

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

REPLY TO RESPONDENT'S RESPONSE IN OPPOSITION 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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Reply to Brief in Opposition

This case raises questions regarding the jurisdiction of the federal courts of appeals and the Congressional constraints contained in 28 U.S.C. § 2544(b), prescribing only a gatekeeping function over second or successive habeas petitions. Respondent agrees this Court may issue an original writ of habeas corpus to determine the lower court's jurisdictional reach but argues that extraordinary circumstances supporting such issuance are dependent on the underlying merit of the claim Petitioner Nichols sought to present to the federal courts below. (Br. in Opp. p.5). Respondent's Brief in Opposition follows the lead of the court below and presents a question for review focused on the state court's merits rejection of the claim pled in Mr. Nichols' proposed second habeas petition. (Br. in Opp. p.ii). Respondent's Brief contains approximately ten pages of merits argument, (Br. in Opp. pp.6-16), and addresses the jurisdictional question in just one short paragraph. (Br. in Opp. pp.15-16). Petitioner, however, has made clear that he seeks review of the scope of the circuit court's action—an overreach to decide the merit of the claim presented in an application for authorization to file a second or successive habeas petition.

Review is warranted, as it was in *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003), and *Buck v. Davis*, 137 S. Ct. 759, 774 (2017), because the circuit court lacked jurisdiction to rule on the merits of the underlying claim until it authorized the filing of Petitioner's second habeas petition. Lacking any argument to the contrary, Respondent asserts that the circuit court did not resolve the merits of the constitutional claim. (Br. in Opp. pp.15-16). This assertion is belied by the circuit

court's order which—despite acknowledgment of the court's gatekeeper role—explains why it concludes that Mr. Nichols' constitutional claim “was without merit” and why, in this case, there was no improper consideration of the prior violent felony aggravating circumstance. (Pet. App. 4a-5a). Had the lower court constrained its analysis to a prima facie inquiry, it would have acknowledged that the new rule in *Johnson* has been applied to sentencing enhancements other than the ACCA's residual clause (*see* Pet. pp.21-23), and it would have allowed the district court to determine whether similar language contained in Tennessee's aggravator is applied in an unconstitutional manner. Instead, the lower court itself impermissibly answered that question. (Pet. App. 4a-5a). The lower court's extra-judicial act denied petitioner a full opportunity to federal court review of a new state-court decision based on a retroactive rule of constitutional law. This Court's review is required to bring the Sixth Circuit in line with its sister circuits. (*See* Pet. pp.18-19),

Finally, in the midst of Respondent's lengthy merits discussion lies a key point demonstrating that Tennessee courts apply the prior violent felony aggravating circumstance like federal courts applied the residual clause. Respondent acknowledges that, decades after Mr. Nichols' sentence was imposed, the Tennessee Supreme Court “curtailed” the state courts' inquiry into whether a prior conviction qualifies as a sentencing enhancement “so as to avoid a violation of the Sixth Amendment right to a jury trial.” (Br. in Opp. p.11 n.3) (citing cases). Since Tennessee's aggravator may apply when violence is not an element of the prior conviction so long as there is a determination that the conviction involved facts indicative of some sort of violence, the Tennessee Supreme Court eventually

limited the universe of facts for consideration in a manner akin to the rule in *Shepard v. United States*, 544 U.S. 13 (2005) (limiting the factual inquiry under the ACCA's residual clause). The state court's application of the aggravator parallels the federal court's application of the ACCA's residual clause. Both sentencing enhancements are unconstitutionally vague and lead to arbitrary application, in violation of the Constitution. Mr. Nichols has demonstrated a prima facie showing of a new, retroactive rule of constitutional law and the potential merit of his *Johnson* claim contributes to the exceptional circumstances that warrant this Court's review.

Conclusion

The Court should entertain this original habeas corpus petition and remand to the district court to resolve, in the first instance, the issues related to and presented by Mr. Nichols' second habeas petition. *See Illinois v. City of Milwaukee*, 406 U.S. 91, 108 (1972) (remanding to the district court "whose powers are adequate to resolve the issues"); *see also Boumediene v. Bush*, 553 U.S. 723, 777-78 (2008) (same).

Respectfully submitted,

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