

No. 21-6590

IN THE
SUPREME COURT OF THE UNITED STATES

TERRY LYNN KING,
Petitioner,

v.

TENNESSEE,
Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

RESTATEMENT OF THE QUESTION PRESENTED

Whether the holding in *Johnson v. United States*, 576 U.S. 591 (2015)—that using the categorical approach to determine the applicability of the Armed Career Criminal Act’s residual clause made the statute unconstitutionally vague—applies to a state prior-violent-felony aggravating factor that requires consideration of real-world facts.

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RULE 15.2 STATEMENT OF PROCEDURAL HISTORY

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

King v. Tennessee, 120 S. Ct. 181 (Oct. 4, 1999) (denying certiorari review of post-conviction appeal)

King v. State, No. E2014-01202-CCA-R3-ECN, 2015 WL 3409486 (Tenn. Crim. App. May 28, 2015), *perm. app. denied* (Tenn. Sept. 16, 2015), *cert denied*, *King v. Tennessee*, 136 S. Ct. 2449 (May 23, 2016) (affirming the denial of error coram nobis relief and denying certiorari review)

Order, *In re Terry Lynn King*, No. 16-5601 (6th Cir. Aug 11, 2016), ECF 13-2 (denying application for permission to file second or successive federal habeas corpus petition)

Order, *King v. Mays*, No. 13-6387 (6th Cir. Jan. 7, 2022), ECF 174-1 (denying King's motion to remand the case to district court for further habeas corpus proceedings)

OPINIONS BELOW

The order of the Tennessee Supreme Court denying King's application for permission to appeal is unreported. Order, *King v. State*, No. E2019-00349-SC-R11-PD (Tenn. July 12, 2021); (Pet's App. 11a). The opinion of the Tennessee Court of Criminal Appeals is also unreported. *King v. State*, No. E2019-00349-CCA-R3-PD, 2021 WL 982503 (Tenn. Crim. App. Mar. 16, 2021), *perm. app. denied* (Tenn. July 12, 2021); (Pet's App. 1a-10a). The order of the post-conviction court denying relief in the reopened post-conviction proceedings is also unreported. (Pet's App. 12a-23a).

JURISDICTIONAL STATEMENT

The Tennessee Supreme Court denied King's application for permission to appeal on July 12, 2021. (Pet's App. 11a.) The time to file a petition for writ of certiorari was extended by this Court's order relating to deadlines in light of the COVID-19 pandemic. (Pet's App. 130a-131a.) King filed his petition on December 9, 2021, and invokes this Court's jurisdiction under 28 U.S.C. § 1257(a). (Pet., 3.)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution provides, in pertinent part, "nor shall any person . . . be deprived of life, liberty, or property, without the due process of law[.]"

The Fourteenth Amendment to the United States Constitution, § 1 states, in pertinent part, "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[.]"

Tenn. Code Ann. § 39-2-203(i)(2) (1982), defined the following as an aggravating factor that could support imposition of a death sentence: "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. § 40-30-117(a) authorizes the reopening of state post-conviction proceedings under the following pertinent circumstance:

(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[.]

STATEMENT OF THE CASE

On July 31, 1983, the victim, Diana K. Smith, left her house to pick up food for her family. *State v. King*, 718 S.W.2d 241, 243 (Tenn. 1986). Her body was discovered on August 6, 1983, in a quarry wrapped in a yellow tarpaulin. *Id.* She had been shot at least once in the back of the head with a high-powered weapon. *Id.*

King confessed to his acquaintance, Jerry Childers, that he had killed Ms. Smith after she threatened to report him for rape. *Id.* at 243-44. King later gave a written statement to police admitting that he confined Ms. Smith in the trunk of her car, drove her to a wooded area, took money from her, shot her in the head, and then disposed of her body in the quarry. *Id.* at 243-54.

King was convicted of armed robbery and first-degree felony murder committed in the perpetration of a simple kidnapping. *Id.* at 243. He was sentenced to death for the murder conviction and to 125 years for the armed robbery conviction. *Id.* The jury found that four aggravating factors applied:

- (1) 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;
- (2) the murder was especially heinous, atrocious or cruel in that it involved torture or depravity of mind;
- (3) the murder was committed for the purpose of avoiding, interfering with, or preventing the lawful arrest of the defendant or another; and
- (4) 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 rape, robbery, larceny or kidnapping.

Id. at 248; *see also* Tenn. Code Ann. § 39-2-203(i)(2), (5), (6), (7) (1982).

At sentencing, the State introduced proof that King had previously been convicted of first-degree murder by use of a firearm in the perpetration of armed robbery and of aggravated kidnapping for offenses that occurred on July 2, 1983—less than one month before King murdered

Mrs. Smith. *King*, 718 S.W.2d at 247. The State also introduced proof that King had been convicted of assault with intent to commit aggravated kidnapping for an offense he committed three days after he murdered Ms. Smith. *Id.* at 247-48. The Tennessee Supreme Court found that these prior offenses supported the jury's reliance on the prior-violent-felony aggravating factor¹ and ultimately affirmed King's death sentence. *Id.* at 248-49, 250.

King later filed a petition for post-conviction relief in state court, which the trial court denied, and the Tennessee Court of Criminal Appeals affirmed the denial of relief. *King v. State*, 989 S.W.2d 319, 323 (Tenn. 1999). The Tennessee Supreme Court affirmed the denial of post-conviction relief. *Id.* at 334-35. This Court denied King's subsequent petition for writ of certiorari. *King v. Tennessee*, 528 U.S. 875 (1999).

King also 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 and declined to issue a certificate of appealability. *King v. Bell*, No. 3:99-cv-454, 2011 WL 3566843, at *1 (E.D. Tenn. Aug. 12, 2011). The Sixth Circuit granted a certificate of appealability on two issues of ineffective assistance of counsel, but it ultimately affirmed the decision of the district court.²

¹ The State also showed, during cross-examination, that King had committed two armed robberies when he was a juvenile. *King*, 718 S.W.2d at 248. On appeal, the State conceded that introduction of King's juvenile offenses was error. *Id.* The Tennessee Supreme Court held that this error was harmless because proof of King's prior convictions as an adult independently supported the prior-violent-felony aggravating factor. *Id.* at 248-49.

² After King filed a petition for rehearing, the Sixth Circuit held further proceedings in abeyance pending the exhaustion of King's reopened state post-conviction proceedings from which this cert petition arises. (Pet. App. 129a.) King recently moved the Sixth Circuit to remand to the district court to consider a challenge to Tennessee's prior-violent-felony aggravating factor under *Johnson v. United States*, 576 U.S. 591 (2015). Motion to Remand, *King v. Mays*, No. 13-6387 (6th Cir. July 20, 2021), ECF 170-1. The Sixth Circuit denied that motion and held that King's *Johnson* claim was meritless. Order, *King v. Mays*, No. 13-6387 (6th Cir. Jan. 7, 2022), ECF 174-1 at 3-5. Notably, the Sixth Circuit concluded, "*Johnson* is irrelevant when courts must apply a fact-specific approach to determine whether a prior felony involved violence, as the Tennessee courts are required to do, rather than a categorical approach." *Id.* at 4-5.

King v. Westbrook, 847 F.3d 788, 799 (6th Cir. 2017).

While King's habeas appeal was pending in the Sixth Circuit, this Court released its opinions in *Johnson v. United States*, 576 U.S. 591 (2015), and *Welch v. United States*, 578 U.S. 120 (2016). In 2016, King requested authorization from the Sixth Circuit 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 that renders Tennessee's prior-violent-felony aggravating factor unconstitutionally vague. The Sixth Circuit denied the request to file a second or successive petition. Order, *In re Terry Lynn King*, No. 16-5601 (6th Cir. Aug 11, 2016), ECF 13-2.

King then filed a motion to reopen his state-court post-conviction petition pursuant to Tenn. Code Ann. § 40-30-117, also relying on *Johnson* and *Welch*. (Pet's App. 12a.) He later filed another motion to reopen on other grounds. (Pet's App. 12a.) The post-conviction court granted the motion to reopen pursuant to the *Johnson* claim only, but it ultimately denied relief following a hearing. (Pet's App. 12a-13a.) It noted that, after the motion to reopen had been granted, the Tennessee Court of Criminal Appeals ruled in another case³ that *Johnson v. United States* was inapplicable to Tennessee's prior-violent-felony aggravating factor. (Pet's App. 20a-23a.) Accordingly, the post-conviction court found King was not entitled to relief. (Pet's App. 23a.)

The Tennessee Court of Criminal Appeals affirmed, holding that *Johnson* was not applicable to Tennessee's prior-violent-felony aggravating factor because, unlike the federal statute, "our precedent has never required the use of a judicially imagined ordinary case in applying the prior violent felony." *King v. State*, No. E2019-00349-CCA-R3-PD, 2021 WL 982503, at *7 (Tenn. Crim. App. March 16, 2021), *perm. app. denied* (Tenn. July 12, 2021). Therefore,

³ *Johnson v. State*, No. W2017-00848-CCA-R28-PC, Order (Tenn. Crim. App. Sept. 11, 2017), *perm. app. denied* (Tenn. Jan. 19, 2018), *cert. denied*, 139 S. Ct. 67 (2018).

Tennessee's aggravating factor was not void for vagueness. *Id.* The Tennessee Supreme Court denied King's application for permission to appeal July 12, 2021. (Pet's App. 11a.)

King now asks this Court to review the decision of the Tennessee Court of Criminal Appeals affirming the denial of relief on his reopened post-conviction petition.

REASONS FOR DENYING THE WRIT

***Johnson* Is Inapplicable to King’s Prior-Violent-Felony Aggravating Factor as a Matter of State Law.**

King claims that Tennessee’s prior-violent-felony aggravating factor is “unconstitutionally vague” because the language of Tennessee’s statute is “materially” similar to the language of the residual clause in the federal Armed Career Criminal Act (ACCA), which this Court declared unconstitutional in *Johnson v. United States*, 576 U.S. 591 (2015). But what led the Court to find the residual clause of the ACCA vague—namely, that it had been applied using the “categorical” approach, which required the court to imagine an “ordinary case” for a given offense—is not a feature of the Tennessee statute. Instead, Tennessee courts have consistently interpreted Tennessee’s prior-violent-felony aggravating factor to require consideration of real-world facts. This important distinction undermines King’s “vagueness” theory, and this Court should deny review, as it has already done recently in similar cases raising the same issue. *Nichols v. Tennessee*, No. 19-8742, 141 S. Ct. 320 (Oct. 5, 2020); *In re Harold Wayne Nichols*, No. 19-8179, 141 S. Ct. 105 (June 8, 2020); *Johnson v. Tennessee*, No. 17-8576, 139 S. Ct. 67 (Oct. 1, 2018); *Suttles v. Tennessee*, No. 17-5622, 138 S. Ct. 383 (Oct. 30, 2017).

Since 1990, the categorical approach had governed the applicability of the ACCA’s residual clause, which provided enhanced penalties for a violator with three or more earlier convictions that “involve[d] conduct that presents a serious potential risk of physical injury to another.” *Johnson*, 576 U.S. at 594, 596-97. Under that approach, “a court assesses[d] 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.* at 596 (quoting *Begay v. United States*, 553 U.S. 137, 141 (2008)). Because the categorical approach governed the Act’s residual clause, the clause “require[d] a court to picture the kind of conduct that the crime

involves in ‘the ordinary case,’ and to judge whether that abstraction present[ed] a serious potential risk of physical injury.” *Id.* (quoting *James v. United States*, 550 U.S. 192, 208 (2007)).

In *Johnson*, this Court held that two features of the imagined “ordinary case” requirement combined to make the residual clause unconstitutionally vague. *Id.* at 597. First, the categorical approach—as applied to the residual clause—tied judicial assessment of risk to an imagined case, “not to real-world facts or statutory elements.” *Id.* Second, it left uncertainty about how much risk was “serious potential risk” when the standard was divorced from real-world facts. *Id.* at 598.

Both those two features are absent from Tennessee’s statutory prior-violent-felony aggravating factor, which is tied directly to real-world facts. Since 1981, Tennessee courts have consistently held that, in order to prove the prior-violent-felony aggravating factor, the State must “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.” *State v. Moore*, 614 S.W.2d 348, 351 (Tenn. 1981); *see State v. Sims*, 45 S.W.3d 1, 12 (Tenn. 2001). Thus, when a Tennessee jury sentenced King to death, Tennessee law “ha[d] never required the use of a judicially imagined ordinary case” like that required by the categorical approach in *Johnson*. (Pet. App. 7a.)

Accordingly, the difference between the residual clause of the ACCA and Tennessee’s prior-violent-felony aggravating factor is simple: the federal statute required imagining a “ordinary case”; the Tennessee statute requires an evaluation of real-world facts of the particular case. The Court of Criminal Appeals understood that distinction and properly rejected King’s vagueness challenge. (Pet. App. 7a); *see also Nichols v. State*, No. E2018-00626-CCA-R3-PD, 2019 WL 5079357, at *6 (Tenn. Crim. App. Oct. 10, 2019) (discussing the distinction between Tennessee’s case-specific approach as *Johnson*’s categorical approach), *perm. app. denied* (Tenn. Jan. 15, 2020), *cert. denied*, 141 S. Ct. 320 (2020).

King seeks to undermine this critical distinction by claiming that *Johnson* also prohibits courts from examining the real-world conduct underlying prior convictions. (Pet., 16-21.) But as both this Court and the Court of Criminal Appeals recognized, the holding in *Johnson* did not call into “doubt the constitutionality of laws that call for the application of a qualitative standard . . . to real-world conduct.” *Johnson*, 576 U.S. at 604; (Pet. App. 7a); *see also United States v. Davis*, 139 S. Ct. 2319, 2327 (2019) (“[A] case-specific approach would avoid the vagueness problems that doomed the statutes in *Johnson* and *Dimaya*.”). Contrary to King’s claims, *Johnson* did not abrogate a fact-based, case-specific procedure but merely applied the categorial approach mandated for application of the residual clause. *Johnson*, 576 U.S. at 596; *see also Taylor v. United States*, 495 U.S. 575, 600-02 (1990). That categorial approach rendered the statute unconstitutional, and *Johnson* did not invalidate aggravating factors that apply a case-specific approach. *Johnson*, 576 U.S. at 604; *see also Davis*, 139 S. Ct. at 2327.

In short, the flaws that led this Court to strike down the residual clause in *Johnson* have simply never been a part of Tennessee’s prior-violent-felony aggravating factor. *Johnson* is patently inapposite and does not require Tennessee’s law to be invalidated as unconstitutionally vague. The Court should once again deny certiorari on this question.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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