______)
___% MIN. SVC. PRIOR TO PROGRAM OR WORK RELEASE ___% MIN. SVC. PRIOR TO RELEASE (MISDEMEANOR ONLY)
( ) WORKHOUSE ___ YEARS ___ MONTHS ___ DAYS ___ HOURS ___ WEEK-ENDS ___ PERIODIC: (______)
___% MIN. SVC. PRIOR TO PROGRAM OR WORK RELEASE ___% MIN. SVC. PRIOR TO RELEASE (MISDEMEANOR ONLY)
( ) WORK RELEASE ___ YEARS ___ MONTHS ___ DAYS ___ HOURS ___ WEEK-ENDS
( ) PROBATION ___ YEARS ___ MONTHS ___ DAYS EFFECTIVE: ______
( ) COMMUNITY BASED ALTERNATIVE ___ YEARS ___ MONTHS ___ DAYS ___ HOURS ___ WEEK-ENDS
SPECIFY: ______

PRETRIAL JAIL CREDIT PERIOD: FROM 1/6/89 TO 2/24/90 FROM _/_/_ TO _/_/_ OR NUMBER OF DAYS ___

$ 26.00 STATE TAX $ ___ DUI FEE
$ 17.00 COUNTY TAX $ ___ JAIL FEES
$ 1.00 LIBRARY TAX $ ___ VICTIM FEE
$ ___ COURT COST
$ ___ FINES
$ ___ CLK INS FEE $ ___ REV. COST
$ 26.50 CIC FEE
___ INDIGENT CREDIT ON COSTS

RESTITUTION:
VICTIM NAME: ______
ADDRESS: ______
TOTAL AMOUNT $ ______ $ ______ PER MONTH
______ UNPAID COMMUNITY SERVICE:
(___ HOURS, ___ DAYS, ___ WEEKS, ___ MONTHS)

(✓) THE DEFENDANT HAVING BEEN FOUND GUILTY IS RENDERED INFAMOUS.

TDOC #: ______
CONCURRENT WITH: #180536
CONSECUTIVE TO:

SPECIAL CONDITIONS:

DOUGLAS A. MEYER
JUDGE NAME

[signature] Douglas A. Meyer
JUDGE SIGNATURE (DATE SIGNED)

_/_/90
DATE OF ENTRY OF JUDGMENT

[signature]
ATTORNEY FOR THE STATE/SIGNATURE (OPTIONAL)

______
DEFENDANT'S ATTORNEY/SIGNATURE (OPTIONAL)

432

... PENDING APPEAL..

JUDGMENT 178087

IN THE CRIMINAL / CIRCUIT COURT OF HAMILTON COUNTY, TENNESSEE

CASE #: 178087 COUNT #:

JUDICIAL DISTRICT: ELEVEN ATTORNEY FOR THE STATE: V.C. Bright

JUDICIAL DIVISION: 3 COUNSEL FOR DEFENDANT: MOORE, HUGH
(__) RETAINED (X) APPOINTED (__) PUBLIC DEFENDER

STATE OF TENNESSEE
vs.

DEFENDANT: NICHOLS, HAROLD WAYNE ALIAS:
DATE OF BIRTH: 12/31/60 SEX: M RACE: W SSN: 409440049
FROM INDICTMENT #: WARRANT #:

* JUDGMENT *

COMES THE DISTRICT ATTORNEY GENERAL FOR THE STATE AND THE DEFENDANT WITH COUNSEL OF RECORD FOR ENTRY OF JUDGMENT, ON THE 11th DAY OF January, 19 90 THE DEFENDANT:

(__) PLED GUILTY

IN FORM:
(X) GUILTY
(X) JURY VERDICT
(__) BENCH TRIAL
(__) NOLO CONTENDERE

(__) NOT GUILTY
(__) NOT GUILTY BY REASON OF INSANITY

INDICTMENT: CLASS (CIRCLE ONE): 1ST (A) B C D E
OFFENSE: AGGRAVATED RAPE
AMENDED CHARGE:
OFFENSE DATE: 1-1-89 COUNTY: HAMILTON
CONVICTION OFFENSE: Aggr. Rape
TCA §: 39020601
CONVICTION CLASS (CIRCLE ONE): 1ST (A) B C D E
SENTENCE IMPOSED-DATE: 1/11/90
(X) PRIMARY (__) MISDEMEANOR

AFTER CONSIDERING THE EVIDENCE, THE ENTIRE RECORD, AND ALL FACTORS IN T.C.A. TITLE 40, CHAPTER 35, ALL OF WHICH ARE INCORPORATED BY REFERENCE HEREIN, THE COURT'S FINDINGS AND RULINGS ARE:

(__) PRE 1982 SENTENCE:
(__) DETERMINATE
(__) INDETERMINATE
FROM ___ YRS. TO ___ YRS.
(__) CLASS X 1979 - 1982: 30%
(__) 1ST DEGREE MURDER

(__) SENTENCE REFORM ACT 1982
(__) ESPECIALLY AGGRAVATED 35% RANGE 1
(__) STANDARD 30% RANGE 2
(__) PREPONDERANCE 25% RANGE 2
(__) ESPECIALLY AGGRAVATED AND PERSISTENT 40% RANGE 2
(__) HABITUAL
(__) 1ST DEGREE MURDER

(X) SENTENCE REFORM ACT 1989
(__) MITIGATED 20%
(__) MITIGATED 30%
(__) STANDARD 30% RANGE 1
(__) MINIMUM 25% RANGE 2
(__) PREPONDERANCE 60% RANGE 3
(X) CAREER 60%
(__) 1ST DEGREE MURDER

SENTENCED TO:
(X) TDOC
(__) COUNTY JAIL
(__) WORKHOUSE
(__) WORK RELEASE
(__) PROBATION
(__) COMMUNITY BASED ALTERNATIVE
SPECIFY:

SENTENCE LENGTH:
60 YEARS ___ MONTHS ___ DAYS ___ LIFE
___ YEARS ___ MONTHS ___ DAYS ___ HOURS ___ WEEK-ENDS ___ PERIODIC: (_____)
___ % MIN. SVC. PRIOR TO PROGRAM OR WORK RELEASE TO RELEASE (INTERROGATION ONLY)
___ YEARS ___ MONTHS ___ DAYS ___ HOURS ___ WEEK-ENDS ___ PERIODIC: (_____)
___ % MIN. SVC. PRIOR TO PROGRAM OR WORK RELEASE TO RELEASE (INTERROGATION ONLY)
___ YEARS ___ MONTHS ___ DAYS ___ HOURS ___ WEEK-ENDS
___ YEARS ___ MONTHS ___ DAYS EFFECTIVE: _____
___ YEARS ___ MONTHS ___ DAYS ___ HOURS ___ WEEK-ENDS

PRETRIAL JAIL CREDIT PERIOD FROM 2/22/87 TO 12/11/89 FROM __/__/__ TO __/__/__ OR NUMBER OF DAYS ___

$ 76.20 STATE TAX $ ___ DOI FEE
$ 1500 COUNTY TAX $ ___ JAIL FEES
$ 1.00 LITIGANT TAX $ ___ VICTIM-WIT.
$ ___ COURT COSTS
$ ___ FINES
$ ___ CLE SUB FEE $ ___ REV. COST
$ 37.50 CLE FEE
___ JUDICIAL CREDIT G H COSTS

RESTITUTION:
VICTIM NAME
AMOUNT
TOTAL AMOUNT $ ___ $ ___ PER MONTH
___ UNPAID COMMUNITY SERVICE:
$ ___ HOURS, ___ DAYS, ___ WEEKS, ___ MONTHS)

(X) THE DEFENDANT HAVING BEEN FOUND GUILTY IS ORDERED IMPRISONED.

TDOC #: ___

CONCURRENT WITH: # 190536

CONSECUTIVE TO: # 175492

SPECIAL CONDITIONS:

Douglas A. Meyer
JUDGE NAME

Douglas A. Meyer
JUDGE SIGNATURE (DATE SIGNED)

1/11/90
DATE OF ENTRY OF JUDGMENT

ATTORNEY FOR THE STATE/SIGNATURE (OPTIONAL)

DEFENDANT'S ATTORNEY/SIGNATURE (OPTIONAL)

429

JUDGMENT 175438

IN THE CRIMINAL / CIRCUIT COURT OF HAMILTON COUNTY, TENNESSEE

CASE #: 175438 COUNT #: _____

JUDICIAL DISTRICT: ELEVEN ATTORNEY FOR THE STATE: H.C. Knight

JUDICIAL DIVISION: 1 COUNSEL FOR DEFENDANT: (X) RETAINED ( ) APPOINTED ( ) PUBLIC DEFENDER

STATE OF TENNESSEE
VS.

DEFENDANT: NICHOLS, HAROLD WAYNE ALIAS:
DATE OF BIRTH: 12/31/60 SEX: M RACE: W SSN: 409010049
FROM INDICTMENT #: _____ PAROLE #: _____

* JUDGMENT *

COMES THE DISTRICT ATTORNEY GENERAL FOR THE STATE AND THE DEFENDANT WITH COUNSEL OF RECORD FOR ENTRY OF JUDGMENT. ON THE 11th DAY OF January, 19 90, THE DEFENDANT:

( ) PLED GUILTY

IN FOUND:
(X) GUILTY ( ) NOT GUILTY
(X) JURY VERDICT ( ) NOT GUILTY BY REASON OF INSANITY
( ) BENCH TRIAL
( ) HOLD CONFERENCE

INDICTMENT: CLASS (CIRCLE ONE): 1ST (A) B C D E
OFFENSE: AGGRAVATED RAPE

AMENDED CHARGE:
OFFENSE DATE: 1/13/89 COUNTY: HAMILTON
CONVICTION OFFENSE: Aggravated Rape
TCA #: 39-2-603
CONVICTION CLASS (CIRCLE ONE): 1ST (A) B C D E
SENTENCE IMPOSED DATE: 12/14/90
(X) FELONY ( ) MISDEMEANOR

AFTER CONSIDERING THE EVIDENCE, THE ENTIRE RECORD, AND ALL FACTORS IN T.C.A., TITLE 40, CHAPTER 35, ALL OF WHICH ARE INCORPORATED BY REFERENCE HEREIN, THE COURT'S FINDINGS AND RULINGS ARE:

( ) PRE 1982 SENTENCE:
( ) DETERMINATE
( ) INDETERMINATE
FROM ___ YRS. TO ___ YRS.
( ) CLASS X 1979 + 1982: 35%
( ) 1ST DEGREE MURDER

( ) SENTENCE REFORM ACT 1982
( ) ESPECIALLY MITIGATED 30% RANGE 1
( ) STANDARD 30% RANGE 1
( ) PERSISTENT 35% RANGE 2
( ) ESPECIALLY AGGRAVATED 35% RANGE 2
( ) ESPECIALLY AGGRAVATED AND PERSISTENT 60% RANGE 2
( ) MANDATORY
( ) 1ST DEGREE MURDER

(X) SENTENCE REFORM ACT 1989
( ) MITIGATED 25%
( ) MITIGATED 30%
( ) STANDARD 30% RANGE 1
( ) PRESUMPTIVE 35% RANGE 2
( ) PERSISTENT 45% RANGE 3
(X) CHANGED 60%
( ) 1ST DEGREE MURDER

SENTENCED TO: SENTENCE LENGTH:

(X) TDOC 60 YEARS ___ MONTHS ___ DAYS ___ LIFE
( ) COUNTY JAIL ___ YEARS ___ MONTHS ___ DAYS ___ HOURS ___ WEEK-ENDS ___ PERIODIC: (_____)
___% MIN. SVC. PRIOR TO PROGRAM OR WORK RELEASE ___% MIN. SVC. PRIOR TO RELEASE (MISDEMEANOR ONLY)
( ) WORKHOUSE ___ YEARS ___ MONTHS ___ DAYS ___ HOURS ___ WEEK-ENDS ___ PERIODIC: (_____)
___% MIN. SVC. PRIOR TO PROGRAM OR WORK RELEASE ___% MIN. SVC. PRIOR TO RELEASE (MISDEMEANOR ONLY)
( ) WORK RELEASE ___ YEARS ___ MONTHS ___ DAYS ___ HOURS ___ WEEK-ENDS
( ) PROBATION ___ YEARS ___ MONTHS ___ DAYS EFFECTIVE: _____
( ) COMMUNITY BASED ALTERNATIVE ___ YEARS ___ MONTHS ___ DAYS ___ HOURS ___ WEEK-ENDS
SPECIFY: _____

PRETRIAL JAIL CREDIT PERIOD FROM 2/2/89 TO 2/28/90 FROM _/_/_ TO _/_/_ OR NUMBER OF DAYS ___

$ 76.00 STATE TAX $ _____ DUI FEE
$ 17.00 COURT TAX $ _____ JAIL FEES
$ 1.00 LIBRARY TAX $ _____ VICTIM FEE
$ _____ COURT COST
$ _____ FINES
$ _____ CLK SVC FEE $ _____ REV. COST
$ 24.50 SVC FEE
___ INDIGENT CREDIT O R COSTS

INSTITUTION:
VICTIM NAME: _____
ADDRESS: _____
TOTAL AMOUNT $ _____ $ _____ PER MONTH
_____ UNPAID COMMUNITY SERVICE:
( ) HOURS, ___ DAYS, ___ WEEKS, ___ MONTHS

(X) THE DEFENDANT HAVING BEEN FOUND GUILTY IS SENTENCED TO ABOVE.

TDOC #: _____ CONCURRENT WITH: #180536 CONSECUTIVE TO:

SPECIAL CONDITIONS:

DOUGLAS A. MEYER
JUDGE NAME

Douglas A. Meyer
JUDGE SIGNATURE (DATE SIGNED)

12-14-90
DATE OF ENTRY OF JUDGMENT

ATTORNEY FOR THE STATE/SIGNATURE (OPTIONAL)

DEFENDANT'S ATTORNEY/SIGNATURE (OPTIONAL)

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JUDGMENT 175495

IN THE CRIMINAL/CIRCUIT COURT OF HAMILTON COUNTY, TENNESSEE

CASE #: 175495
JUDICIAL DISTRICT: ELEVEN
JUDICIAL DIVISION: I

COUNT #: ____
ATTORNEY FOR THE STATE: H. C. Bright
COUNSEL FOR DEFENDANT: MOORE, HUGH
(__) RETAINED (✓) APPOINTED (__) PUBLIC DEFENDER

STATE OF TENNESSEE
VS.

DEFENDANT: NICHOLS, HAROLD WAYNE
DATE OF BIRTH: 12/11/60 SEX: M RACE: W
FROM INDICTMENT #: ____

ALIAS:
SSN: 409040047
WARRANT #: ____

* JUDGMENT *

COMES THE DISTRICT ATTORNEY GENERAL FOR THE STATE AND THE DEFENDANT WITH COUNSEL OF RECORD FOR ENTRY OF JUDGMENT. ON THE 13th DAY OF September, 1989, THE DEFENDANT:

(✓) PLED GUILTY

IS FOUND:
(✓) GUILTY
(__) JURY VERDICT
(__) BENCH TRIAL
(__) NOLO CONTENDERE
(__) NOT GUILTY
(__) NOT GUILTY BY REASON OF INSANITY

INDICTMENT: CLASS (CIRCLE ONE): 1ST (A) B C D E
OFFENSE: AGGRAVATED RAPE

AMENDED CHARGE:
OFFENSE DATE: 12/27/88 COUNTY: HAMILTON
CONVICTION OFFENSE: Aggravated Rape
TCA #: 39020601
CONVICTION CLASS (CIRCLE ONE): 1ST (A) B C D E
SENTENCE IMPOSED-DATE 12/14/90
(✓) FELONY (__) MISDEMEANOR

AFTER CONSIDERING THE EVIDENCE, THE ENTIRE RECORD, AND ALL FACTORS IN T.C.A. TITLE 40, CHAPTER 35, ALL OF WHICH ARE INCORPORATED BY REFERENCE HEREIN, THE COURT'S FINDINGS AND RULINGS ARE:

(__) PRE-1982 SENTENCE:
(__) DETERMINATE
(__) INDETERMINATE
FROM ___ YRS. TO ___ YRS.
(__) CLASS X 1979 - 1982: 35%
(__) 1ST DEGREE MURDER

(__) SENTENCE REFORM ACT 1982
(__) ESPECIALLY MITIGATED 20% RANGE 1
(__) STANDARD 30% RANGE 1
(__) PERSISTENT 35% RANGE 2
(__) ESPECIALLY AGGRAVATED 35% RANGE 2
(__) ESPECIALLY AGGRAVATED AND PERSISTENT 40% RANGE 2
(__) HABITUAL
(__) 1ST DEGREE MURDER

(✓) SENTENCE REFORM ACT 1989
(__) MITIGATED 20%
(__) MITIGATED 30%
(__) STANDARD 30% RANGE 1
(✓) MULTIPLE 35% RANGE 2
(__) PERSISTENT 45% RANGE 3
(__) CAREER 60%
(__) 1ST DEGREE MURDER

SENTENCED TO:
(✓) TDOC
(__) COUNTY JAIL
___% MIN. SVC. PRIOR TO PROGRAM OR WORK RELEASE
(__) WORKHOUSE
___% MIN. SVC. PRIOR TO PROGRAM OR WORK RELEASE
(__) WORK RELEASE
(__) PROBATION
(__) COMMUNITY BASED ALTERNATIVE
SPECIFY: ____

SENTENCE LENGTH:
16 YEARS ___ MONTHS ___ DAYS ___ LIFE
___ YEARS ___ MONTHS ___ DAYS ___ HOURS ___ WEEK-ENDS ___ PERIODIC: (____)
___% MIN. SVC. PRIOR TO RELEASE (MISDEMEANOR ONLY)
___ YEARS ___ MONTHS ___ DAYS ___ HOURS ___ WEEK-ENDS ___ PERIODIC: (____)
___% MIN. SVC. PRIOR TO RELEASE (MISDEMEANOR ONLY)
___ YEARS ___ MONTHS ___ DAYS ___ HOURS ___ WEEK-ENDS
___ YEARS ___ MONTHS ___ DAYS EFFECTIVE: ____
___ YEARS ___ MONTHS ___ DAYS ___ HOURS ___ WEEK-ENDS

PRETRIAL JAIL CREDIT PERIOD: FROM 1/6/89 to 12/14/90 FROM _/_/_ TO _/_/_ OR NUMBER OF DAYS ___

$26.00 STATE TAX
$19.00 COUNTY TAX
$1.00 LIBRARY TAX
$____ COURT COST
$____ FINES
$____ CLK IDR FEE
$26.50 CIC FEE
___ INDIGENT CREDIT O P COSTS
$____ DUI FEE
$____ JAIL FEES
$____ VICTIM FEE
$____ REV. COST

RESTITUTION:
VICTIM NAME ____
ADDRESS ____
TOTAL AMOUNT $____ $____ PER MONTH
UNPAID COMMUNITY SERVICE:
(___ HOURS, ___ DAYS, ___ WEEKS, ___ MONTHS)

(✓) THE DEFENDANT HAVING BEEN FOUND GUILTY IS RENDERED INFAMOUS.

TDOC # ____
CONCURRENT WITH: #170536
CONSECUTIVE TO: #175475;

SPECIAL CONDITIONS:

DOUGLAS A. MEYER
JUDGE NAME

Douglas A. Meyer
JUDGE SIGNATURE (DATE SIGNED)

12/14/90
DATE OF ENTRY OF JUDGMENT

ATTORNEY FOR THE STATE/SIGNATURE (OPTIONAL)

DEFENDANT'S ATTORNEY/SIGNATURE (OPTIONAL)

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... ... PENDING APPEAL

XXIV . NO. 47

IN THE CRIMINAL COURT OF TENNESSEE AT CHATTANOOGA

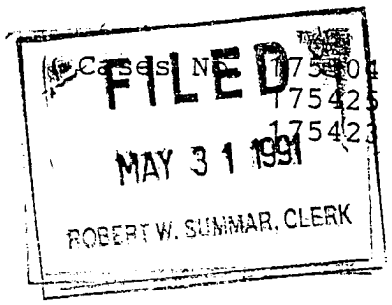
THE ELEVENTH JUDICIAL DISTRICT

STATE OF TENNESSEE,
Appellee,

VS.

HAROLD WAYNE NICHOLS,
Appellant.

Cases Nos. 175404
175425
175423



TRANSCRIPT OF THE EVIDENCE

Volume Four of Five Volumes

THE HONORABLE DOUGLAS A. MEYER, PRESIDING JUDGE

APPEARANCES

FOR THE APPELLEE:

Mr. Stephen Bevil
Assistant District Attorney General
Hamilton County Justice Building
Chattanooga, TN 37402

FOR THE APPELLANT:

Mr. Hugh J. Moore, Jr.
Ms. Rosemarie Bryan
Attorneys-at-Law
1100 American National Bank Building
Chattanooga, TN 37402

entire course of this sentencing phase. The jury are the sole judges of the facts, and of the law as it applies to the facts in the case. In making up your verdict, you are to consider the law in connection with the facts; but the Court is the proper source from which you are to get the law. In other words, you are the judges of the law as well as the facts under the direction of the Court.

The burden of proof is upon the State to prove any statutory aggravating circumstance or circumstances beyond a reasonable doubt and to a moral certainty.

Reasonable doubt is that doubt engendered by an investigation of all the proof in the case and an inability, after such investigation, to let the mind rest easily upon the certainty of your verdict. Reasonable doubt does not mean a doubt that may arise from possibility. Absolute certainty is not demanded by the law, but moral certainty is required and this certainty is required as to every proposition of proof requisite to constitute the verdict. The law makes you, the jury, the sole and exclusive judges of the credibility of the witnesses and the weight to be given to the evidence.

Tennessee Code Annotated 39-2-203(i) provides that no death penalty shall be imposed by a jury but upon a unanimous finding of the existence of one or more of the statutory aggravating circumstances, which shall be limited

to the following:

(1) 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.

(2) The murder was committed while defendant was engaged in committing, or was attempting to commit, or was fleeing after committing or attempting to commit rape.

Members of the jury, the Court has previously read to you the aggravating circumstances which the law requires you to consider if you are to find beyond a reasonable doubt that the evidence was established. You shall not take account of any other facts or circumstances as the bases for deciding whether the death penalty would be appropriate punishment in this case.

Tennessee Code Annotated 39-13-203(j), provides that in arriving at the punishment, the jury shall consider as heretofore indicated, any mitigating circumstances which shall include, but not be limited to, the following:

(1) The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(2) The defendant acted under extreme duress.

(3) The capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was substantially impaired as a result of mental disease or defect which was insufficient to establish a defense to the crime but which substantially affected his judgment.

(4) Any other mitigating factor which is raised by the evidence produced by either the prosecution or defense.

If you unanimously determine that at least one or more statutory aggravating circumstances have been proved by the State, beyond a reasonable doubt, and said circumstance or circumstances outweigh any mitigating circumstance or circumstances, the sentence shall be death. The jury shall state in writing the statutory aggravating circumstance or statutory aggravating circumstances so found, and signify in writing that the statutory aggravating circumstance or circumstances outweigh the mitigating circumstance or circumstances so found.

You will write your findings and verdict upon the enclosed form attached hereto and made a part of this charge. Your verdict should be as follows:

(1) We, the jury, unanimously find the following listed statutory aggravating circumstance or circumstances.

(2) We, the jury, unanimously find that the statutory aggravating circumstance or circumstances so listed above outweigh the mitigating circumstance or circumstances.

(3) We, the jury, unanimously find that the punishment shall be death.

The verdict must be unanimous and each juror must sign his or her name beneath the verdict.

If you unanimously determine that no statutory aggravating circumstances has been proved by the State beyond a reasonable doubt; or if the jury unanimously determines that a statutory aggravating circumstance or circumstances have been proved by the State beyond a reasonable doubt but that said statutory aggravating circumstance or circumstances did not outweigh one or more mitigating circumstances, the sentence shall be life imprisonment. You will write your verdict upon the enclosed form attached hereto and made a part of this charge.

The verdict should be as follows:

We, the jury, unanimously find that the punishment shall be life imprisonment.

The verdict must be unanimous and signed by each juror.

Are there any requests?

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

STATE OF TENNESSEE v. HAROLD WAYNE NICHOLS

Criminal Court for Hamilton County
No. 175504

No. E1998-00562-SC-R11-PD

ORDER

On September 20, 2019, the State filed a motion to set an execution date for Harold Wayne Nichols stating that Mr. Nichols had completed the standard three-tier appeals process and requesting that an execution date be set pursuant to Tennessee Supreme Court Rule 12(4)(A). On December 30, 2019, Mr. Nichols filed a response opposing the State's motion because of his Rule 11 application in this Court regarding his motion to reopen post-conviction proceedings. *See Nichols v. State*, No. E2018-00626-SC-R11-PD. Mr. Nichols also requested that this Court issue a certificate of commutation to the governor under Tennessee Code Annotated section 40-27-106 because of certain enumerated extenuating circumstances.

Because the Court has now denied Mr. Nichols' Rule 11 application, it provides no basis for denying the motion to set an execution date. Furthermore, after careful review of the request for a certificate of commutation and the supporting documentation, the Court concludes that under the principles announced in *Workman v. State*, 22 S.W.3d 807 (Tenn. 2000), Mr. Nichols has presented no extenuating circumstances warranting issuance of a certificate of commutation. It is therefore ORDERED that the request for a certificate of commutation is DENIED.

Upon due consideration, the State's motion to set an execution date is GRANTED. Accordingly, under the provisions of Rule 12(4)(E), it is hereby ORDERED, ADJUDGED and DECREED by this Court that the Warden of the Riverbend Maximum Security Institution, or his designee, shall execute the sentence of death as provided by law on the 4th day of August, 2020, unless otherwise ordered by this Court or other appropriate authority. No later than July 20, 2020, the Warden or his designee shall notify Mr. Nichols of the method that the Tennessee Department of Correction (TDOC) will use to carry out the execution and of any decision by the Commissioner of TDOC to rely upon the Capital Punishment Enforcement Act.

Counsel for Harold Wayne Nichols shall provide a copy of any order staying execution of this order to the Office of the Clerk of the Appellate Court in Nashville. The Clerk shall expeditiously furnish a copy of any order of stay to the Warden of the Riverbend Maximum Security Institution.

PER CURIAM

United States Court of Appeals for the Sixth Circuit

MOTION UNDER 28 U.S.C. § 2244 FOR LEAVE TO FILE A SECOND OR SUCCESSIVE HABEAS CORPUS PETITION UNDER 28 U.S.C. §2254 BY A PERSON IN STATE CUSTODY

Case Number (to be provided by the court): _____

Name: Harold Wayne Nichols

Prisoner Number: 146457

Place of Confinement: Riverbend Maximum Security Institution

Instructions

(1) **Purpose.** Use the attached form to file a motion under 28 U.S.C. § 2244 for an order authorizing the district court to consider a second or successive petition under 28 U.S.C. § 2254.*

* If the district court transferred your petition or motion to this court and you do not feel that you should be required to obtain prior authorization, you must still complete this form. You may, however, attach an additional statement explaining to the court why you oppose the transfer.

(2) **Form.** You must answer all questions completely and concisely in the proper space on the form. Attach additional pages if necessary to list all of your claims and the facts upon which you rely to support those claims. Your failure to provide complete answers may result in the court of appeals denying your motion for authorization.

(3) **Standard of Review.** In accordance with the Antiterrorism and Effective Death Penalty Act of 1996, as codified at 28 U.S.C. § 2244(b), before authorization to file a second or successive petition can be granted by the United States Court of Appeals, the movant must make a prima facie showing that he or she satisfies either of the following conditions found in 28 U.S.C. § 2244(b)(2):

(A) The claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the United States Supreme Court, that was previously unavailable; **or**

(B)(i) The factual predicate for the claim could not have been discovered previously through the exercise of due diligence; **and**

(ii) The facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.

Pursuant to 28 U.S.C. § 2244(b)(1), the court will not consider claims that were presented in a prior 28 U.S.C. § 2254 petition.

(4) **Attestation.** You must sign the motion at the end of page 9. Failure to sign the motion for authorization may result in the court of appeals denying your motion.

(5) **Copies.** If they are reasonably available, you must file with your motion the magistrate judge's report and recommendation and the district court's opinion from your prior 28 U.S.C. § 2254 proceedings.

(6) **No Filing Fee.** There is no fee for filing a motion under 28 U.S.C. § 2244 for an order authorizing the district court to consider a second or successive petition under 28 U.S.C. § 2254.

(7) **Filing.** When this motion for authorization is fully completed, **mail the original (with all documents attached) to the below address**. The court of appeals will serve your motion and attachments on the appropriate state Attorney General using the electronic case filing (ECF) system.

Sixth Circuit Court of Appeals
Clerk's Office
Room 540, Potter Stewart U.S. Courthouse
100 E. Fifth Street
Cincinnati, OH 45202

MOTION UNDER 28 U.S.C. § 2244 FOR LEAVE TO FILE A SECOND OR SUCCESSIVE HABEAS CORPUS PETITION UNDER 28 U.S.C. § 2254 BY A PERSON IN STATE CUSTODY

A. STATE COURT PROCEEDINGS

1. (a) Name and location of the court that entered the judgment of conviction under attack:

Eleventh Judicial District Criminal Court,

Chattanooga, Hamilton County, Tennessee

(b) Case number: 175504 / 180573

2. Date of judgment of conviction: May 9, 1990

3. Length of sentence: Death Sentence

4. Offense or offenses for which you were convicted:

Murder in First Degree

5. Did you appeal the conviction and sentence? **YES** ☑ **NO** ☐

6. If you appealed, give the name of court, the result, and the date of the result:

Tennessee Supreme Court, case no. 03S01-9105-CR-00047

Death sentence affirmed, May 2, 1994

B. PRIOR FEDERAL HABEAS CORPUS PROCEEDINGS

7. Have you previously filed a habeas corpus petition or other application for collateral relief **in any federal court** related to this conviction and sentence?

YES ☑ **NO** ☐ If "yes," how many? 1

If more than one, attach a separate page providing the information required in items 7(a) through 7(g) for the additional petitions, applications, or motions.

As to the **first** federal petition, give the following information.

(a) Name of court: USDC Eastern District, Chattanooga, TN

(b) Case number: 1:02-cv-0330

(c) Nature of proceeding: 2254 seeking relief from his unconstitutional convictions & death sentence

(d) Claims raised (list **all** claims, using extra pages if necessary):

See attached sheet

(e) Result and date of result: Denied on the merits & for procedural default

July 25, 2006

(f) Did you appeal? **YES** ☑ **NO** ☐

(g) If you appealed, give the result and the date of the result:

Affirmed the district court's denial; July 25, 2013

C. PROPOSED CLAIMS IN CURRENT MOTION FOR AUTHORIZATION

8. State concisely the claim (or claims) that you **now** wish to raise. Summarize briefly the facts supporting each ground.

Claim One: The prior violent felony conviction aggravating circumstance is unconstitutionally vague because the statutory language does not give adequate notice as to which prior convictions may increase punishment and the determination of whether a prior conviction qualifies for the aggravating circumstance is based on an after the fact assessment of the underlying conduct.

See second petition for writ of habeas corpus.

Supporting **FACTS** (tell your story briefly without citing cases or law):

Nichols' new claim arose when the United States Supreme Court recognized a new constitutional right, applicable to cases on collateral review. The state court found Nichols' new claim colorable and reopened his post-conviction case. The state court decided Nichols' claim on a federal law basis and the decision is contrary to or an unreasonable application of federal law. See second petition for writ of habeas corpus.

Was this claim raised in a prior federal petition, application, or motion?

YES ☐ **NO** ☑

Does this claim rely on a "new rule of constitutional law"? **YES** ☑ **NO** ☐

If "yes," state the new rule of law (give case name and citation):

Johnson v. U.S., 135 S. Ct. 2551 (2015)

Does this claim rely on newly discovered evidence? **YES** ☐ **NO** ☑

If "yes," briefly state the new evidence and why it was not previously available:

Claim Two: _____

Supporting **FACTS** (tell your story briefly without citing cases or law):

Was this claim raised in a prior federal petition, application, or motion?

YES ☐ **NO** ☐

Does this claim rely on a "new rule of constitutional law"?

YES ☐ **NO** ☐

If "yes," state the new rule of law (give case name and citation):

Does this claim rely on newly discovered evidence? **YES** ☐ **NO** ☐

If "yes," briefly state the new evidence and why it was not previously available:

Claim Three:

Supporting **FACTS** (tell your story briefly without citing cases or law):

Was this claim raised in a prior federal petition, application, or motion?

YES ☐ **NO** ☐

Does this claim rely on a "new rule of constitutional law"? **YES** ☐ **NO** ☐

If "yes," state the new rule of law (give case name and citation):

Does this claim rely on newly discovered evidence? **YES** ☐ **NO** ☐

If "yes," briefly state the new evidence and why it was not previously available:

Additional claims may be asserted on additional pages if necessary.

9. Do you have any motion or appeal now pending in any federal court as to the judgment now under attack?

YES ☐ NO ☑

If "yes," name of court and nature of proceeding: _____

_____

_____

_____

Case number: _____

Wherefore, movant asks the United States Court of Appeals for the Sixth Circuit to grant an order authorizing the district court to consider the movant's second or successive petition for a writ of habeas corpus under 28 U.S.C. § 2254. I declare under penalty of perjury that my answers to all the questions in this motion for authorization are true and correct.

Executed on 12-18-19
(Date)

Harold W Nichols
Movant's Signature

Question # 7(d)

Harold Wayne Nichols' Claims
Presented in the Federal District Court

1. Ineffective Assistance of Counsel at the guilt and penalty phases;
2. Cumulative errors by trial counsel;
3. The trial court erred when it allowed the jury to sentence Mr. Nichols' to death based on non-statutory aggravators;
4. The trial court erred when it did not limit the evidence during the penalty phase after Mr. Nichols pleaded guilty;
5. The trial court erred when it turned over the expert's notes and memos to the State;
6. Prosecutorial misconduct;
7. Change of venue;
8. *Middlebrooks* claim;
9. Unconstitutional and statutorily inadequate jury instructions;
10. Trial court erred when it allowed the admission of Nichols' videotape confession;
11. Trial court erred when it allowed the scheduling of the trials out of chronological order in order to provide the prosecution with additional aggravating factors;
12. Trial court erred when Nichols' 1984 convictions were admitted into evidence;
13. Improper polling of the jurors;
14. Tennessee death penalty statute violates the US Constitution;
15. Trial court erred when it allowed the prosecution to use an indictment that had been dismissed by the State as an aggravating factor;
16. Trial court erred when it allowed the prosecution to use convictions that were not final as aggravating circumstances;
17. Trial court erred when it refused to consider newly discovered evidence brought to the Court's attention at the motion for new trial;
18. Prosecution presented arguments minimizing the jury's role and diminishing its collective sense of responsibility, thus violating US Supreme Court precedent;
19. Cumulative errors

No._____

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE HAROLD WAYNE NICHOLS,

Movant.

APPLICATION FOR LEAVE TO FILE A SECOND OR SUCCESSIVE HABEAS PETITION

Dana C. Hansen Chavis
FEDERAL DEFENDER SERVICES
OF EASTERN TENNESSEE, INC.
Asst. Federal Community Defender
800 S. Gay Street, Suite 2400
Knoxville, TN 37929
(865) 637-7979
Dana_Hansen@fd.org

Attorney for Movant Nichols

December 20, 2019

Table of Contents

I. INTRODUCTION

Movant, Harold Wayne Nichols, through undersigned counsel, respectfully requests that this Court, pursuant to 28 U.S.C. § 2244(b)(3) (2018), authorize the filing of a second or successive habeas petition under 28 U.S.C. §§ 2244(b)(2)(A) and 2254. The state court recently adjudicated a claim that relies on a new, retroactive rule of constitutional law; therefore, federal-court review of that adjudication is warranted. *See Nichols v. State*, No. E2018-00626-CCA-R3-PD, 2019 WL 5079357 (Tenn. Crim. App. Oct. 10, 2019) (unpublished). The claim was not—and could not have been—presented in a prior habeas petition. Authorization to file a second or successive habeas petition should be granted because Nichols presents herein a prima facie showing that his new claim "relies on a new rule of constitutional law, made retroactive to cases on collateral review by the United States Supreme Court, that was previously unavailable." 28 U.S.C. § 2244(b)(2)(A).

Nichols' new claim arose when the United States Supreme Court recognized a new constitutional right—applicable to cases on collateral review—that demonstrates Nichols' death sentence was imposed in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. *Johnson v. United States*, ___ U.S. ___, 135 S. Ct. 2551 (2015); *Welch v. United States*, ___ U.S. ___, 136 S. Ct. 1257 (2016) (holding that *Johnson* is retroactive). The *Johnson* decision declared that a

sentencing enhancement based on a prior violent felony conviction is unconstitutionally vague if the determination of whether that conviction can increase a future sentence is not apparent from the elements of the crime of conviction. *Johnson*, 135 S. Ct. at 2557; *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); *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"). The *Johnson* Court's vagueness analysis applies with equal force to the prior violent felony conviction aggravating circumstance in Nichols' case. *See In re Patrick*, 833 F.3d 584, 587-88 (6th Cir. 2016) (the rule in *Johnson* applies retroactively to similar sentencing statutes).

Tennessee's capital punishment statute does not enumerate the crimes which qualify for the prior violent felony conviction aggravator. Instead, the actual facts of the prior felony are reviewed to determine if violence was used during that offense; if violence was used, the prior conviction qualifies for the aggravating circumstance and an increase in punishment to include a death sentence. *Compare*

Nichols, 2019 WL 5079357, at *6, *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 Tennessee Court of Criminal Appeals recently applied *Johnson*, *supra*, to the prior violent felony aggravating circumstance that supports Nichols' death sentence. The state court held the aggravating circumstance is not unconstitutionally vague, reasoning:

> The fact that the federal statues invalidated by *Johnson* and its progeny could not be saved by applying a fact-specific approach due to the language of those statutes and the precedent interpreting that language does not mean that a fact-specific approach is itself unconstitutional.

Id. This decision conflicts with the new rule of *Johnson* that prohibits an after-the-fact determination of an enhancement factor in such a vague and arbitrary manner. The state court's application of federal law should now be reviewed by the federal courts. *Henry v. Spearman*, 899 F.3d 703 (9th Cir. 2018) (granting leave to file a second or successive habeas petition raising a *Johnson* claim against California's second-degree felony murder rule).

Nichols makes a prima facie showing of the requirements for certification of a second or successive habeas petition and this Court should direct the district court to consider the merits of Nichols' claim.

II. PROCEDURAL HISTORY

Nichols pled guilty to felony first-degree murder and, after a jury hearing, was sentenced to death. The death sentence is based on Tennessee's prior violent felony aggravating circumstance. The State entered into evidence the judgments and minute entries of convictions for crimes which occurred after the capital crime. The judge instructed the jury 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.[1]

(Attachment A, *Nichols v. Bell*, Case No. 1:02-cv-330, R.43, Addendum 5, Volume 24, trial transcript p. 583).

On direct appeal, the Tennessee Supreme Court upheld Nichols' conviction and death sentence. *State v. Nichols*, 877 S.W.2d 722 (Tenn. 1994). The state courts denied post-conviction relief. *Nichols v. State*, No. E1998-00562-CCA-R3-PD, 2001 WL 55747 (Tenn. Crim. App. Jan. 19, 2001); *Nichols v. State*, 90

[1] 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 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, the elements of a prior conviction must conclusively reveal the use of violence. *Id*.

S.W.3d 576 (Tenn. 2002). Nichols filed a federal habeas petition challenging his conviction and death sentence, but did not raise the claim presented here because it was not then-available; *Johnson* had not been decided. The federal district court denied habeas relief, and this Court affirmed. *Nichols v. Heidle*, 725 F.3d 516 (6th Cir. 2013). The Supreme Court denied certiorari review. *Nichols v. Heidle*, 135 S. Ct. 704 (2014).

On June 26, 2015, the Supreme Court decided *Johnson v. United States*, 135 S. Ct. 2551. On April 18, 2016, the Supreme Court held *Johnson* is retroactive to cases on collateral review. *Welch v. United States*, 136 S. Ct. 1257. On May 17, 2016, Nichols requested leave from this Court to file a second or successive habeas petition, and he notified the Court that he would be exhausting state remedies. *In re Harold Wayne Nichols*, No. 16-5665, Application fn.1. Nichols' request was denied on August 15, 2016.

On June 24, 2016, state post-conviction counsel properly and timely filed a 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 found that Nichols' motion stated a colorable claim, and the post-conviction proceedings were reopened. *Nichols*, 2019 WL 5079357, at *2. The parties subsequently agreed to settle the case and to modify Nichols' sentence to life imprisonment. The post-conviction court, however, rejected the proposed settlement agreement and entered an order summarily denying relief. *Id* at *3.

On October 10, 2019, the Tennessee Court of Criminal Appeals affirmed. *Nichols*, 2019 WL 5079357. On December 6, 2019, Nichols applied to the Tennessee Supreme Court for discretionary review. That appeal is pending.[2]

III. NICHOLS' PRIMA FACIE SHOWING

Nichols demonstrates below a prima facie showing that his claim relies on a new rule of constitutional law, made retroactive to cases on collateral review, and therefore, this application should be granted. *See* 28 U.S.C. § 2244(b)(2)(B) (The court may authorize a second petition if "the application makes a prima facie

[2] Despite pendency of this state-court appeal, the *Johnson* claim is 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 remedies respecting a claim of error. Tenn. Sup. Ct. R. 39; *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.").

showing that … satisfies the requirements of this subsection."). The prima facie standard is lenient and not difficult to meet. *In re Lott*, 366 F.3d 431, 432-33 (6th Cir. 2004). "A prima facie showing, in this context, simply requires that the applicant make a showing of possible merit sufficient to 'warrant a fuller exploration by the district court.'" *In re Watkins*, 810 F.3d 375, 379 (6th Cir. 2015) (citations omitted).

A. *Johnson* is a new rule of constitutional law that applies retroactively to cases on collateral review

There are three prerequisites to obtaining authorization to file a second habeas petition under 28 U.S.C. § 2244(b)(2)(A). *Tyler v. Cain*, 533 U.S. 656, 661-62 (2001). "First, the rule on which the claim relies must be a 'new rule' of constitutional law; second, the rule must have been 'made retroactive to cases on collateral review by the Supreme Court'; and third, the claim must have been 'previously unavailable.'" *Id.* at 662. Nichols' Application meets this standard because *Johnson*, *supra*, is a retroactive new rule of constitutional law that overrules prior precedent.

First, "[i]t is undisputed that *Johnson* announced a new rule." *Welch*, 136 S. Ct. at 1264 "[A] case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final." *Chaidez v. United States*, 568 U.S. 342, 347 (2013) (quoting *Teague v. Lane*, 489 U.S. 288, 301 (1989)). In particular, the explicit overruling of an earlier holding no doubt

creates a new rule. *Whorton v. Bockting*, 549 U.S. 406, 416 (2007). The rule announced in *Johnson* is new because it expressly overruled earlier holdings which had found that the language of the residual clause was not void for vagueness. *Johnson*, 135 S. Ct. at 2563 ("Our contrary holdings in *James* and *Sykes* are overruled."); *see also In re Watkins*, 810 F.3d at 383. There is also no question that *Johnson* announced a rule "of constitutional law." *Johnson* expressly holds that "imposing an increased sentence under the residual clause of the [Armed Career Criminal Act] violates the Constitution's guarantee of due process." *Johnson*, 135 S. Ct. at 2563; *see also In re Watkins*, 810 F.3d at 380. It declares that when a sentence enhancement is based on a prior conviction, due process prohibits an after-the-fact inquiry into whether the conduct involved in that conviction qualifies as a violent felony (as opposed to a limited inquiry into the statutory elements of the prior conviction). *Johnson*, 135 S. Ct. at 2563. The act of looking beyond the elements of the prior conviction and basing the sentencing enhancement on what the prior offense "involved" leads to arbitrary results and fails to give ordinary people fair notice of the conduct the sentencing enhancement punishes. *Id*. at 2556-59; *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); *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").

Second, *Johnson* applies to cases on collateral review, including Nichols' case. In *Welch*, the Supreme Court held that the rule in *Johnson* is substantive and, therefore, has retroactive effect to cases on collateral review. *Welch*, 136 S. Ct. at 1264-65*; see also In re Watkins*, 810 F.3d at 380.

Third, the *Johnson* claim was previously unavailable to Nichols. This Court has explained the claim was previously unavailable because "until June 2015, the *Johnson* rule was proscribed, rather than dictated, by existing Supreme Court precedent." *In re Watkins*, 810 F.3d at 380.

B. The *Johnson* claim has possible merit sufficient to warrant federal-court review of the state court's decision

Nichols' claim has "possible merit sufficient to warrant a fuller exploration by the district court." *In re Watkins*, 810 F.3d at 379 (quotation and citation omitted). Nichols timely filed his *Johnson* claim in state court within one year of the Supreme Court's decision in *Johnson*, *supra*.[3] The state court found he had

[3] The one-year statute of limitation for presenting this claim to the federal courts began on the date the constitutional right was recognized and made retroactive by the Supreme Court, 28 U.S.C. § 2244(d)(1)(C), and it was tolled during the pendency

properly presented a colorable claim sufficient to warrant re-opening his post-conviction proceedings.[4] *Nichols*, 2019 WL 5079357, at *2.

The aggravating circumstance supporting the death sentence is materially the same in language and application as the sentence enhancement held unconstitutional in *Johnson*, *supra*, and its progeny.[5] The aggravating circumstance applicable at the time of the crime provided that "[t]he defendant was previously convicted of one or more felonies, other than the present charge, which *involve* the use or threat of violence to the person." *Id.* at *6 (quoting Tenn. Code Ann. § 39-13-204(i)(2) (1988) (repealed and replaced 1989)) (emphasis added). The jury was instructed on a later version of the prior violent felony aggravator, which looks to whether the statutory elements of the prior conviction "*involve* the use of violence to the person." Tenn. Code Ann. § 39-13-204(i)(2) (1990) (emphasis added). The state appeals court determined the difference in statutory language does not affect the application of *Johnson* to the aggravator because "under either version of the statute, trial courts are to look to the actual facts of the prior felony to determine

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of the state court proceedings. 28 U.S.C. § 2244(d)(2). Accordingly, Nichols' claim is timely presented herein.

[4] A colorable claim is "a claim that, if taken as true, in the light most favorable to the petitioner, would entitle petitioner to relief under the Post-Conviction Procedure Act." Tenn. Sup. Ct. R. 28, § 2(H).

[5] *See, e.g.*, *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018); *United States v. Davis*, 139 S. Ct. 2319 (2019).

the use of violence when such cannot be determined by the elements of the offense alone." *Nichols*, 2019 WL 5079357, at *6.

In the re-opened post-conviction proceeding, the state court applied *Johnson* to the prior violent felony aggravating circumstance and determined that the practice of conducting an after-the-fact assessment of the facts underlying a previous conviction to determine whether it would enhance the sentence in a pending case is constitutional. *Nichols*, 2019 WL 5079357, at *6. The state court reasoned:

> The fact that the federal statues invalidated by Johnson and its progeny could not be saved by applying a fact-specific approach due to the language of those statutes and the precedent interpreting that language does not mean that a fact-specific approach is itself unconstitutional.

Id. That determination should be reviewed by the federal courts because it is contrary to *Johnson*. The rule in *Johnson* prohibits an after-the-fact assessment of the underlying conduct of a prior conviction to determine whether the prior conviction qualifies as a sentencing enhancement—the same assessment undertaken by Tennessee courts when determining whether a prior conviction supports the "prior conviction" aggravating circumstance. That case-specific approach is unconstitutional because it fails to provide notice to defendants and fails to prevent arbitrary application by courts. *Johnson*, 135 S. Ct. at 2556-59.

The Supreme Court's decision in *Johnson* explained that the determination of whether a prior conviction will qualify as a sentencing enhancement in a future

case must be clear and unambiguous. A sentencing enhancement based on a prior conviction for an enumerated felony, therefore, is constitutional. *Johnson*, 135 S. Ct. at 2562-63. A sentencing enhancement based on a prior conviction that is deemed violent, however, could only provide adequate notice and be regularly applied if violence was an element of that offense. *Id*.

The state court's decision conflicts with *Johnson* because it mis-reads a portion of the opinion which discusses a case-specific analysis of a prior conviction. In the course of the *Johnson* opinion, the Supreme Court compared the means of determining a qualifying prior conviction under an "ordinary case" analysis based on a hypothetical case and under a case-specific analysis based on real-world facts or underlying conduct in the case. The Court said, "we do not doubt the constitutionality of laws that call for the application of a qualitative standard such as 'substantial risk' to real-world conduct[.]" *Johnson*, 135 S. Ct. at 2561. The *Johnson* Court's discussion of a case-specific analysis relates to a factual analysis of the case pending prosecution; a critical distinction overlooked by the state court's decision.

The Supreme Court has explained that a jury can be asked to make an additional finding, "focus[ing] on the conduct with which the defendant is *currently charged*[,]" that will increase punishment for the current crime. *Davis*, 139 S. Ct. at 2327. Such a case-specific approach "would avoid the vagueness

problems that doomed the statutes in *Johnson* and *Dimaya*." *Id.* (citations omitted). In contrast, a determination that involves "reconstruct[ing], long after the original conviction," the conduct underlying a prior conviction raises serious due process concerns of inadequate notice and arbitrary application, *id.*, including "the 'utter impracticability'—and associated inequities—of such an [approach]." *Dimaya*, 138 S. Ct. at 1218. *Johnson* does not sanction a later review of the facts underlying a previous conviction in order to determine whether that conviction qualifies as a sentence enhancement factor.

The Supreme Court's subsequent decision in *Davis* further explains why a Tennessee court's "case-specific" analysis of the prior violent felony aggravator is unconstitutional. At issue in *Davis* was a federal statute that provides for an increase in punishment if a defendant used or carried a firearm during a "crime of violence." *Davis*, 139 S. Ct. at 2324. The definition of "crime of violence" included a residual clause describing a felony,

> that *by its nature, involves* a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

Id. (quoting 18 U.S.C. §924(c)(3)(B)) (emphasis added). The Court easily found this language is unconstitutionally vague, just as it did in *Johnson* and the

additional intervening case of *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018).[6] *Davis*, 139 S. Ct. at 2326-27.

Under the residual clause of § 924(c) federal courts had employed the "ordinary case" analysis now prohibited by *Johnson*, and in *Davis* the government argued that the statute at issue could survive constitutional scrutiny if courts instead applied a "case-specific" analysis (like Tennessee's "case-specific" procedure set out in *Sims*, *supra*). *Davis*, 139 S. Ct. at 2327. The Supreme Court agreed with the government that in §924(c) prosecutions "there would be no vagueness problem with asking a jury to decide whether a defendant's 'real-world conduct' created a substantial risk of physical violence." *Id.* (quoting *Dimaya*, 138 S. Ct. at 1215-16, and *Johnson*, 135 S. Ct. at 2558, 2561). Importantly, a "case-specific" approach would be constitutional only because "a §924(c) prosecution focuses on the conduct with which the defendant is *currently charged*." *Id.* The jury, therefore, could also decide whether the currently charged crime "*by its nature, involves*" a substantial risk of force. *Id.*

[6] In *Dimaya*, *supra*, the Supreme Court held that the residual clause of the federal criminal code's definition of "crime of violence," as incorporated into the Immigration and Nationality Act's definition of aggravated felony, is impermissibly vague in violation of due process. The statute defined a crime of violence as "any other offense that is a felony and that, *by its nature, involves* a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. § 16(b) (emphasis added).

The *Davis* Court then addressed the propriety of using a "case-specific" approach under the Armed Career Criminal Act's ("ACCA") residual clause (and the provision, §16(b), at issue in *Dimaya*, *supra*), which would yield unconstitutional results:

> Those other statutes [the ACCA's residual clause and §16(b)], in at least some of their applications, required a judge to determine whether a defendant's prior conviction was for a "crime of violence" or "violent felony." In that context, a case-specific approach would have entailed "reconstruct[ing], long after the original conviction, the conduct underlying that conviction." *Id*., at ___, 135 S. Ct. 2551, 192 L. Ed. 2d 569, 582.

Davis, 139 S. Ct. at 2327.

The Court noted another problem with a "case-specific" approach to defining prior convictions used for enhancement purposes: it "would result in the vast majority of felonies becoming potential predicates[.]" *Davis*, 139 S. Ct. at 2332 (remarking that such a result would be "contrary to the limitation Congress deliberately imposed when it restricted the statute's application to crimes of violence"). In other words, a "case-specific" analysis would not cure the vague statue and it would render the statute over-broad. That effect is proven in Tennessee where courts use a "case-specific" analysis to define prior convictions for enhancement purposes.

Tennessee's prior conviction 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 of violence to the person. *Compare Nichols*, 2019 WL 5079357, at *6, *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 phrasing "whose statutory *elements involve*" includes an unknowable group of offenses which might or might not involve the use of violence. *State v. 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). The ambiguous language "*elements involve*" asks the same question posed by the residual clause: whether the prior conviction "*involves*" a certain type of conduct. The inquiry into the type of conduct involved in a prior violent felony conviction does not restrict the definition of the prior violent felony conviction aggravator to only the elements of that crime.

Moreover, Tennessee courts read the language of the aggravator like federal courts read the residual clause, and the courts look beyond the elements of the prior conviction to determine if it qualifies for the enhancement. *Sims, supra*. Under Tennessee law, the prior violent felony aggravator enhances the punishment for first degree murder even when violence is not necessarily an element of the prior

offense. *Sims*, 45 S.W.3d at 10-12 (requiring an examination of whether the defendant's actual conduct at the time of the prior offense involved the use or threat of violence); *State v. Moore*, 614 S.W.2d 348, 351 (Tenn. 1981) (holding that the prosecution must show that there was in fact either violence or a threat of violence to another for prior felonies that did not, by definition, involve the use or threat of violence). The state court's analysis of whether a prior conviction will enhance a sentence for a subsequent crime moves beyond the elements of the prior crime. *Nichols*, 2019 WL 5079357, at *6.

The answer to the question of which prior convictions qualify under Tennessee's aggravator is necessarily vague because the aggravator is established by prior conduct rather than elements of a prior crime. Determining whether any crime involves any type of conduct apart from its enumerated elements is an impossibly speculative task. Prior violent felony convictions that *involve* "the use or threat of violence to the person" are innumerable, particularly when the sentencer must potentially look at crimes committed in any jurisdiction. The category of crimes that involve the use of violence to the person is "so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement" *Johnson*, 135 S. Ct. at 2556. Broadening the application of the prior violent felony aggravator violates the Eighth Amendment's requirement that the death penalty be narrowly applied. *See*,

e.g., *Godfrey v. Georgia*, 446 U.S. 420, 428-29 (1980) (States must give narrow and precise definition to the aggravating factors that can result in a capital sentence.).

At the time of the crime in this case, the language of the prior violent felony aggravator failed to give adequate notice about which convictions could qualify for an increased punishment in a new prosecution. This type of unfairness to defendants can only be avoided through an exclusive inquiry into the elements of prior convictions. *Mathis v. United States*, 136 S. Ct. 2243, 2253 (2016). The prior violent felony aggravator runs afoul of the retroactive rule in *Johnson* because when a court examines the means of conviction rather than the elements there is "no reliable way" to interpret, or there is "grave uncertainty" about, the scope of the aggravator and it is, therefore, arbitrarily applied. *Johnson*, 135 S. Ct. at 2557-58.

Tennessee's prior violent felony conviction aggravating circumstance is void-for-vagueness because the targeted conduct is not clearly, unambiguously identified, and a "case-specific" analysis only increases its ambiguity and arbitrary application. Accordingly, Nichols' death sentence violates due process of law and the prohibition on cruel and unusual punishment. The state court decision finding the aggravator constitutional employs the same "case-specific" reasoning that has

been rejected by the Supreme Court and is contrary to, or an unreasonable application of, *Johnson*.

IV. CONCLUSION

Nichols is entitled to certification under 28 U.S.C. § 2244(b)(2)(A). He has made a "prima facie showing," 28 U.S.C. § 2244(b)(3)(C), and this application demonstrates possible merit sufficient to warrant a fuller exploration by the district court. *In re Watkins*, 810 F.3d at 379.

WHEREFORE, Nichols respectfully requests that this application be granted and that he be allowed to present a second habeas petition containing his *Johnson* claim to the district court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 20, 2019, the foregoing *Application for Leave to File a Second or Successive Habeas Petition* was accomplished via email and regular U.S. Mail to:

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s/Dana C. Hansen Chavis
Dana C. Hansen Chavis

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re	)	
	)	**DEATH PENALTY CASE**
HAROLD WAYNE NICHOLS,	)	
	)	**19-6460**
Petitioner-Movant.	)	

RESPONSE TO APPLICATION FOR LEAVE TO FILE
SECOND OR SUCCESIVE HABEAS CORPUS PETITION

For a second time, the petitioner-movant ("the petitioner") has requested authorization to file a second or successive habeas corpus petition claiming that *Johnson v. United State*, 135 S. Ct. 2551 (2015), and *Welch v. United States*, 136 S. Ct. 1257 (2016), render Tennessee's prior violent felony aggravating circumstance unconstitutionally vague. Just as the Court appropriately denied the first request, it should again conclude that the petitioner has not made the requisite showing for authorizing a second or successive habeas corpus petition to litigate this claim. The Supreme Court has announced no new rule of constitutional law that is applicable to the petitioner's case.

PROCEDURAL HISTORY

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

On September 30, 1988, the petitioner broke into the home of 21-year-old Karen Pulley. "After finding Pulley home alone in her upstairs bedroom, the [petitioner] tore her undergarments from her and violently raped her." *Id*. at 726. When she resisted, he "forcibly struck her at least twice in the head with a two-by-four he had picked up after entering the house." *Id*. While struggling with the victim after raping her, the petitioner struck her in the head with the two-by-four several more times with great force. *Id*.

One of the victim's roommates found her alive the following morning, lying in a pool of blood on the floor next to her bed. She died the next day. Three months later, during questioning by law enforcement officers about other cases, the petitioner confessed to the crime. *Id*.

The petitioner pled guilty in the Hamilton County Criminal Court to first-degree felony murder, aggravated rape, and first-degree burglary. The State

dismissed the charge of first-degree premeditated murder. The case proceeded to a sentencing hearing before a jury. By that time, the petitioner had been charged with the aggravated rape and attempted rape of 12 other women and had been convicted on five counts of aggravated rape against four women. *Id*.

The jury imposed a sentence of death on the first-degree felony murder conviction. The jury applied two aggravating circumstances under Tenn. Code Ann. § 39-2-204(i): (1) 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, and (2) the murder occurred during the commission of a felony. *Id*. at 725. The State relied on his five aggravated rape convictions against four women to support the prior violent felony aggravating circumstance. *Id*. at 726-27, 735-36.[1]

On direct appeal, the Tennessee Supreme Court applied its intervening decision in *State v. Middlebrooks*, 840 S.W.2d 317 (Tenn. 1992), to find error in the jury's application of the felony murder aggravating circumstance. However, the error was harmless beyond a reasonable doubt due to "undisputed and overwhelming" evidence supporting the prior violent felony aggravating

[1]"In three of those prior rapes, Petitioner had been armed with a weapon (a cord, a knife, and a pistol, respectively), and he caused personal injury to the victim in the fourth." *Nichols v. State*, E2018-00626-CCA-R3-PD, 2019 WL 5079357, at *1 (Tenn. Crim. App. Oct. 10, 2019), *perm. app. filed* (Tenn. Dec. 6, 2019).

circumstance. *Nichols*, 877 S.W.2d at 738. "[T]he sentence would have been the same had the jury given no weight to the invalid felony-murder aggravating circumstance." *Id*. at 739.

On collateral review, the petitioner filed a petition for post-conviction relief in the convicting court, which denied the petition. The Tennessee Supreme Court affirmed. *Nichols v. State*, 90 S.W.3d 576 (Tenn. 2002).

Thereafter, the petitioner filed a petition for writ of habeas corpus under 28 U.S.C. § 2254 in the United States District Court for the Eastern District of Tennessee, which denied the petition. *Nichols v. Bell*, 440 F. Supp. 2d 730 (E.D. Tenn. 2006). On appeal, this Court affirmed. *Nichols v. Heidle*, 725 F.3d 516 (6th Cir. 2013), *cert denied*, 574 U.S. 1025 (2014).

In 2016, the petitioner asked this Court for authorization to file a second or successive habeas corpus petition, claiming that *Johnson* and *Welch* announced a new rule of law retroactively applicable to his case. In an order filed August 15, 2016, this Court denied the motion, rejecting the petitioner's attempt to equate the unconstitutionally vague "residual clause" at issue in *Johnson* and *Welch* with the elements- and conduct-based prior violent felony aggravating circumstance applied in the petitioner's case. *In re Nichols*, No. 16-5665 (Aug. 15, 2016) (Attachment 1). The petitioner cannot "use *Johnson* to invalidate the same sort of 'elements clause' that *Johnson* itself refused to call into question." (Attachment 1, p. 3.)

Furthermore, "even if Tennessee juries did assess the underlying conduct of prior convictions before imposing the death penalty, nothing in *Johnson* suggests that this would be unconstitutional." *Id*. As the Court aptly noted, "we cannot permit every successive petitioner who manages to cite a new retroactive rule to proceed to the district court." *Id*. "Because there's no 'fair-minded argument' that *Johnson* dictates a result it explicitly disavowed, Nichol's challenge never even gets off the ground." *Id*. (citing *In re Embry*, 831 F.3d 377, 382 (6th Cir. 2016)).

Relying on *Johnson* and *Welch*, the petitioner also moved to reopen his state-court post-conviction petition under Tenn. Code Ann. § 40-30-117. The trial court granted the reopening motion but ultimately denied relief on the claim. The Tennessee Court of Criminal Appeals affirmed, and the petitioner's application for permission to appeal to the Tennessee Supreme Court is pending. *Nichols v. State*, No. E2018-00626-CCA-R3-PD, 2019 WL 5079357 (Tenn. Crim. App. Oct. 10, 2019), *perm app. filed* (Tenn. Dec. 6, 2019).[2]

The petitioner has now returned to this Court to ask for a second time that the Court authorize the filing of a second or successive petition for him to litigate a claim under *Johnson* and *Welch*. The Court should again decline the request.

[2]On September 20, 2019, the State filed in the Tennessee Supreme Court a motion to set an execution date, as required by Tenn. Sup. Ct. R. 12.4(A). The petitioner filed a response in opposition to the motion on December 30, 2019. The motion remains pending.

ARGUMENT

The Petitioner Cannot Make a Prima Facie Showing of a New Rule of Constitutional Law Made Retroactive on Collateral Review That Is Applicable to His Case.

Prior to pursuing a new claim in a second or successive petition under 28 U.S.C. § 2254, a habeas corpus petitioner must secure authorization from this Court for filing the new petition. 28 U.S.C. § 2244(b)(3)(A). As relevant here, the petitioner must make a prima facie showing to this Court 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." 28 U.S.C. § 2244(b)(2)(A) and (b)(3)(C). In this context, "prima facie" means "sufficient allegations of fact together with some documentation that would 'warrant a fuller exploration in the district court.'" *In re Lott*, 355 F.3d 431, 433 (6th Cir. 2004) (quoting *Bennett v. United States*, 199 F.3d 468, 469 (7th Cir. 1997)).

The petitioner is not entitled to authorization for a second or successive petition under *Johnson v. United State*, 135 S. Ct. 2551 (2015), because the new rule of constitutional law announced there and made retroactively applicable in *Welch v. United States*, 136 S. Ct. 1257 (2016), does not apply to the petitioner. In *Johnson*, the Court concluded that a sentence enhancement provision in the Armed Career Criminal Act of 1984 ("ACCA") is unconstitutionally vague. The petitioner was not convicted or sentenced under the ACCA. For that reason alone, he is not

entitled to pursue a second or successive petition in order to litigate a claim under *Johnson*.

Furthermore, the petitioner's reliance on *Johnson* is misplaced because the statute deemed unconstitutionally vague there is readily distinguishable from Tennessee's prior violent felony aggravating circumstance at issue here. In *Johnson*, the Court considered the portion of the ACCA that requires sentence enhancement for a defendant previously convicted of three or more violent felonies. The ACCA defines "violent felony" as a crime punishable by more than one year of imprisonment that either (1) "has as an element the use, attempted use, or threated use of physical force against the person of another," or (2) "is burglary, arson, or extortion, involves 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). The Court considered the "residual clause"—the provision for a prior convicted offense that "otherwise involves conduct that presents a serious potential risk of physical injury to another."

When considering whether a prior convicted offense "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another," the sentencing court must use the "categorial approach." This means that the prior offense is reviewed "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*. at 2557 (quoting *Taylor v. United States*, 495 U.S. 575, 600 (1990)). For the residual clause, "[t]he court's task goes beyond deciding whether creation of risk is an element of the crime. That is because . . . the residual clause asks whether the crime '*involves conduct*' that presents too much risk of physical injury." *Id*. (emphasis in original). Thus, applying the residual clause "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*. (quoting *James v. United States*, 550 U.S. 192, 208 (2007)).

The Court found the residual clause unconstitutionally vague for two reasons. First, it "leaves grave uncertainty about how to estimate the risk posed by a crime" when it "ties the judicial assessment of risk to a judicially imagined 'ordinary case' of a crime, not to real-world facts or statutory elements." *Id*. "[P]icturing the criminal's behavior is not enough; . . . assessing 'potential risk' seemingly requires the judge to imagine how the idealized ordinary case of the crime subsequently plays out." *Id*. at 2557-58.

Second, the residual clause "leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony." *Id*. at 2558. And "[b]y asking whether the crime '*otherwise* involves conduct that presents a serious potential risk,' moreover, the residual clause forces courts to interpret 'serious potential risk' in light

of the four enumerated crimes—burglary, arson, extortion, and crimes involving the use of explosives." *Id*. (emphasis in original). "By combining indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony, the residual clause produces more unpredictability and arbitrariness than the Due Process Clause tolerates." *Id*.

With its holding in *Johnson*, the Court did not question the constitutionality of "laws that call for the application of a qualitative standard such as 'substantial risk' to real-world conduct." *Id*. at 2561. Nor did it "call into question application of the Act to the four enumerated offenses, or the remainder of the Act's definition of a violent felony" under the elements clause. *Id*. at 2563. The problem for the residual clause is that it "requires application of the 'serious potential risk' standard to an idealized ordinary case of the crime." *Id*. at 2561; *see also Welch*, 136 S. Ct. at 1262 ("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."), and *United States v. Davis*, 139 S. Ct. 2319, 2326 (2019) ("[T]he imposition of criminal punishment can't be made to depend on a judge's estimation of the degree of risk posed by a crime's imagined 'ordinary case.'").

The "pair of features—the ordinary-case inquiry and a hazy risk threshold—that *Johnson* found to produce impermissible vagueness," *Sessions v. Dimaya*, 138

S. Ct. 1204, 1218 (2018), are not present in Tennessee's prior violent felony aggravating circumstance in Tenn. Code Ann. 39-13-204(i)(2). At the time of the petitioner's offense in 1988, the prior violent felony aggravating circumstance was codified as:

> 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.

Tenn. Code Ann. § 39-13-204(i)(2) (1988). The General Assembly modified the statutory language in 1989 to:

> 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.

Tenn. Code Ann. § 39-13-204(i)(2) (Supp. 1990). During the petitioner's trial, the court instructed the jury using the 1989 version of the statue.

Neither version authorizes analysis of a prior violent felony under a categorial approach comparable to what the Supreme Court found unconstitutional in *Johnson*. In *State v. Moore*, 614 S.W.2d 348, 350 (Tenn. 1981), the Tennessee Supreme Court construed the pre-1989 version and clarified that, when the prior violent felony conviction is for an offense that could, in some circumstances but not others, involve the use or threat of violence, the State must "show that there was in fact either violence to another or the threat thereof." Otherwise, an assessment of the elements of the prior conviction is sufficient to determine if it involved the use or threat of

violence. For example, this factual inquiry "would not generally be required if the conviction were for rape, murder or other crimes which by their very definition involve the use or threat of violence to a person." *Id*. The petitioner's prior violent felony convictions were for aggravated rape.

The court reversed the death sentence in *Moore* because the State failed to prove that the defendant's prior violent felony offenses actually involved the use or threat of violence. Stated simply, the Tennessee Supreme Court construed the sentence enhancement statute based on prior violence to require an elements test in conjunction with "a qualitative standard such as [use or threat of violence] to real-world conduct," a process whose constitutionality the United States Supreme Court has expressly declined to question. *Johnson*, 135 S. Ct. at 2561; *see also Davis*, 139 S. Ct. at 2327 ("[A] case-specific approach would avoid the vagueness problems that doomed the statutes in *Johnson* and *Dimaya*."). "*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. *State v. Johnson*, No. W2017-00848-CCA-R28-PD, at 6 (Tenn. Crim. App. Sept. 11, 2017), *perm. app. denied* (Tenn. Jan. 19, 2018) (Attachment 2).

In *State v. Sims*, 45 S.W.3d 1 (Tenn. 2001), the court applied *Moore* to the 1989 version, which asks whether the prior offense's "statutory elements involve the

use of violence to the person." For the prior offense at issue in that case—aggravated assault—the petitioner was indicted in a manner that may not necessarily include the use of violence. However, under the particular facts of that case, the defendant acted in a manner that included the use of violence. The court concluded that the 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." *Sims*, 45 S.W.3d at 12.[3] "To hold that these prior convictions do not involve use of violence against a person would be an absurd result contrary to the objectives of the criminal code." *Id.* As in *Moore*, the state supreme court construed the 1989 statute to include an assessment of the real-world conduct underlying the prior violent felony offense, in addition to an analysis of its statutory elements, to determine if the prior offense involved the use of violence.

As shown, the manner in which a prior violent felony is considered under either version of Tenn. Code Ann. § 39-13-204(i)(2) is in no way akin to the process found problematic in *Johnson*. Tennessee's courts follow a process not questioned or undermined by *Johnson* and its progeny.

[3]The proof available for the trial court's initial analysis under *Sims* on whether a previous conviction qualifies as a prior violent felony under Tenn. Code Ann. § 39-13-204(i)(2) has been curtailed so as to avoid a violation of the Sixth Amendment right to a jury trial. *State v. Bell*, 512 S.W.3d 167, 204 n.27 (Tenn. 2015) (citing *Shepard v. United States*, 544 U.S. 13, 16, 20 (2005), and *State v. Young*, 196 S.W.3d 85, 112 (Tenn. 2006)).

Tennessee's process does not include constructing in a vacuum some idealized or "ordinary" way of committing a criminal offense and then determining whether the constructed version somehow involves something akin to a "serious potential risk of physical injury to another." As the Tennessee Court of Criminal Appeals correctly concluded when denying post-conviction relief on the petitioner's *Johnson* claim, "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." *Nichols*, 2019 WL 5079357, at *6. "Thus, our precedent has never required the use of a judicially imagined ordinary case in applying the prior violent felony aggravating circumstance." *Id.*

The petitioner argues, with little explanation, that *Johnson* stands for the proposition that "a sentencing enhancement based on a prior violent felony conviction is unconstitutionally vague if the determination of whether that conviction can increase a future sentence is not apparent from the elements of the crime of conviction." (D.E. 1-3, Application, p. 4.) It is unclear how this assertion precisely squares with the language of *Johnson*, which declined to hold that anything other than an elements test for sentencing enhancement purposes is unconstitutionally vague. The Court passed no judgment on "laws that call for the application of a qualitative standard such as 'substantial risk' to real-world conduct

[because] 'the law is full of instances where a man's fate depends on his estimating rightly . . . some matter of degree.'" *Johnson*, 135 S. Ct. at 2561 (quoting *Nash v. United States*, 229 U.S. 373, 377 (1913)). The Court did not question laws "gauging the riskiness of conduct in which an individual defendant engages *on a particular occasion*." *Id*. (emphasis in original). The problem in *Johnson* was applying the residual clause to some idealized standard of a crime instead of a case-specific situation. More to the point, *Johnson* did not require an elements-only test for sentencing enhancement based on certain prior convictions.

Another problem with the petitioner's analysis is the manner in which he appears to conflate the Supreme Court's distinct tasks of construing federal statutory law and considering the law's vagueness under the Due Process Clause. As noted above, the Supreme Court previously construed the ACCA's residual clause to require the categorial approach. In *Johnson*, the Court declined to reconsider its prior construction and require a case-specific approach so as to avoid a vagueness issue. *Johnson*, 135 S. Ct. at 2561-62. Similarly, in *Davis*, the Court declined to construe statutory language similar to the ACCA's residual clause to require a case-specific approach after the Court previously concluded that the categorical approach should be used. *Davis*, 139 S. Ct. at 2327-29.

In effect, the petitioner relies on the Court's statutory construction analysis—about how the Court may not re-construe the ACCA's residual clause to operate in

a case-specific way, even if doing so would avoid a vagueness challenge—to mean that a case-specific method for sentence enhancement would be unconstitutionally vague. (D.E. 1-3, Application, pp. 14-17.)[4] As shown, this is simply contrary to the Supreme Court's analysis in *Johnson*.

Furthermore, it is for the Tennessee Supreme Court to construe Tennessee state law. There can be no genuine dispute that the Tennessee Supreme Court has actually construed each version of Tenn. Code Ann. § 39-13-204(i)(2) to include a case-specific analysis when an elements test alone does not clarify whether the previous offense qualifies as a prior violent felony. And as the Tennessee Court of Criminal Appeals rightly concluded on post-conviction review,

> [t]he fact that the federal statutes invalidated by *Johnson* and its progeny could not be saved by applying a fact-specific approach due to the language of those statutes and the precedent interpreting that language does not mean that the fact-specific approach is itself unconstitutional.

Nichols, 2019 WL 5079357, at *6. Despite the petitioner's argument to the contrary, nothing in *Johnson* questions on vagueness grounds a statutory scheme that requires either an elements test or a fact-specific analysis of the defendant's own past conduct before enhancing a sentence due to violence in a prior felony.

[4]The petitioner also relies on *Dimaya* in the same way; however, the part of *Dimaya* declining to apply the case-specific method on statutory construction grounds was a plurality opinion and not an opinion of the Court. *Dimaya*, 138 S. Ct. at 1216-18.

CONCLUSION

For the reasons shown, the petitioner remains unentitled to authorization for a second or successive petition challenging Tennessee's prior violent felony aggravating circumstance on vagueness grounds. The Court should again deny the petitioner's request for leave to file a second or successive habeas corpus petition under *Johnson* and *Welch*.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this response complies with the word-count limitation in Fed. R. App. P. 27(d)(2)(A) in that the response contains 3,621 words. In certifying the number of words in the response, I have relied on the word count of the word processing system used to prepare the response.

/s/ John H. Bledsoe
JOHN H. BLEDSOE
Deputy Attorney General

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been served by the Court's electronic case filing system to Dana C. Hansen Chavis, Assistant Federal Community Defender, 800 South Gay Street, Suite 2400, Knoxville, Tennessee 37929, on the 3rd day of January, 2020.

/s/ John H. Bledsoe
JOHN H. BLEDSOE
Deputy Attorney General

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE HAROLD WAYNE NICHOLS,	)	
Movant.	)	**Case No. 19-6460**
	)	**Death Penalty case**
	)	

REPLY TO RESPONSE TO MOVANT'S APPLICATION FOR LEAVE TO FILE A SECOND OR SUCCESSIVE HABEAS PETITION

To obtain permission or certification from this Court to file a second or successive habeas petition under 28 U.S.C.§ 2244(b)(2)(A), Nichols need only make a prima facie case that his petition raises a new rule. *Paulino v. United States*, 352 F.3d 1056, 1058 (6th Cir. 2003). Nichols has presented a plausible claim based on the new, retroactive rule of *Johnson v. United States*, 135 S. Ct. 2551 (2015), and his petition should be certified for filing in the district court. *See Henry v. Spearman*, 899 F.3d 703 (9th Cir. 2018) (granting leave to file a second or successive habeas petition raising a *Johnson* claim).

I. Nichols' petition should be authorized for filing because it presents a claim based on a new rule of constitutional law that is retroactive on collateral review.

Nichols' second or successive habeas petition alleges the state court's recent decision on the constitutionality of the prior violent felony conviction aggravating circumstance is contrary to, or an unreasonable application of, *Johnson*, *supra.* Respondent acknowledges that the *Johnson* claim in Nichols' petition arises from a new, retroactive rule of constitutional law. (Response p.6). Respondent's argument against authorization of Nichols' petition rests solely on his assessment of the *Johnson* claim's ultimate merit.[1] (Response *in passim*).

The merits question, however, is not before the Court. "The immediate issue here is whether [the applicant] has made a prima facie showing authorizing a second or successive [habeas petition]." *In re Patrick*, 833 F.3d 584, 589 (6th Cir. 2016) (discussing with approval *In re Hubbard*, 825 F.3d 225, 231-32 (4th Cir. 2016)). This Court has explained repeatedly that an "initial order, authorizing a district court to consider a successive petition for a writ of habeas corpus or § 2255 motion, is based only on a prima facie showing that the requirements of

[1] Respondent's opposition refers to this Court's previous denial.

the statute have been met and does not indicate whether or not the claims are meritorious." *In re Sims*, 111 F.3d 45, 48 n.2 (6th Cir. 1997). Nichols' application presents a prima facie showing of the statutory prerequisites for filing a second or successive petition and therefore his petition should be certified for filing.

Respondent's lengthy merits argument is misplaced because the district court, in the first instance, reviews and decides the merits of a certified second or successive petition. *Paulino*, 352 F.3d at 1058. However, Respondent's merits argument does demonstrate that Nichols' petition has possible merit sufficient to warrant fuller exploration by the district court. *In re Watkins, 810 F.3d* 375, 379 (6th Cir. 2015) (citing cases).

II. Nichols' claim has possible merit, as demonstrated by Respondent's lengthy merits-based argument, and his petition should be authorized for filing.

The chance that Nichols' petition may be denied by the district court, even if a denial is foreseeable, does not prevent authorization of his petition. "It will frequently be the case that a successive motion, once certified by the appropriate appellate court, will fail on its merits before the district court." *Paulino*, 352 F.3d at 1060 n.3. When a claim

has possible merit, however, merits-based arguments against authorization, like the one made by Respondent, do not prevail.[2]

For example, this Court recently authorized the filing of a second or successive petition because the movant had made a prima facie showing under § 2244(b)(2)(B) (actual innocence). *In re Wogenstahl*, 902 F.3d 621, 628-29 (6th Cir. 2018). In that case, the Court noted that the movant's petition contained two claims that were framed "as logical opposites." *Id.* at 629 n.4. The fact that the movant could not win both claims was irrelevant at the authorization stage which examines only whether the statutory prerequisites are satisfied. *Id.* In another case, this Court authorized the filing of a second or successive petition without considering the Respondent's statute of limitations argument, instead leaving it for the district court's consideration in the first instance. *In re McDonald*, 514 F.3d 539, 543-44 (6th Cir. 2008).

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[2] In contrast, a successive petition that presents an issue previously foreclosed by a prior merits decision of this Court may be denied authorization for filing. *See, e.g., In re Avery,* No. 17-6008, 2018 U.S. App. LEXIS 3005, at *3 (6th Cir. Feb. 7, 2018) (denying permission to file a successive § 2255 motion because the Court had already concluded that *Johnson* does not invalidate the residual clause of § 924(c)(3)(B)). *But see United States v. Davis*, 139 S. Ct. 2319 (2019) (holding that the residual clause of § 924(c)(3)(B) is unconstitutionally vague under *Johnson*).

Requests to authorize the filing of second or successive petitions raising claims under *Johnson* are considered in the same manner.[3] The first case that received authorization from this Court to file a second or successive petition based on *Johnson* determined that the AEDPA's gatekeeping requirements were met because *Johnson* was a new, retroactive rule of constitutional law. *See In re Watkins*, 810 F.3d at 379. Subsequently, in *In re Patrick*, *supra*, the applicant raised a *Johnson* claim against a sentencing enhancement contained in the Sentencing Guidelines. The government opposed authorization and argued that the new rule in *Johnson* was limited to the residual clause of the Armed Career Criminal Act ("ACCA") and did not apply to a different context like the Sentencing Guidelines.[4] *In re Patrick*, 833 F.3d at 586. Because certification is not dependent on the merits of the

[3] The Court in *In re Pollard*, No. 19-5908, 2019 U.S. App. LEXIS 36521, at *3 (6th Cir. Dec. 9, 2019), authorized a second § 2255 motion, while acknowledging that the Court had yet to consider whether *Davis* applies retroactively to cases on collateral review. It found that the movant made a prima facie showing based on authority cited and the government's concession that the motion satisfied § 2255(h)(2).

[4] The government argued that *Johnson* did not have retroactive application because—as applied to the Sentencing Guidelines—the rule in *Johnson* was procedural, not substantive. *In re Patrick*, 833 F.3d at 588.

claim, the Court certified the filing of *Patrick*'s successive § 2255 motion notwithstanding the then-unsettled issue of whether *Johnson* applied to the Sentencing Guidelines. *Id.* at 589.

The *In re Patrick* Court discussed with approval the Fourth Circuit case of *In re Hubbard*, 825 F.3d 225, where the government had previously argued that *Johnson* was limited to the ACCA and did not apply to the Sentencing Guidelines. *Id.* at 229. The movant argued:

> his burden is merely to show that it is plausible that the rule announced in Johnson renders § 16(b) unconstitutionally vague. In other words, he argues that the government is making a merits argument that would be properly presented to the district court in response to a § 2255 motion but that is premature at this preliminary stage.

In re Hubbard, 825 F.3d at 230-31. The Court agreed.

> The government is making a merits argument: its contention that the Johnson rule does not render similar language in a closely related provision unconstitutional is an argument about the proper application of the new rule in *Johnson*. And at this stage, a merits argument faces an almost insurmountable hurdle: while determining whether to authorize a successive petition "may entail a cursory glance at the merits . . . the focus of the inquiry must always remain on the § 2244(b)(2) standards."

In re Hubbard, 825 F.3d at 231-32 (citations omitted); *accord In re Patrick*, 833 F.3d at 588. For the same reasons, Respondent's opposition in this case is not well-taken.

Here, Respondent acknowledges that *Johnson* is a new rule of constitutional law that applies retroactively to cases on collateral review but opposes authorization with a merits-based argument that attempts to limit the holding in *Johnson* to cases involving the ACCA's residual clause. (Response p.6). Respondent's narrow construction of *Johnson* is unsupported. *Johnson* has been applied to, and has invalidated, other sentencing enhancements. *See, e.g.,* D*avis,* 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."). Respondent's argument that the state court's decision is correctly decided demonstrates that the district court should determine, in the

first instance, whether the state court's decision is contrary to, or an unreasonable application of, *Johnson*, *supra*.

Respondent also argues that Nichols' claim conflates statutory interpretation and constitutional analysis. (Response p.14). *Johnson* and its progeny address the constitutionality of sentencing enhancements under the Due Process Clause and it is under that rule of law that Nichols challenges the enhancement of his sentence. *Johnson*, 135 S. Ct. at 2555 (reviewing the constitutionality of 18 U.S.C. § 924(e)(2)(B)); *Sessions*, 138 S. Ct. at 1210 (reviewing the constitutionality of 18 U.S.C. § 16(b)); *Davis*, 139 S. Ct. 2319 (reviewing the constitutionality of 18 U.S.C. § 924(c)).

III. The aggravating circumstance based on a prior violent felony conviction does not provide notice as required by the Due Process Clause because a conviction can qualify even if violence is not an element of the prior offense.

Respondent's lengthy merits argument ignores the notice aspect of the rule pronounced in *Johnson*. Instead of addressing the vagueness of the aggravator, Respondent argues that *Johnson* "did not require an elements-only test for sentencing enhancement based on certain prior convictions." (Response p.14).

The *Johnson* Court explained that there was no uncertainty or vagueness about whether a prior conviction could enhance a sentence under the ACCA's force clause, or elements clause, because it lists qualifying convictions. *See Johnson*, 135 S. Ct. at 2557. With respect to the ACCA's residual clause use of the term "convictions" supported an elements-based inquiry into the prior offense. *Mathis v. United States*, 136 S. Ct. 2243, 2253 (2016). "[I]ndeed, that language directly refutes an approach that would treat as consequential a statute's reference to factual circumstances *not* essential to any conviction." *Id.* The focus on the elements of a prior conviction avoids unfairness to defendants, *id.,* a principle left unaddressed in Respondent's opposition. The problem with the elements-based test 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*'s fundamental holding applies to instances where a sentencer engages in an after-the-fact consideration of the conduct underlying a prior conviction, based on a cold record, and determines whether the prior conviction qualifies as a violent felony. *Johnson*, 135 S. Ct. at 2558. The important aspect of *Johnson*'s holding is that the "wide-ranging

inquiry" into the factual circumstances of a prior conviction to determine whether it is a violent felony "denies fair notice to defendants and invites arbitrary enforcement by judges." *Shuti v. Lynch*, 828 F.3d 440, 446 (6th Cir. 2016).

The same inquiry is undertaken with respect to Tennessee's prior violent felony conviction aggravator. If violence is not an element of a prior conviction, the sentencer will look to the defendant's conduct during the crime. The improperly wide-ranging inquiry under the ACCA's residual clause involved a categorical approach, whereas Tennessee's aggravator looks beyond the elements of conviction to the facts of the prior conviction. This distinction, however, does not affect the lack of notice resulting from the way the aggravating circumstance will be applied. 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.

The prior conviction aggravator is invalid under *Johnson*, so it cannot support the sentence of death imposed in this case. "*Johnson* establishes, in other words, that even the use of impeccable factfinding

procedures could not legitimate a sentence based on that clause." *Welch v. United States*, 136 S. Ct. 1257, 1265 (2016) (quotation marks and citation omitted).

IV. Conclusion

For the reasons stated, Nichols' petition should be certified under 28 U.S.C. § 2244(b)(2)(A).

WHEREFORE, Nichols respectfully requests that this application be granted and that he be allowed to present a second habeas petition containing his *Johnson* claim to the district court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 13, 2020, the foregoing *Reply to Response to Application for Leave to File a Second or Successive Habeas Petition* was filed electronically. Service was made upon Filing Users through the Electronic Filing System. Service was accomplished via regular U.S. Mail on any participating party or counsel who was not served through the Electronic Filing System.

s/Dana C. Hansen Chavis
Dana C. Hansen Chavis