

CAPITAL CASE

No. \_\_\_\_\_

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IN THE  
SUPREME COURT OF THE UNITED STATES

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DONNIE E. JOHNSON,

Petitioner,

vs.

STATE OF TENNESSEE,

Respondent.

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

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PETITION FOR WRIT OF CERTIORARI

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## CAPITAL CASE

### QUESTION PRESENTED

In *Johnson v. United States*, this Court held that the Armed Career Criminal Act's (ACCA) residual clause, which defined "a crime of violence" as one that "involves conduct that presents a serious potential risk of physical injury to another," was unconstitutionally vague and violated due process. Petitioner was sentenced to death based on two aggravating circumstances, one of which was "the defendant was previously convicted of one or more felonies ... which involve the use or threat of violence to the person." This petition asks this Court to conclude that pursuant to *Johnson*, application of the prior violent felony aggravating circumstance at Petitioner's capital sentencing hearing violated due process.

In *Sessions v. Dimaya*, this Court considered *Johnson's* applicability to an Immigration and Nationality Act (INA) provision that closely tracked the residual clause's language. Employing a categorical approach, this Court held that, like the residual clause, the INA provision was unconstitutionally vague. *Dimaya*, however, left open the question of whether, and under what circumstances, the Sixth Amendment requires a categorical approach for *Johnson* like determinations, and when it allows for an underlying conduct approach focusing on what the defendant did and did not do during the commission of a crime. This petition presents this Court an opportunity to address this important issue. It asks:

Does the Sixth Amendment require Tennessee courts to employ a categorical approach when determining whether a prior conviction involved the use or threat of violence to the person?

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## **OPINIONS BELOW**

The Tennessee Supreme Court order denying Petitioner’s application for permission to appeal is unreported. *Johnson v. State*, No. W2017-00848-SC-R11-PD (Tenn. January 19, 2108)(App. at 1). The opinion of the Tennessee Court of Criminal Appeals denying permission to appeal is also unreported. *Johnson v. State*, No. W2017-00848-CCA-R28-PD (Tenn. Crim. App. September 11, 2017)(App. at 2). The opinion of the trial court denying Petitioner’s motion asking that court to reopen his post-conviction petition is unreported. *Johnson v. State*, No. P-5654 (30th Judicial District Criminal Court March 30, 2017)(App. at 8).

## **JURISDICTION**

This Court has jurisdiction under 28 U.S.C. § 1257. On January 19, 2018, the Tennessee Supreme Court entered its order denying relief. Petitioner files this certiorari petition within ninety days of that court’s order.

## **CONSTITUTIONAL PROVISIONS INVOLVED**

U.S. Const. Amend. VI, provides: “In all criminal prosecutions, the accused shall enjoy the right to (a) jury ....”

U.S. Const. Amend. XIV, provides: “No state ... shall ... deprive any person of life, liberty, or property, without due process of law ....”

## **STATEMENT OF THE CASE**

At Petitioner’s capital sentencing hearing, the jury applied the prior violent felony aggravating circumstance upon finding that Petitioner “was previously convicted of one or more felonies ... which involve the use or threat of violence to the

person.” *See Johnson v. State*, 743 S.W.2d 154, 157 (Tenn. 1987); Tenn. Code Ann. § 39-2-203(i)(2) (repealed). The jury concluded that the (i)(2) circumstance, along with the heinous, atrocious, or cruel circumstance, Tenn. Code Ann. § 39-2-203(i)(5) (repealed), outweighed Petitioner’s mitigation evidence, and it sentenced him to death. *Johnson*, 743 S.W.2d at 157.

On June 26, 2015, this Court issued its opinion in *Johnson v. United States*, 135 S.Ct. 2251 (2015). In *Johnson*, this Court held that when a statute permits increasing a sentence due to a defendant's prior conviction, but the requirements are vague for determining what prior convictions justify such an enhancement, the enforcement of that statute violates due process. *Johnson v. United States*, 135 S. Ct. at 2557. Applying this law, the Court concluded that the “involves” language of the ACCA residual clause was unconstitutionally vague. *Johnson*, 135 S. Ct. at 2563.

Petitioner’s motion to reopen asserted that like the language of the ACCA residual clause, the “involves” language of the prior violent felony aggravating circumstance applied in his case was unconstitutionally vague. The trial court summarily denied Petitioner’s claim. (App. at 10-11).

Petitioner filed in the Tennessee Court of Criminal Appeals an application asking the court to vacate the trial court’s order and remand Petitioner’s case for further proceedings. The Court of Criminal Appeals denied Petitioner’s application reasoning that (1) *Johnson v. United States* did not establish a new rule of constitutional law; and (2) pursuant to *State v. Moore*, 614 S.W.2d 348 (Tenn. 1981),

Tennessee courts look at the facts of the actual crime charged to determine whether it constitutes a prior violent felony. (App. at 5-7).

On January 19, 2018, the Tennessee Supreme Court summarily denied Petitioner's application for permission to appeal. (App. at 1).

### **REASONS FOR GRANTING THE WRIT**

Like *Dimaya*, Petitioner's case gives this Court an opportunity to provide lower courts guidance on how to apply its reasoning in *Johnson* to cases outside the context of the ACCA. Of central importance to that undertaking is a question that *Dimaya* recognized but did not answer: When can a court engage in a backward looking inquiry assessing prior conduct to resolve whether that conduct meets statutory standards, and when does the Sixth Amendment require courts to employ a categorical approach for that inquiry? This petition presents an ideal case for resolving this issue.

#### **I. *Johnson v. United States***

The ACCA establishes a sentencing enhancement if a defendant has prior violent felony convictions. *Johnson*, 135 S.Ct. at 2555. The statute sets out two ways for proving a requisite prior conviction.

The first clause of the ACCA provides an "elements test." A prior conviction qualifies as an enhancing conviction if it "has as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i).

The second clause of the ACCA contains an enumeration of four specific felonies which are “crimes of violence,” followed by the “residual clause.” Under the residual clause, a prior conviction was a crime of violence if it “otherwise involves conduct that presents a serious potential risk of physical injury to another.” 18 U.S.C. § 924(e)(2)(B)(ii)(emphasis added).

In *Johnson*, this Court concluded that the ACCA’s residual clause violated the Constitution by “den[ying] fair notice to defendants and invit[ing] arbitrary enforcement by judges.” *Johnson*, 135 S. Ct. at 2557. This Court reasoned that, unlike the straight forward inquiry under the “elements test” into whether a conviction required a finding of a specified element, the residual clause required courts “to picture the kind of conduct that the crime involves ‘in the ordinary case.’” *Johnson*, 135 S.Ct. at 2557. This Court held that the “wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges. Increasing a defendant’s sentence under the (residual) clause denies due process of law.” *Johnson*, 135 S.Ct. at 2557.

## II. *Johnson* Establishes A New Rule

The Court of Criminal Appeals ruled that *Johnson* did not establish a new rule of constitutional criminal law. (App. at 5). In doing so the court clearly erred. *Welch v. United States*, 136 S.Ct. 1257, 1264 (2016)(“it is undisputed that *Johnson* announced a new rule”).

## III. This Petition Presents An Important Issue *Dimaya* Recognized But Did Not Address: When Does the Sixth Amendment Require A Court To Employ A Categorical Approach When Making A *Johnson* Like Determination

The Court of Criminal Appeals concluded that *Johnson* did not apply to Petitioner's case because, unlike the ACCA residual clause, the Tennessee death penalty statute allowed for consideration of the facts of the actual crime charged. (App. at 6-7). This petition asks whether the Sixth Amendment allows for such consideration in Petitioner's case. In *Dimaya* a plurality of Justices recognized but did not resolve the Sixth Amendment issue Petitioner's case presents. *See Sessions v. Dimaya*, 584 U.S. \_\_\_, \_\_\_, (opinion of Kagan, J., slip op. at 13-14); *see also id.*, 584 U.S. at \_\_\_ (opinion of Thomas, J., slip op. at 22-23). This petition thus gives the Court an opportunity to decide and provide guidance on the question of when a lower court may look to prior conduct when making *Johnson* like determinations and when it must employ a categorical approach to do so. For the following reasons, Petitioner's argument that Tennessee's courts improperly engaged in an underlying conduct approach when it reviewed the prior violent felony circumstance is a strong one.

At a death penalty sentencing hearing, the Sixth Amendment requires that the jury find facts supporting the application of aggravating circumstances. *Ring v. Arizona*, 536 U.S. 584, 609 (2002). The Sixth Amendment precludes judges from doing so. *Id.* While this Sixth Amendment requirement does not apply to the "fact" that a defendant was previously convicted of a crime, *see Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), it applies once the inquiry turns away from the "fact" of a prior conviction and toward the conduct that resulted in the defendant's conviction. *Ring*, 536 U.S. at 609; *Apprendi*, 530 U.S. at 487-40.

While the jury at Petitioner’s trial found the “fact” that Petitioner had prior convictions, it did not find any facts concerning what Petitioner did or did not do to garner the prior convictions. *See State v. Johnson*, 743 S.W.2d at 157. Because the Sixth Amendment precludes judges from making findings about the conduct underlying the prior convictions, the Court of Criminal Appeals’ decision employing such an analysis violates Petitioner’s right to jury findings of facts that support aggravating circumstances.

IV. The Similar Language Of The ACCA Residual Clause And The Prior Violent Felony Aggravating Circumstance Indicates *Johnson’s* Applicability To Petitioner’s Case

As *Dimaya* demonstrates, this Court’s *Johnson* reasoning is not limited to application within the confines of the ACCA. When another statutory provision bears a textual resemblance to the ACCA residual clause, *Johnson’s* reasoning applies to that provision. *See Dimaya*, 584 U.S. at \_\_\_\_ (opinion of Kagan, J., slip op. at 9-11); *Shuti v. Lynch*, 828 F.3d 440, 446 (6th Cir. 2016). A comparison of the ACCA residual clause’s language with that of the prior violent felony circumstance demonstrates the textual resemblance of the two.

The ACCA residual clause provides for application when a prior felony “involves conduct that presents a serious potential risk of physical injury to another.” 18 U.S.C. § 924(e)(2)(B)(ii). Using similar language, the prior violent felony circumstance provided for application when a defendant “was previously convicted of one or more felonies ... which involve the use or threat of violence to the person.” Tenn. Code Ann. § 39-2-203(i)(2) (repealed). Neither of these statutes

employ an elements test.<sup>1</sup> Instead, both ask whether a prior violent felony “involved” conduct. The textual similarities of the ACCA residual clause and the prior violent felony circumstance demonstrate *Johnson’s* applicability to Petitioner’s case. That this Court found the ACCA residual clause unconstitutionally vague in *Johnson* suggests that the prior violent felony circumstance is likewise vague in Petitioner’s case.

### CONCLUSION

This Court should grant certiorari.

Respectfully Submitted,

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By: /s/ *Christopher M. Minton*

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<sup>1</sup>In 1989, the Tennessee General Assembly recognized the efficacy of including an elements test for the prior violent felony circumstance, and it amended the (i)(2) circumstance to include such a test. *See* Tenn. Code Ann. § 39-13-203(i)(2) (1989).

## CERTIFICATE OF SERVICE

I certify that a copy of the foregoing petition for writ of certiorari was served via first-class mail upon James Gaylord, Esq., Office of the Attorney General, P. O. Box 20207, Nashville, Tennessee 37202 this 18th day of April, 2018.

*/s/ Christopher M. Minton*