

CAPITAL CASE

No. _____

IN THE

Supreme Court of the United States

TERRY LYNN KING,

Applicant,

v.

STATE OF TENNESSEE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS OF TENNESSEE

PETITION FOR WRIT OF CERTIORARI

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CAPTIAL CASE

QUESTIONS PRESENTED FOR REVIEW

The Petitioner, Terry Lynn King, was sentenced to death by a Tennessee Court. This death sentence relies in part on the jury having found the aggravating factor that he was previously convicted of one or more felonies involving the use or threat of violence to the person of another. Following this Honorable Court's decision in *Johnson v. United States*, Mr. King challenged his death sentence on the grounds that the statutory language of the Tennessee prior violent felony aggravating factor, as it existed at the time Mr. King was sentenced to death, was unconstitutionally vague.¹

Under Tennessee law at the time of Mr. King's sentencing, a jury could impose a death sentence if the defendant "was previously convicted of one or more felonies, other than the present charge, which involve the use or threat of violence to the person."² This prior violent felony aggravator is applied to increase the potential minimum punishment for the offense from life imprisonment to death. Just as with the residual clause dealt with in *Johnson*, this statutory language is not defined and does not require that the prior conviction include violence as an element.

The Tennessee courts rejected Mr. King's claims on the basis that *Johnson* does not apply to Mr. King's death sentence because the Tennessee Courts eschew an elements-based categorical approach and instead look to the facts of the underlying

¹ *Johnson v. United States*, 135 S. Ct. 2551 (2015).

² Tenn. Code Ann. § 39-2-203 (i)(2) (1982) (repealed).

prior conviction. This is a clear misapplication of the jurisprudence of this Honorable Court, which deprives Mr. King of his constitutional rights. Mr. King's death sentence, and the death sentences of others who are awaiting execution by the State of Tennessee based on this same aggravating factor, are founded upon an unconstitutional aggravating factor.

Mr. King asserts in this petition that this Honorable Court should grant certiorari because the Tennessee state courts are acting contrary to this Honorable Court's precedent with the result that persons are currently under unconstitutional death sentences. To that end, he presents the following question:

- (1) Is the 'prior violent felony conviction' aggravating factor in Tennessee's death penalty statutes unconstitutional under *Johnson v. United States*, 135 S. Ct. 2551 (2015), because the language of that aggravator is vague and because Tennessee has, in practice, rejected an elements-based categorial approach in favor of examining the specific underlying conduct of the prior conviction?

LIST OF THE PARTIES TO THE PROCEEDING

The parties to the proceedings below were as follows:

1. At trial, through direct appeal, and on petition for post-conviction relief:
 - a. The State of Tennessee
 - b. Terry Lynn King
 - c. Randall Sexton, co-defendant at trial.³
2. In the habeas corpus litigation:
 - a. Terry Lynn King, petitioner
 - b. Ricky Bell, Warden
 - c. Bruce Westbrooks, Warden

³ Mr. Sexton received a life sentence.

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OPINIONS BELOW

The Tennessee Court of Criminal Appeals opinion, *Terry Lynn King v. State of Tennessee*, No. E2019-00349-CCA-R3-PD, 2021 WL 982503 (Tenn. Crim. App. March 16, 2021), is unpublished and is attached as Appendix A, Pet. App. 1a-10a. The Tennessee Supreme Court's order denying discretionary review of the judgment of the Court of Criminal Appeals, *Terry Lynn King v. State of Tennessee*, No. E2019-00349-SC-R11-PD (Tenn. July 12, 2021), is unpublished and is attached as Appendix B, Pet. App. 11a. The January 24, 2019 judgment of the Criminal Court for Knox County, Tennessee, denying Terry King's Amended Petition for Post-Conviction Relief, *Terry King v. State of Tennessee*, No. 72987 (Knox County Crim. Ct. January 24, 2019), is unpublished and is attached as Appendix C, Pet. App. 12a-23a.

Mr. King's litigation of his habeas corpus proceedings is pending in the Sixth Circuit, as that matter was stayed pending the exhaustion of the post-conviction litigation at issue in this current petition.

LIST OF PROCEEDINGS

- *State of Tennessee v. Terry Lynn King*, No. 21126 (Knox Co. Crim. Ct. February 11, 1985) (judgment of conviction and sentence of death), Appendix D, Pet. App. 24a-31a.
- *State of Tennessee v. Terry Lynn King*, 718 S.W.2d 241 (Tenn. July 28, 1986) (direct appeal den.), Appendix E, Pet. App. 32a-38a.
- *State of Tennessee v. Terry Lynn King*, No. 33878 (Knox Co. Crim. Ct. October 31, 1995) (post-conviction den.), Appendix F, Pet. App. 39a-59a.

- *Terry King v. State of Tennessee*, No. 03C01-9601-CR-00024, 1997 WL 416389 (Tenn. Crim. App. July 14, 1997) (perm. app granted) (Tenn. Dec. 8, 1997) (affirming denial of post-conviction petition, subsequently affirmed by the Tennessee Supreme Court), Appendix G, Pet. App. 60a-73a.
- *Terry King v. State of Tennessee*, 989 S.W.2d 319 (Tenn. April 12, 1999) (affirming denial of post-conviction petition), Appendix H, Pet. App. 74a-85a.
- *Terry King v. Ricky Bell*, No. 3:99-CV-454, 2011 WL 3566843 (E.D. Tenn. August 12, 2011) (denying petition for writ of habeas corpus), Appendix I, Pet. App. 86a-120a.
- *Terry King v. Bruce Westbrooks*, 848 F.3d 788 (6th Cir., February 9, 2017) (affirming denial of petition for writ of habeas corpus), Appendix J, Pet. App. 121a-128a.
- *Terry King v. Bruce Westbrooks*, 13-6387 (6th Cir., April 18, 2017) (ordering a stay of further appellate proceedings pending exhaustion of Mr. King's state post-conviction petition, reopened on *Johnson* grounds), Appendix K, Pet. App. 129a.

JURISDICTION

The date of the judgment sought to be reviewed is July 12, 2021, that being the date the Tennessee Supreme Court denied discretionary review of the judgment of the Tennessee Court of Criminal Appeals. There was no petition for rehearing filed. The time for filing the petition for writ of certiorari was extended by this Honorable

Court's order relating to deadlines in light of the COVID-19 pandemic, Appendix L, Pet. App. 130a-131a. Jurisdiction over the final state court judgment is invoked pursuant to 28 U.S.C. § 1257(a), specifically that the "the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States". 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

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

U.S. CONSTITUTION, Eighth Amendment, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

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

Tenn. Code Ann., § 39-2-203(i)(2) (1982), defining the relevant aggravating factor for the imposition of the death sentence as being, "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[.]”⁴

STATEMENT OF THE CASE

On February 1, 1985, Mr. King was convicted of the offense of felony murder in the perpetration of a kidnapping by confinement and was sentenced to die by electrocution. The jury considered and found as one of four aggravating circumstances that Mr. King had been previously convicted of “one or more felonies, other than the present charge, which involve the use or threat of violence to the person[.]” Tenn. Code Ann. § 39-2-203(i)(2) (1982) (repealed). Mr. King was also convicted of armed robbery, for which he received a sentence of 125 years’ incarceration, to be served consecutively to his death sentence.

On direct appeal, Mr. King’s convictions were affirmed. Of the four aggravating factors found by the jury, one was invalidated on direct appeal based on a *Middlebrooks* error.⁵ After finding that factor inapplicable, the appellate courts then re-weighed the remaining factors and affirmed the sentence of death. *State v. King*, 718 S.W.2d 241, 248 (Tenn. 1986).

Mr. King then filed a petition for post-conviction relief, which was

⁴ This statute has since been repealed, but a copy is reproduced as Appendix N, Pet. App. 144a.

⁵ *State v. Middlebrooks*, 840 S.W.2d 317 (Tenn. 1992) (holding that if a person is convicted of felony murder, the application of a felony-murder aggravating factor does not sufficiently narrow the class of persons to be a Constitutionally valid aggravating factor, because it essentially duplicates the elements of the crime.

denied following an evidentiary hearing. The denial of this post-conviction petition was affirmed by the Tennessee Court of Criminal Appeals and later by the Tennessee Supreme Court. *King v. State*, 989 S.W.2d 319 (Tenn. 1999). Mr. King's subsequent petition for a writ of certiorari was denied by this Court. *King v. Tennessee*, 528 U.S. 875 (1999).

A petition for a writ of habeas corpus was then filed in the District Court for the Eastern District of Tennessee, which was denied as well. *King v. Bell*, 2011 WL 3566843 (E.D. Tenn. Aug. 12, 2011). An appeal from the denial of that petition is currently pending, having been stayed after Mr. King's petition for post-conviction relief was reopened in light of *Johnson*.

Mr. King filed a motion to reopen his petition for post-conviction relief on June 26, 2001, based on a change in the law. This motion was denied and the appellate courts subsequently denied Mr. King's application for permission to appeal. *King v. State*, No. E2003-00701-CCA-R28-PD. Mr. King then filed a petition for a writ of error coram nobis, based on a newly-discovered *Brady* claim, but this petition was denied as time-barred and that denial was affirmed on appeal. *King v. State*, No. E2014-01202-CCA-R3-ECN.

On June 26, 2015, the United States Supreme Court decided *Johnson v. United States*, 135 S.Ct. 2551 (2015). *Johnson* held that the language of the federal statute that enhanced a sentence based upon the Residual Clause of the Armed Career Criminal Act was unconstitutional under the void-for-vagueness doctrine mandated by the Due Process Clause of the Fifth and

Fourteenth Amendments. This holding was later held to be a new substantive rule of law with retroactive effect in *Welch v. United States*, 136 S.Ct. 1257 (2016).

Based in part on this holding, Mr. King filed a timely motion to reopen his post-conviction petition. The trial court entered an order granting this motion and permitting Mr. King to file an amended petition. Pursuant to that order, Mr. King filed amended and second amended petitions raising a number of issues, including the *Johnson* issue. This was the point at which the federal question sought to be reviewed in the instant petition was raised. The trial court's ruling on this issue appears in Appendix C, Pet App. 12a-23a. Although other issues were raised in this litigation, the federal question sought to be reviewed was the central issue in this litigation.

Following the filing of the second amended petition, the State's response, and Mr. King's reply to the State's response, the trial court heard argument of counsel relating to the issues raised in these petitions. The trial court entered a written order, denying relief on the *Johnson* issue and finding that the other issues were not properly before the court, but even if they were, they were either previously determined or time-barred.

Mr. King timely appealed the dismissal of his post-conviction petition to the Court of Criminal Appeals. On March 16, 2021, following oral argument, the Court of Criminal Appeals affirmed the post-conviction court's denial of Mr. King's claims for post-conviction relief. *King v. State*, 2021 WL

982503, No. E2019-00349-CCA-R3-PD (Tenn. Crim. App., Knoxville, Mar. 16, 2021). A timely application for discretionary review was filed with the Tennessee Supreme Court, and that application was denied on July 12, 2021.

REASONS FOR GRANTING THE WRIT

Mr. King's death sentence is invalid because one of the three remaining aggravating circumstances relied upon to sentence Mr. King to death, the prior violent felony conviction aggravator, is unconstitutionally vague. *Johnson v. United States*, 135 S.Ct. 2551 (2015); *Welch v. United States*, 136 S.Ct. 1257 (2016) (holding that *Johnson* is retroactive). The statutory language of the prior violent felony aggravator in effect at the time of Mr. King's crime (Tenn. Code Ann. § 39-2-203(i)(2)) is materially the same as the language of the sentencing statute in *Johnson* that the Supreme Court found to be unconstitutionally vague. *See Johnson*, 135 S.Ct. at 2555-57. Accordingly, the *Johnson* Court's vagueness analysis applies with equal force to the sentencing factor in Mr. King's case and invalidates it as a basis for his death sentence.

A death sentence which rests, in whole or in part, upon an unconstitutionally vague aggravating factor is inherently invalid. *Godfrey v. Georgia*, 446 U.S. 420, 427-28 (1980). Mr. King's death sentence, therefore, stands in violation of Article I, §§ 6, 8, 9, 10, 16, 17, and 32 and Article XI, § 16 of the Tennessee Constitution, and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. The Fifth

Amendment guarantees that no person shall be deprived of life, liberty, or property without due process of law. It follows that the Constitution prohibits vague laws. *Johnson v. United States*, 135 S. Ct. 2551 (2015). A statute so vague that it fails to give ordinary people fair notice of punishment, or so standardless that it invites arbitrary enforcement, violates the fundamental principles of justice enshrined under due process of law. *Johnson*, 135 S.Ct. at 2556-57; *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983). The void-for-vagueness doctrine applies not only to statutes defining elements of crimes, but also to statutes fixing sentences. *Johnson*, 135 S. Ct. 2557 (citing *United States v. Batchelder*, 442 U.S. 114, 123 (1979)).

Vagueness, in the death penalty context, violates not only the Fifth and Fourteenth Amendments, but also the Eighth Amendment and Article I, §§ 8 and 16 of the Tennessee Constitution. *See Maynard v. Cartwright*, 486 U.S. 356, 363-64 (1988). The United States Supreme Court has consistently held that, because the death penalty is uniquely different from all other punishments, the Eighth Amendment's prohibition on cruel and unusual punishment requires heightened procedural safeguards. This heightened due process includes fair notice and a fair and reliable decision-making process, and commands that death sentences be free from arbitrariness and capriciousness. *See California v. Ramos*, 463 U.S. 992, 998-99 (1983); *Gardner v. Florida*, 430 U.S. 349, 357-

58 (1997); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976); *Maynard v. Cartwright*, 486 U.S. 356 (1988); *Lankford v. Idaho*, 500 U.S. 110 (1991); *Van Tran v. State*, 66 S.W.3d 790, 807 (Tenn. 2001); and *Howell v. State*, 151 S.W.3d 450, 462-63 (Tenn. 2004). It is therefore required that a sentence of death which rests, in whole or in part, upon an unconstitutionally vague aggravating factor must be invalidated. *Godfrey v. Georgia*, 446 U.S. 420, 427-28 (1980).

I. Mr. King remains sentenced to be executed even though one of the aggravating factors in his case is void for vagueness.

The statutory language of Tennessee’s prior violent felony conviction aggravating factor that increased the maximum punishment in this case to the death penalty is just as indefinite as the language of the ACCA’s residual clause that this Court declared in *Johnson v. United States*, 135 S. Ct. 2551 (2015), to be unconstitutionally vague. Any differences have no impact on the constitutional analysis.⁶ The aggravating factor in effect at

⁶ Courts have determined that “a couple of minor distinctions between the text of the residual clause” and other definitions of violent felonies do not undermine “the applicability of *Johnson’s* fundamental holding[.]” *Dimaya v. Lynch*, 803 F.3d 1110, 1120 (9th Cir. 2015). Accordingly, the definition of “aggravated felony” for immigration cases has been declared unconstitutionally vague under *Johnson*. See, e.g., *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018) (applying *Johnson* to the INA’s definition of a crime of violence). In addition, the residual clause of the definition of violent felony in a federal statute providing for mandatory minimum sentences based on using, carrying, or possessing a firearm in

the time of the felony murder enhanced the maximum punishment from life imprisonment to death if:

(2) The defendant was previously convicted of one or more felonies, other than the present charge, which involve the use or threat of violence to the person.

Tenn. Code Ann. § 39-2-203 (i)(2) (1982).

Tennessee’s prior violent felony aggravating circumstance does not conclusively define a violent felony and it is not restricted to prior convictions where violence is a statutory element. Instead, it asks whether the previous conviction “involve[s]” the use or threat of violence to the person. *Compare* with *Butcher v. State*, 171 A.3d 537, 540 n.16 (Del. 2017) (noting, “our General Assembly’s decision to specifically enumerate those offenses deemed to be ‘violent felonies’ avoids the problem posed in *Johnson* of ascertaining which types of offenses are ‘violent felonies.’”). The problematic inquiry into the conduct “*involve[d]*” includes an unknowable group of prior convictions 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); *State v. Moore*, 614 S.W.2d 348,

connection with a federal crime of violence was held unconstitutionally vague. *United States v. Davis*, 139 S. Ct. 2319 (2019).

351 (Tenn. 1981). The aggravator asks the same question posed by the ACCA's residual clause: whether the prior felony conviction "*involves*" a certain type of prior conduct. *See* 18 U.S.C. § 924(e)(2)(B)(ii) (increasing punishment for a prior felony conviction which "otherwise involves conduct that presents a serious potential risk of physical injury to another").

Tennessee's prior violent felony aggravating circumstance shares functional and textual characteristics with the residual clause of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(2)(B)(ii). First, both sentencing provisions increase the maximum punishment for the crime in question. The maximum available punishment for the crime of being a felon in possession of a firearm is not more than ten years, 18 U.S.C. § 924(a)(2), unless the defendant had committed three or more qualifying felonies under 18 U.S.C. § 924(e)(1). In such an event, the minimum punishment becomes fifteen years and the maximum is life. Here, the maximum available punishment for the crime of first-degree murder was life in prison unless, for example, there was a finding of the prior violent felony conviction aggravator. In such an event, the maximum punishment becomes death.

Second, the applicability of both sentencing statutes turns upon the fact that a defendant had been convicted of a qualifying offense, not upon whether a defendant had engaged in prohibited conduct. Like the residual

clause struck down in *Johnson* (which enhanced a defendant's maximum punishment for a prior felony conviction which "otherwise involves conduct that presents a serious potential risk of physical injury to another," see 18 U.S.C. § 924 (e)(2)(B)(ii)), the enhancement of Mr. King's maximum sentence to include the possibility of a sentence of death turned entirely upon whether he had prior felony convictions "which involve the use or threat of violence to the person." Tenn. Code Ann. § 39-2-203 (i)(2) (1982). Faced with almost identical language, this Court observed:

the relevant part of the Armed Career Criminal Act "refers to 'a person who . . . has three previous convictions' for—not a person who has committed—three previous violent felonies or drug offenses." 495 U.S., at 600. This emphasis on convictions indicates that "Congress intended the sentencing court to look only to the fact that the defendant had been convicted of crimes falling within certain categories, and not to the facts underlying the prior convictions." *Ibid.*

Johnson, 135 S. Ct. at 2562 (quoting *Taylor v. United States*, 495 U.S. 575 (1990)).

In both instances, the statutory language requires the sentencing court to determine whether the defendant's prior **conviction** fell within a particular category of crimes—previous convictions for violent crimes—not whether the defendant had previously engaged in violent and/or potentially violent conduct.

Third, the ACCA's residual clause and Tennessee's prior violent felony conviction aggravator contain similar language. The residual clause required a conviction that "involves conduct that presents a serious

potential risk of physical injury to another.” *Johnson*, 135 S. Ct. at 2555-56. The language of the Tennessee prior violent felony aggravator required a conviction that “*involve[s] the use or threat of violence to the person.*” Tenn. Code Ann. § 39-2-203(i)(2) (1982).⁷

For further comparison, the sentencing provision struck down in *Dimaya* increased the maximum penalty where the defendant had been convicted of:

(b) 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). Similarly, the residual clause struck down in *Davis* enhanced the defendant’s sentence when the defendant had previously been convicted of a felony:

(B) 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. § 924 (c)(3)(B).

The language of Tennessee’s prior violent felony aggravator at issue here cannot be distinguished from the federal sentencing enhancements this Court has already struck down. The phrase “involves the threat of

⁷ “The defendant was previously convicted of one or more felonies, other than the present charge, which involve the use or threat of violence to the person.” Tenn. Code Ann. § 39-2-203 (i)(2) (1982) (repealed and replaced 1989).

violence” in Tennessee’s aggravator is synonymous with the phrase “presents a serious potential risk” in the ACCA’s residual clause, § 924(e)(2)(B). It is even more linguistically similar to “involves a substantial risk” in § 16(b) and § 924(c)(3)(B), the provisions at issue in *Dimaya* and *Davis*, respectively.

Fourth, neither statute requires violence as an element of the prior conviction. They allow for a chance that the prior conviction involved violence. *See Johnson*, 135 S. Ct. at 2557-58 (contrasting risk-based and elements-based definitions of prior violent felonies). In the residual clause, that “chance” is described as involving conduct that presents “a serious potential risk of physical injury to another.” In Tennessee’s aggravating circumstance, the “chance” is described as involving a “threat of violence.” Though the language of the residual clause requires that the chance be “serious,” and Tennessee’s aggravator does not, neither statute further defines what level of threat the prior conviction must present.

Tennessee courts do not dispute that the language of Tennessee’s prior violent felony aggravator is vague, but they have determined that it is not unconstitutionally vague. *See, e.g., Nichols v. State*, 2019 WL 5079357, at *6 (Tenn. Crim. App. Oct. 10, 2019) (Appendix M, Pet. App. 132a-143a). The problem that must be corrected is that Tennessee misuses language from *Johnson* and this Court’s recent decision in *Davis* to excise the notice requirement from the Due Process Clause. *Id.* Tennessee courts

have determined that when a capital defendant's prior conviction does not include "violence" as a necessary element, the trial court is "to look to the actual facts of the prior felony to determine the use of violence[.]" (Appendix M, Pet. App. 136a). The state courts have reasoned that the aggravator "is not void for vagueness under *Johnson*[,]" (Appendix M, Pet. App. 137a), because state court judges do not use "a judicially imagined ordinary case in applying the prior violent felony aggravating circumstance." (Appendix M, Pet. App. 136a).

The first problem with Tennessee courts' reasoning is that they mistake effect for causation. The federal courts' use of a categorical approach to apply the residual clause resulted from the fact that the statutory language of the residual clause is vague. In other words, the vagueness problem did not originate with the use of the categorical approach but with the language of the sentence-enhancing statute. Vagueness caused the sentencer to look beyond the elements of the prior offense to determine whether the conviction qualified for the enhancement provision. *Johnson*, 135 S. Ct. at 2557. The *Johnson* decision clearly drew a constitutional line between definitions of a past conviction that rely on the elements of the crime versus definitions of a past conviction that turn on a determination of the type of conduct that was involved in the past crime. *Id.* For example, a sentencing enhancement based on a prior conviction that has violence *as an element* provides notice of its

enhancement potential and is constitutional. *See, e.g.*, 18 U.S.C. § 924 (e)(2)(B)(i) (the ACCA’s “force” or “elements clause”).

In contrast, Tennessee’s prior violent felony aggravating circumstance requires a prior conviction that “involve[s] the use or threat of violence to the person.” Tenn. Code Ann. § 39-2-203 (i)(2) (1982). A sentencing enhancement—like Tennessee’s prior violent felony aggravator—based on a prior conviction for a crime that involves conduct not identifiable by the elements of the conviction is vague and unknowable and, therefore, unconstitutional. *See, e.g.*, 18 U.S.C. § 924(e)(2)(B)(ii) (the ACCA’s residual clause); *but cf. Shular v. United States*, _____ U.S.

_____, 140 S. Ct. 779 (2020) (a sentencing provision based on a prior conviction that involves conduct which *is* identifiable by the elements of conviction is constitutional). Accordingly, the fact that Tennessee courts may not use a judicially imagined ordinary case to apply the aggravating circumstance does not avoid the vagueness problem with the aggravator.

The Tennessee courts’ reliance on *Sims*⁸ and *Moore*⁹ is misplaced because *Taylor* and its progeny abrogate the very fact-based procedure endorsed by *Sims* and *Moore*. The United States Supreme Court’s holding in *Taylor*, supported by *Johnson*, prohibits the *Sims* procedure. Under *Sims*, a defendant’s death eligibility could depend on the nature and

⁸ *State v. Sims*, 45 S.W.3d 1 (Tenn. 2001).

⁹ *State v. Moore*, 614 S.W.2d 348 (Tenn. 1981).

extent of the particular inquiry conducted by a particular court, with the resulting risk that two different courts, analyzing identical cases, could come to different results. Such a procedure would allow a court to find a prior felony was indeed violent based on its own inquiry of the underlying facts even if the statutory elements of that offense charged did not involve the use of violence to the person. *Sims*, 45 S.W.3d. at 12. It is for these reasons that the *Sims* procedure clearly fails to provide notice of what prior felonies may be used to sentence a person to death. “It is impermissible for ‘a particular crime [to] sometimes count towards enhancement and sometimes not, depending on the facts of the case.’” *Mathis v. United States*, 136 S. Ct. 2243, 2251 (2016) (quoting *Taylor*, 495 U.S. at 601).

The second problem with the state court’s reasoning is that it endorses a practice of moving beyond the elements of a prior conviction and reconstructing the conduct underlying that conviction to determine, in the first instance, whether such past conduct can enhance the punishment of an offense under prosecution. *Johnson’s* fundamental holding applies to instances where a sentencer engages in an after-the-fact consideration of conduct underlying a prior conviction based on a cold record to determine whether the prior conviction qualifies as a violent felony. *Johnson*, 135 S. Ct. at 2558; *see also Smith v. Goguen*, 415 U.S. 566, 575 (1974) (explaining that any judicial narrowing of a vague statute

must occur before the defendant commits the crime for which the enhanced punishment is to be imposed). The “wide-ranging inquiry” into the factual circumstances of a prior conviction to demonstrate that the aggravator 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. The state court’s decision ignores the notice aspect of due process and the rule announced in *Johnson*.

Tennessee courts apply the vague prior violent felony aggravator by looking beyond the elements of the prior conviction and examining the underlying facts, whereas the improperly wide-ranging inquiry undertaken by courts applying the ACCA’s residual clause involved a categorical approach. This distinction, however, does not cure the lack of notice resulting from such an inquiry. *See Commonwealth v. Beal*, 52 N.E.3d 998, 1008 (Mass. 2016) (holding a similar state statute unconstitutional under *Johnson*); *Commonwealth v. Rezendes*, 37 N.E.3d 672, 679-80 (Mass. App. Ct. 2015) (holding in light of *Johnson* that “unless the Commonwealth can prove, without inquiring into the manner in which the weapon was used, that a prior adjudication involved a deadly weapon, the adjudication cannot qualify as a predicate offense”). *See also Nordahl v. State*, 829 S.E.2d 99, 104-06 (Ga. 2019) (any interpretation of a state sentencing statute that allows an analysis of the conduct involved in a

prior conviction—beyond consideration of only the elements of the conviction—is unconstitutional); *People v. Navarette*, 4 Cal. App. 5th 829, 852 (2016) (holding that “a sentencing court considering a prior conviction for sentencing purposes is limited to an elements-centric inquiry[.]”). A Tennessee defendant has no “principled and objective” way to know if a future sentencing body will deem violent the means of a prior conviction, and a defendant is unable to anticipate the consequences of future criminal convictions. *Shuti v. Lynch*, 828 F.3d 440, 450 (6th Cir. 2016).

A sentencing enhancement—like Tennessee’s prior violent felony aggravator—based on a prior conviction for a crime that involves conduct not identifiable by the elements of the conviction is vague and unknowable and, therefore, unconstitutional. *See, e.g.*, 18 U.S.C. § 924 (e)(2)(B)(ii) (the ACCA’s residual clause); *but cf. Shular v. United States*, 140 S. Ct. 779 (2020) (a sentencing provision based on a prior conviction that involves conduct which *is* identifiable by the elements of conviction is constitutional). Determining whether any crime involves any type of categorical conduct apart from its enumerated elements is an impossibly speculative task. *Johnson*, 135 S. Ct. at 2556 (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”). The *Johnson* Court found this to be true even where “common sense” might dictate what type of conduct

was involved in committing certain offenses. *Johnson*, 135 S. Ct. at 2559. The inquiry under Tennessee’s aggravator as to whether elements of a prior conviction “*involves*” violent conduct is just as indefinite as the inquiry under the ACCA’s residual clause as to whether a prior conviction “*involves*” violent conduct. Such uncertainty about what constitutes a violent felony is what rendered the sentence enhancement in *Johnson*, and subsequent cases, void-for-vagueness. “*Johnson establishes, in other words, that even the use of impeccable factfinding procedures could not legitimate a sentence based on that clause.*” *Welch*, 136 S. Ct. at 1265 (quotation marks and citation omitted). *Johnson*’s fundamental holding applies to instances where a sentencer engages in an after-the-fact consideration of conduct underlying a prior conviction based on a cold record to determine whether the prior conviction qualifies as a violent felony. *Johnson*, 135 S. Ct. at 2558.

Tennessee courts have misread the following statement in *Davis*:

[A] case-specific approach would avoid the vagueness problems that doomed the statutes in *Johnson* and *Dimaya*. In those cases, we recognized that 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.

Davis, 139 S. Ct. at 2327 (quoting *Dimaya*, 138 S. Ct. 1215).

Tennessee courts have misread *Davis* to hold that an unconstitutionally-vague statute is cured by the application of “*real-world facts.*” Indeed, a determination of whether a prior conviction will enhance

a sentence that involves a case-specific approach by “reconstruct[ing], long after the original conviction, the conduct underlying that conviction” would raise serious constitutional concerns. *Johnson*, 135 S. Ct. at 2562. *Davis* refers to a method of applying the “real world facts” of the current offense, not, as occurred in this case, applying the “real world facts” of an offense long after the date of conviction. See *Nichols*, 2019 WL 5079357, at *5 (Appendix M, Pet. App. 135a).

By contrast, a § 924(c) prosecution focuses on the conduct with which the defendant is currently charged. The government already has to prove to a jury that the defendant committed all the acts necessary to punish him for the underlying crime of violence or drug trafficking crime. So it wouldn't be that difficult to ask the jury to make an additional finding about whether the defendant's conduct also created a substantial risk that force would be used.

Davis, 139 S. Ct. at 2327.

The Tennessee legislature, in fact, appears to have recognized and attempted to correct exactly this problem. Only a few short years after Mr. King was convicted and sentenced to death, the Tennessee legislature amended the prior violent felony aggravator to include an elements-based inquiry. Specifically, the statute was amended as follows:

The defendant was previously convicted of one (1) or more felonies, other than the present charge, ***whose statutory elements involve the use of violence to the person***[.]

Tenn. Code Ann. § 39-2-203 (i)(2) (1989) (emphasis added).

Finally, *Johnson* recognizes that, even when “real world facts” are examined, they cannot be compared to facts of an “imaginary ideal” of

what constitutes a violent crime. *Johnson v. United States*, 135 S. Ct. at 2561. At bottom, allowing the sentencer to make such a determination long after the point in time by which a defendant must be fully apprised of the consequences of his actions implicates the very due process protections this Court has jealously guarded in *Johnson* and its progeny. Vagueness in the death penalty context violates not only the Fifth and Fourteenth Amendments but also the Eighth Amendment's prohibition against unguided discretion to determine whether a defendant's maximum penalty should be increased. See *Franklin v. Lynaugh*, 487 U.S. 164, 181 (1988); *Maynard v. Cartwright*, 486 U.S. 356, 363-64 (1988).

Tennessee courts have failed to properly apply precedent set by this Court in *Johnson* and its progeny; review should therefore be granted.

CONCLUSION

For the foregoing reasons, Petitioner requests that this Honorable Court grant his petition for a writ of certiorari.

Respectfully submitted this the 9th day of December, 2021, by:



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