

No. 19-8179

**IN THE
SUPREME COURT OF THE UNITED STATES**

**IN RE HAROLD WAYNE NICHOLS,
Petitioner,**

ON ORIGINAL PETITION FOR WRIT OF HABEAS CORPUS

**RESPONDENT'S RESPONSE IN OPPOSITION TO
ORIGINAL PETITION FOR WRIT OF HABEAS CORPUS**

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

CAPITAL CASE

QUESTION PRESENTED FOR REVIEW

Should this Court deny the petitioner's original petition for habeas relief when the new rule of law proffered to support the petition plainly does not apply to his conviction, the state-court merits rejection of the claim neither contravened nor unreasonably applied this Court's precedents, and no exceptional circumstances otherwise warrant the exercise of this Court's jurisdiction?

TABLE OF CONTENTS

QUESTIONS PRESENTED.....ii

RULE 15.2 STATEMENT OF PROCEDURAL HISTORY.....iv

TABLE OF AUTHORITIES.....v

STATEMENT OF THE CASE.....1

ARGUMENT5

 I. The Petitioner Has Not Shown the Exceptional Circumstances
 Necessary for Granting an Original Petition for Writ of Habeas
 Corpus Because the Petition Does Not Meet the Statutory Criteria
 for Granting a Second or Successive Petition and Because the
 Petition Is Meritless.....5

 A. The petitioner presents no exceptional circumstances for an
 original writ because his petition is a second or successive
 petition that does not satisfy the requirements in
 28 U.S.C. § 2244(b)(2).....5

 1. The new rule of law now asserted has no
 application to the petitioner’s conviction.....6

 2. The new rule of law announced in *Johnson* is
 inapplicable also because Tennessee’s
 prior-violent-felony aggravating circumstance is
 readily distinguishable from the ACCA’s
 residual clause.....6

 B. The state court’s rejection of the petitioner’s claim on the
 merits neither contravened nor unreasonably applied
 this Court’s precedents.....12

 II. The Petitioner Is Not Entitled to Relief From the Sixth Circuit’s
 Denial of His Second or Successive Petition Authorization Request.....15

CONCLUSION..... 16

LIST OF PROCEEDINGS

Pursuant to Supreme Court Rule 15.2, the respondent supplements the list of proceedings provided by the petitioner under Supreme Court 14.1(b)(iii) with the following case citation:

Nichols v. State, No. E1998-00562-CCA-R3-PD, 2001 WL 55747 (Tenn. Crim. App. Jan. 19, 2001), *perm. app. granted* (Tenn. July 2, 2001) (affirming denial of post-conviction petition, subsequently affirmed by the Tennessee Supreme Court).

TABLE OF AUTHORITIES

Cases

<i>Cullen v. Pinholster</i> , 563 U.S. 170 (2011).....	13
<i>Felker v. Turpin</i> , 518 U.S. 651 (1996).....	6, 12, 13
<i>Greene v. Fisher</i> , 565 U.S. 34 (2011).....	13
<i>Harrington v. Richter</i> , 562 U.S. 86 (2011).....	13
<i>Johnson v. United States</i> , 135 S. Ct. 2551 (2015).....	<i>passim</i>
<i>Metrish v. Lancaster</i> , 569 U.S. 351 (2013).....	13
<i>Nichols v. Bell</i> , 440 F. Supp. 2d 730 (E.D. Tenn. 2006).....	2
<i>Nichols v. Bell</i> , 440 F. Supp. 2d 847 (E.D. Tenn. 2006).....	2
<i>Nichols v. Heidle</i> , 725 F.3d 516 (6th Cir. 2013), <i>cert denied</i> , 574 U.S. 1025 (2014).....	2
<i>Nichols v. State</i> , 90 S.W.3d 576 (Tenn. 2002).....	2
<i>Nichols v. State</i> , No. E1998-00562-CCA-R3-PD, 2001 WL 55747 (Tenn. Crim. App. Jan. 19, 2001), <i>perm. app. granted</i> (Tenn. July 2, 2001)	iii, 14
<i>Nichols v. State</i> , No. E2018-00626-CCA-R3-PD, 2019 WL 5079357 (Tenn. Crim. App. Oct. 10, 2019), <i>perm. app. denied</i> (Tenn. Jan. 15, 2020)	<i>passim</i>
<i>In re Nichols</i> , No. 16-5665 (6th Cir. Aug. 15, 2016).....	3

<i>In re Nichols</i> , No. 19-6460 (6th Cir. Feb. 13, 2020)	4
<i>Sessions v. Dimaya</i> , 138 S. Ct. 1204 (2018).....	9, 10
<i>State v. Bell</i> , 512 S.W.3d 167 (Tenn. 2015).....	11
<i>State v. Middlebrooks</i> , 840 S.W.2d 317 (Tenn. 1992).....	2
<i>State v. Moore</i> , 614 S.W.2d 348 (Tenn. 1981).....	10, 11, 14
<i>State v. Nichols</i> , 877 S.W.2d 722 (Tenn. 1994), <i>cert. denied</i> , 513 U.S. 1114 (1995).....	1, 2
<i>State v. Sims</i> , 45 S.W.3d 1 (Tenn. 2001).....	10, 11, 14
<i>Sutton v. State</i> , No. E2018-00877-CCA-R3-PD, 2020 WL 525169 (Tenn. Crim. App. Jan. 31, 2020), <i>perm. app. denied</i> (Tenn. Feb. 13, 2020), <i>cert. denied</i> , 140 S. Ct. 991 (2020).....	15
<i>United States v. Davis</i> , 139 S. Ct. 2319 (2019).....	9, 10
<i>Virginia v. LeBlanc</i> , 137 S. Ct. 1726 (2017).....	14
<i>Welch v. United States</i> , 136 S. Ct. 1257 (2016).....	<i>passim</i>
<i>Williams v. Taylor</i> , 529 U.S. 362 (2000).....	13
<i>Woods v. Donald</i> , 135 S. Ct. 1372 (2015).....	13
<i>Woods v. Etherton</i> , 136 S. Ct. 1149 (2016).....	14
Statutes	
18 U.S.C. § 924(e)(2)(B)	7

28 U.S.C. § 2241(a)	5
28 U.S.C. § 2244(b)(2)	5, 6, 12
28 U.S.C. § 2244(b)(2)(A)	16
28 U.S.C. § 2244(b)(2)(B)	6
28 U.S.C. § 2244(b)(3)	5, 15
28 U.S.C. § 2244(b)(3)(C)	15
28 U.S.C. § 2244(b)(3)(E)	5
28 U.S.C. § 2254.....	2, 6
28 U.S.C. § 2254(a)	5
28 U.S.C. § 2254(d)	13, 15, 16
28 U.S.C. § 2254(d)(1)	13
Tenn. Code Ann. § 39-13-204(i)(2).....	9, 11
Tenn. Code Ann. § 40-30-117	3
Other Authorities	
Sixth Amendment	11
Sup. Ct. R. 15.2.....	iii
Sup. Ct. R. 20.4(a)	5

STATEMENT OF THE CASE

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, the petitioner “faced forty charges growing out of some fourteen incidents” of rape. *Id.* at 735.

On September 30, 1988, the petitioner broke into the home of 21-year-old victim, K.P. “After finding [her] 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.* After he raped the victim, while struggling with her, the petitioner struck the victim in the head with the two-by-four several more times, using great force. *Id.*

One of the victim’s roommates found her alive the next morning, lying in a pool of blood on the floor beside her bed. She died the following day. Three months later, during questioning by law enforcement officers about other cases, the petitioner confessed to this 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 he 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. It applied two aggravating circumstances to support the sentence: (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 the petitioner’s five aggravated rape convictions against four women to support the prior-violent-felony aggravating circumstance. *Id.* at 726-27, 735-36. “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. denied* (Tenn. Jan. 15, 2020).

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 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 relief as to the first-degree murder conviction and the death sentence. The Tennessee Supreme Court affirmed. *Nichols v. State*, 90 S.W.3d 576 (Tenn. 2002).¹

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 but granted a certificate of appealability on certain claims. *Nichols v. Bell*, 440 F. Supp. 2d 730 (E.D. Tenn. 2006); *Nichols v. Bell*, 440 F. Supp. 2d 847 (E.D. Tenn. 2006). On appeal, the Sixth Circuit Court of Appeals affirmed. *Nichols v. Heidle*, 725 F.3d 516 (6th Cir. 2013), *cert denied*, 574 U.S. 1025 (2014).

¹The convicting court granted sentencing relief on the petitioner’s remaining convictions, which the State did not challenge on appeal. *Nichols*, 90 S.W.3d at 582.

In 2016, the petitioner requested authorization from the Sixth Circuit 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), announced a new rule of law retroactively applicable to his case that rendered Tennessee’s prior-violent-felony aggravating circumstance unconstitutionally vague. In an order filed August 15, 2016, the Sixth Circuit denied the motion, rejecting the petitioner’s attempt to equate the “residual clause” of the Armed Career Criminal Act of 1984 (“ACCA”) 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 (6th Cir. Aug. 15, 2016) (Pet. App. G, pp. 103a-106a).

“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.* at 105a.) The Sixth Circuit rightly reasoned that the petitioner could not “use *Johnson* to invalidate the same sort of ‘elements clause’ that *Johnson* itself refused to call into question.” (*Id.*) 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 Sixth Circuit aptly noted, “we cannot permit every successive petitioner who manages to cite a new retroactive rule to proceed to the district court.” (*Id.*)

Relying on *Johnson* and *Welch*, the petitioner also moved the convicting court to reopen his state-court post-conviction petition pursuant to Tenn. Code Ann. § 40-30-117. The court granted the reopening motion but ultimately denied relief on the claim. (Pet. App. D, pp. 61a-82a.) On appeal, the Tennessee Court of Criminal Appeals affirmed, concluding that *Johnson* and *Welch* have no impact on Tennessee’s prior-violent-felony aggravating circumstance. The Tennessee Supreme Court denied permission to appeal. *Nichols v. State*, No. E2018-00626-CCA-

R3-PD, 2019 WL 5079357 (Tenn. Crim. App. Oct. 10, 2019), *perm app. denied* (Tenn. Jan. 15, 2020).²

On December 23, 2019, the petitioner returned to the Sixth Circuit to request, for a second time, authorization to file a second or successive habeas corpus petition predicated on *Johnson and Welch*. The Sixth Circuit again denied authorization. *In re Nichols*, No. 19-6460 (6th Cir. Feb. 13, 2020) (Pet. App. A, pp. 1a-5a.) The court accurately recognized that “[l]ittle has changed since [it] previously denied Nichols’s permission to file a successive habeas petition, and nothing has changed that would warrant . . . now granting that permission.” (*Id.* at 4a.) That the state courts, in the interim, rejected the petitioner’s claim raised under *Johnson and Welch* “does not provide a basis for filing a second habeas petition.” (*Id.*)

On January 15, 2020, the Tennessee Supreme Court set the petitioner’s execution for August 4, 2020. (Pet. App. K, pp. 118a-119a.) On April 1, 2020, the petitioner filed this original petition for writ of habeas corpus, relying on *Johnson and Welch* to support his assertion that Tennessee’s prior-violent-felony aggravating circumstance is unconstitutionally vague.

²To date, the petitioner has not filed a petition for writ of certiorari relative to the state appellate court’s decision.

ARGUMENT

I. The Petitioner Has Not Shown the Exceptional Circumstances Necessary for Granting an Original Petition for Writ of Habeas Corpus Because the Petition Does Not Meet the Statutory Criteria for Granting a Second or Successive Petition and Because the Petition Is Meritless.

On two separate occasions, the Sixth Circuit Court of Appeals rightly denied the petitioner's requests to authorize a second or successive petition under 28 U.S.C. § 2244(b)(3) asserting a baseless claim that Tennessee's prior-violent-felony aggravating circumstance is unconstitutionally vague under *Johnson v. United States*, 135 S. Ct. 2551 (2015), as made retroactively applicable by *Welch v. United States*, 136 S. Ct. 1257 (2016). Undaunted, the petitioner attempts to avoid the Court's lack of jurisdiction to review the Sixth Circuit's most recent denial by characterizing his present request as an original petition for writ of habeas corpus. *See* 28 U.S.C. § 2244(b)(3)(E). On that request, he can establish no exceptional circumstances for the Court to issue an original writ of habeas corpus; therefore, the petition should be denied.

Both 28 U.S.C. § 2241(a) and 28 U.S.C. § 2254(a) authorize the Court to issue an original writ of habeas corpus. Nevertheless, "[t]his writ is rarely granted." Sup. Ct. R. 20.4(a). Indeed, the Court last granted an original writ in 1925. Lee Kovarsky, *Original Habeas Redux*, 97 Va. L. Rev. 61, 62-63 (2011). "To justify the granting of a writ of habeas corpus, the petitioner must show that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court." Sup. Ct. 20.4(a).

A. The petitioner presents no exceptional circumstances for an original writ because his petition is a second or successive petition that does not satisfy the requirements in 28 U.S.C. § 2244(b)(2).

The petitioner rightly concedes that a petition for writ of habeas corpus filed at this late date relative to his first-degree murder conviction is a second or successive petition. This Court has concluded that the statutory limitations on second or successive habeas corpus petitions do

“certainly inform” the Court’s determination on whether exceptional circumstances necessitate granting an original writ. *Felker v. Turpin*, 518 U.S. 651, 662-63 (1996). These “restrictions on repetitive and new claims imposed by §§ 2244(b)(1) and (2)” apply “without qualification” to any habeas corpus petition filed under 28 U.S.C. § 2254. *Id.* They do not limit themselves solely to petitions filed in the district court. *Id.*

1. The new rule of law now asserted has no application to the petitioner’s conviction.

Applying *Felker*, the petitioner presents no extraordinary circumstances for issuing a writ of habeas corpus because he has failed to satisfy 28 U.S.C. § 2244(b)(2)(B), in that the petitioner has identified no applicable “new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.” He relies on *Johnson*, but in that case, the Court concluded that a sentence enhancement provision within the Armed Career Criminal Act of 1984 (“ACCA”) is unconstitutionally vague. As shown, the petitioner was not convicted of or sentenced under the ACCA. The petitioner argues that Tennessee’s prior-violent-felony aggravating circumstance is unconstitutionally vague, but neither *Johnson* nor any other case has announced a new rule of law regarding the aggravating circumstance. For that reason alone, the petition fails to satisfy 28 U.S.C. § 2244(b)(2)(B), and the petitioner is not entitled to an original writ of habeas corpus on his second or successive petition.

2. The new rule of law announced in *Johnson* is inapplicable also because Tennessee’s prior-violent-felony aggravating circumstance is readily distinguishable from the ACCA’s residual clause.

Even if the petitioner could now satisfy 28 U.S.C. § 2244(b)(2) by advocating that the rationale of *Johnson* should somehow extend to his case, his reliance on *Johnson* is unavailing. Tennessee’s prior-violent-felony aggravating circumstance does not have the same fatal deficiencies found in the sentencing statute at issue in *Johnson*.

In *Johnson*, this Court considered a portion of the ACCA that requires sentence enhancement for a criminal 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 threatened 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.” *See* 18 U.S.C. § 924(e)(2)(B). At issue particularly in *Johnson* was the ACCA’s so-called “residual clause,” allowing sentencing enhancement for an offense that “otherwise involves conduct that presents a serious potential risk of physical injury to another.”

As a matter of statutory construction, the Court observed that, 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 “categorical approach.” Consequently, the sentencing court must review the prior offense “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, the sentencing court’s task “goes beyond deciding whether creation of risk is an element of the [prior] 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 [prior] 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)).

This Court found the ACCA’s residual clause unconstitutionally vague for two reasons. First, it “leaves grave uncertainty about how to estimate the risk posed by a crime” because 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 a 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 by asking whether the crime “otherwise involves conduct that presents a serious potential risk,” 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.* “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.*

In *Johnson*, the Court expressly declined to 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. This 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.’” *Id.* (quoting *Nash v. United States*, 229 U.S. 373, 377 (1913)). Nor did this Court question laws “gauging the riskiness of conduct in which an individual defendant engages *on a particular occasion*.” *Id.* (emphasis in original).

This Court further declined to “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.’”).

Tennessee’s prior-violent-felony aggravating circumstance, as codified in Tenn. Code Ann. § 39-13-204(i)(2), does not implicate 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). At the time of the petitioner’s offense in 1988, the prior-violent-felony aggravating circumstance applied when:

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 Tennessee General Assembly modified it in 1989 to apply when:

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 statute. (Pet. App. J, pp. 114a-115a.)

As construed and applied by Tennessee’s courts, neither version of the aggravating circumstance authorizes consideration of a prior violent felony for sentencing enhancement under a categorical approach comparable to what this Court reviewed 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 offense is sufficient to determine whether 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 state supreme court reversed the death sentence in *Moore* because the State failed to prove that the defendant’s prior felony offenses actually involved the use or threat of violence. The court construed the sentence enhancement statute predicated 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 this Court has expressly declined to disturb. *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*.”).

In *State v. Sims*, 45 S.W.3d 1 (Tenn. 2001), the state supreme court applied *Moore* to the 1989 version of Tennessee’s prior-violent-felony aggravating circumstance, which asks whether the prior offense’s “statutory elements involve the use of violence to the person.” For the prior offense at issue in *Sims*—aggravated assault—the defendant had been indicted in a manner that may not necessarily have included the use of violence. However, under the particular facts of that

prior case, the defendant acted in a way that included the use of violence. The Tennessee Supreme 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 whether 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 unconstitutionally vague residual clause at issue in *Johnson*. Tennessee follows a process left unquestioned and undisturbed by *Johnson* and its progeny.

More to the point, application of Tennessee’s prior-violent-felony aggravating circumstance does not involve constructing in a vacuum some idealized or “ordinary” way of committing a criminal offense and then determining whether the constructed version—as opposed to the actual commission—involves something akin to “serious potential risk of physical injury to another.” As the Tennessee Court of Criminal Appeals correctly concluded when denying post-conviction relief to the petitioner on this issue, “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*,

³The 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)).

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 reasons that this Court declared the ACCA’s residual clause unconstitutionally vague are simply not present in Tennessee’s prior-violent-felony aggravating circumstance. 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. Even if the petitioner could rely on *Johnson* to overcome the statutory restriction in 28 U.S.C. § 2244(b)(2) on second or successive petition raising new claims, *Johnson* provides the petitioner no support.

B. The state court’s rejection of the petitioner’s claim on the merits neither contravened nor unreasonably applied this Court’s precedents.

In *Felker*, the Court recognized that the enactment of deferential review over the state-court merits adjudication of a federal claim “changed the standards governing [this Court’s] consideration of habeas petitions by imposing new requirements for the granting of relief to state prisoners.” *Felker*, 518 U.S. at 662 (citing 28 U.S.C. § 2254(d)). This change “inform[s]” the Court’s decision whether to grant an original writ of habeas corpus. *Id.* The petitioner cannot show extraordinary circumstances for an original writ because the petitioner’s federal claim is meritless. Under 28 U.S.C. § 2254(d), the state court’s rejection of the claim neither contravened nor unreasonably applied this Court’s precedents.

As noted above, the convicting court authorized the petitioner to reopen his petition for post-conviction relief to litigate a claim that Tennessee’s prior-violent-felony aggravating circumstance is unconstitutionally vague under *Johnson* and *Welch*. Thereafter, the state courts adjudicated the claim and found it meritless. Specifically, the Tennessee Court of Criminal Appeals affirmed the trial court’s rejection of the claim, and the Tennessee Supreme Court denied

discretionary review. Applying deferential review over the state court’s decision—as provided by 28 U.S.C. § 2254(d) and *Felker*—the petitioner cannot show that the state appellate court’s adjudication of the claim is contrary to, or an unreasonable application of, this Court’s precedents.

A habeas corpus petitioner whose claim was adjudicated on the merits in state court may obtain relief only when the state court’s resolution “resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law as determined by the Supreme Court of the United States.” 28 U.S.C. § 2254(d)(1). The “clearly established Federal law” is the Court’s precedents in effect at the time of the state court’s adjudication. *Greene v. Fisher*, 565 U.S. 34, 38-40 (2011); *Cullen v. Pinholster*, 563 U.S. 170, 182 (2011)

A state-court decision is “contrary to” federal law “if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts.” *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000); *see also Metrish v. Lancaster*, 569 U.S. 351, 357 n.2 (2013). When none of the Court’s decisions “confront ‘the specific question presented by this case,’ the state court’s decision could not be ‘contrary to’ any holding from this Court.” *Woods v. Donald*, 135 S. Ct. 1372, 1377 (2015) (quoting *Lopez v. Smith*, 135 S. Ct. 1, 4 (2014)).

A state-court decision involves an “unreasonable application” of the Court’s precedents if it “identifies the correct governing legal principle in existence at the time” but “unreasonably applies that principle to the facts of the prisoner’s case.” *Pinholster*, 563 U.S. at 182 (internal quotation marks and citation omitted). An unreasonable application is one “so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.” *Harrington v. Richter*, 562 U.S. 86, 103 (2011). When “[n]o precedent of this Court clearly forecloses” a state-court decision, it cannot be an

unreasonable application of the Court’s precedents. *Woods v. Etherton*, 136 S. Ct. 1149, 1152 (2016). And “the ruling must be ‘objectively unreasonable, not merely wrong; even clear error will not suffice.’” *Virginia v. LeBlanc*, 137 S. Ct. 1726, 1728 (2017) (quoting *Donald*, 135 S. Ct. at 1376 (2016)).

The decision of the Tennessee Court of Criminal Appeals on the merits of this claim is not contrary to this Court’s precedents, nor does it involve an unreasonable application of its precedents. This Court has not before assessed whether Tennessee’s prior-violent-felony aggravating circumstance—or a statute materially indistinguishably from it—is unconstitutionally vague. The Court has not squarely confronted that question. Clearly, the state court’s decision is not “contrary to” the Court’s precedents in effect at the time of that decision.

Nor does the state-court adjudication reflect an unreasonable application of the Court’s decisions. To support his claim, the petitioner relied upon *Johnson* and *Welch*. The Tennessee Court of Criminal Appeals concluded that Tennessee’s prior-violent-felony aggravating circumstance does not include the same deficiencies that the Court identified with regard to the ACCA’s residual clause. Thus, the Tennessee statute is not unconstitutionally vague. Under *Moore* and *Sims*, “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 507357, at *6. Tennessee law “has never required the use of a judicially imagined ordinary case in applying the prior violent felony aggravating circumstance.” *Id.* At the very least—and as relevant here—this is not an unreasonable application of *Johnson* and its progeny with regard to the challenged Tennessee sentencing enhancement provision. No precedent of this Court clearly forecloses the state court’s merits adjudication.

Because the state-court decision neither contravenes nor unreasonably applies this Court's precedents, the petition lacks merit under 28 U.S.C. § 2254(d), and the petitioner can prove no extraordinary circumstances to support issuance of a writ of habeas corpus.

II. The Petitioner Is Not Entitled to Relief From the Sixth Circuit's Denial of His Second or Successive Petition Authorization Request.

The petitioner acknowledges that 28 U.S.C. § 2244(b)(3) disallows a petition for writ of certiorari from the Sixth Circuit's denial of his second request to authorize the filing of a second or successive petition under *Johnson* and *Welch*. Nevertheless, he attempts to use this original habeas corpus petition as a means to challenge the manner in which the Sixth Circuit denied his request. That issue is not properly before the Court. The question presented is whether the petitioner has proven extraordinary circumstances for the Court, in this rare instance, to grant an original petition for writ of habeas corpus. For the reasons already stated, the petitioner has not shown extraordinary circumstances for an original writ of habeas corpus.

But even if the petitioner could use this opportunity to challenge the manner in which the Sixth Circuit carried out its gatekeeping function under 28 U.S.C. § 2244(b)(3) for second or successive petitions, he has shown no error in that court's decision. For the reasons already stated, the Sixth Circuit was correct to determine that *Johnson* and *Welch* have no impact on Tennessee's prior-violent-felony aggravating circumstance, just as every other court to consider the question has so concluded. *See Sutton v. State*, No. E2018-00877-CCA-R3-PD, 2020 WL 525169, at *5-*7 (Tenn. Crim. App. Jan. 31, 2020), *perm. app. denied* (Tenn. Feb. 13, 2020), *cert. denied*, 140 S. Ct. 991 (2020); *Nichols*, 2019 WL 5079357, at *6 (collecting cases).

The petitioner claims that the Sixth Circuit impermissibly resolved the merits of his claim instead of limiting its inquiry to whether the petitioner made a prima facie showing under 28 U.S.C. § 2244(b)(3)(C). But a fair reading of the court's order reflects that it considered particularly

whether the petitioner made the requisite prima facie showing. (Pet. App. A, pp. 1a-5a.) And it correctly concluded that he did not. Indeed, if the Sixth Circuit had intended to resolve the merits of the petitioner's claim, it would have reviewed the state-court merits adjudication under the parameters of 28 U.S.C. § 2254(d). It did not do so. The Sixth Circuit limited its inquiry to matters properly before it.

Finally, it bears noting—and directly informs the extraordinary circumstances inquiry—that even if the Sixth Circuit had authorized a second or successive petition, the district court would have been tasked with determining whether a new rule of law made retroactive by this Court applied to the petitioner's case. *See* 28 U.S.C. § 2244(b)(2)(A) and -2244(b)(4). For the reasons already stated, the petitioner could not meet that burden. Likewise, if the district court reached the merits of the claim, it would have resolved the claim by applying the deferential review required by 28 U.S.C. § 2254(d). And for the reasons already stated, the petitioner would be unable to prove his entitlement to habeas corpus relief, in view of how the state court considered and resolved the merits of his claim in the reopened post-conviction proceedings. This directly undermines the petitioner's assertion that extraordinary circumstances support the issuance of an original writ of habeas corpus.

CONCLUSION

For the reasons stated, the original petition for writ of habeas corpus should be denied.

Respectfully submitted,

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