

NO. 17-8576

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

**DONNIE E. JOHNSON,
Petitioner,**

v.

**STATE OF TENNESSEE,
Respondent.**

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

RESPONDENT'S BRIEF IN OPPOSITION

**HERBERT H. SLATERY III
Attorney General & Reporter
State of Tennessee**

**ANDRÉE S. BLUMSTEIN
Solicitor General**

**JAMES E. GAYLORD
Senior Counsel
425 Fifth Avenue North
P.O. Box 20207
Nashville, Tennessee 37202-0207
(615) 532-7356
*Counsel of Record for Respondent***

CAPITAL CASE

QUESTION PRESENTED

Whether the rule in *Johnson v. United States*, 135 S.Ct. 2551 (2015), is applicable to Tennessee's former prior violent felony aggravating circumstance, which provided for eligibility for the death penalty when the defendant was previously convicted of one or more felonies "which involve the use or threat of violence to the person."

TABLE OF CONTENTS

QUESTION PRESENTED.....	i
OPINION BELOW.....	1
STATEMENT OF JURISDICTION.....	1
STATUTORY PROVISION INVOLVED.....	1
STATEMENT OF THE CASE.....	1
REASONS WHY THE PETITION SHOULD BE DENIED.....	4
CONCLUSION.....	8
CERTIFICATE OF SERVICE	9

TABLE OF AUTHORITIES

CASES

<i>Johnson v. State</i> , No. W2017-00848-CCA-R28-PD (Tenn. Crim. App. filed Apr. 27, 2017).....	4
<i>Johnson v. State</i> , No. 02C01-9111-CR-00237, 1997 WL 141887 (Tenn. Crim. App. Mar. 27, 1997).....	2
<i>Johnson v. State</i> , No. 02C01-9111-CR-00237, 1995 WL 603159 (Tenn. Oct. 9, 1995).....	2
<i>Johnson v. State</i> , No. 02C01-9111-CR-00237, 1994 WL 90483 (Tenn. Crim. App. Mar. 23, 1994).....	2
<i>Johnson v. State</i> , No. 02-S-01-9207-CR-00041, 1993 WL 61728 (Tenn. Mar. 8, 1993).....	2
<i>Johnson v. United States</i> , 135 S.Ct. 2551 (2015).....	2,5
<i>Sessions v. Dimaya</i> , 138 S.Ct. 1204 (2018).....	4
<i>State v. Johnson</i> , 734 S.W.2d 154 (Tenn. 1987).....	1,2
<i>State v. Moore</i> . 614 S.W.2d 348 (Tenn. 1981).....	6

STATUTES

18 U.S.C. § 924(e)(2)(B)	5
28 U.S.C. § 1257(a)	1
Tenn. Code Ann. § 39-2-203(i)(2) (1982)	2
Tenn. Code Ann. § 39-2-203(i)(5).....	2
Tenn. Code Ann. § 39-13-204(i)(2).....	1,6,7

Tenn. Code Ann. § 39-13-207	1
Tenn. Code Ann. § 39-13-207(a)(1)	4

OPINION BELOW

The order of the Tennessee Court of Criminal Appeals denying petitioner's application for permission to appeal (Pet. App. P2-P7) is unreported.

STATEMENT OF JURISDICTION

The order of the Tennessee Court of Criminal Appeals was filed on September 11, 2017. (Pet. App. P2.) Petitioner filed an application for permission to appeal to the Tennessee Supreme Court, which was denied on January 19, 2018. (Pet. App. P1.) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a). (Pet. 1.)

STATUTORY PROVISIONS INVOLVED

The version of Tennessee's prior violent felony aggravating circumstance in place at the time of Petitioner's trial provided for eligibility for the death penalty when: "The defendant was previously convicted of one (1) or more felonies, other than the present charge, which involve the use or threat of violence to the person." Tenn. Code Ann. § 39-13-204(i)(2) (1988).

Tennessee Code Annotated § 39-13-207 provides in pertinent part:

(a) A petitioner may file a motion in the trial court to reopen the first post-conviction petition only if the following applies:

(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

In 1985, Petitioner was convicted of first degree murder in connection with the suffocation of his wife, Connie Johnson. *See State v. Johnson*, 734 S.W.2d 154, 155 (Tenn. 1987). The jury found that Petitioner's previous convictions for armed robbery and aggravated assault constituted

felonies “which involve the use or threat of violence to the person,” Tenn. Code Ann. § 39-2-203(i)(2) (1982), and that the murder was especially cruel and involved torture or depravity of mind, *id.* § 39-2-203(i)(5). *Johnson*, 734 S.W.2d at 157. Further concluding that these aggravating circumstances outweighed any mitigating factors, the jury imposed a sentence of death. *Id.* at 155, 157. The conviction and sentence were affirmed on direct appeal by the Tennessee Supreme Court. *Id.* at 155, 160. The Petitioner later sought post-conviction relief, which was unsuccessful. *See Johnson v. State*, No. 02C01-9111-CR-00237, 1997 WL 141887, at *1 (Tenn. Crim. App. Mar. 27, 1997), *perm. app. denied* (Tenn. Sept. 8, 1997); *Johnson v. State*, No. 02C01-9111-CR-00237, 1995 WL 603159 (Tenn. Oct. 9, 1995); *Johnson v. State*, No. 02C01-9111-CR-00237, 1994 WL 90483, at *1 (Tenn. Crim. App. Mar. 23, 1994), *remanded* (Tenn. Oct. 9, 1995); *Johnson v. State*, No. 02-S01-9207-CR-00041, 1993 WL 61728, at *1 (Tenn. Mar. 8, 1993).

On June 16, 2016, Petitioner filed a motion to re-open his post-conviction proceedings. (See Pet. App. P9.) Petitioner argued, among other things, that this Court’s decision in *Johnson v. United States*, 135 S.Ct. 2551 (2015), invalidated Tennessee’s prior violent felony aggravating circumstance on vagueness grounds. (See Pet. App. P10.) The trial court summarily denied the motion. (Pet. App. P11.) The court found that the prior violent felony aggravating circumstance pursuant to which Petitioner was sentenced was “distinctly narrower” than the provision invalidated in *Johnson*, and hence that *Johnson*’s rule was not applicable to this case. (Pet. App. P11.)

Petitioner applied for permission to appeal to the Tennessee Court of Criminal Appeals. (See Pet. App. P2.) The CCA denied the application. (Pet. App. P7.) *Johnson*, in the court’s view, did not “appear to create a new constitutional right,” but only applied “an existing constitutional test to a statute.” (Pet. App. P5.) Regardless, the court concluded that application of *Johnson*’s

ruling would not result in Tennessee’s prior violent felony aggravating circumstance being held unconstitutionally vague. (Pet. App. P6.) *Johnson* condemned a statute that “required the trier of fact to imagine some far reaching machination to determine any number of possible outcomes not specifically related to the underlying felony.” (Pet. App. P6.) The pre-1989 version of the prior violent felony aggravator, however, did not limit consideration “to an ‘ordinary case’ of the prior felony but required the court to look at the specific acts of the prior felony to determine if the use or threat of violence to a person was present.” (Pet. App. P7.) Consequently, any new rule announced by *Johnson* would have no application to Petitioner’s case. (See Pet. App. P6-P7.)

Petitioner now seeks a writ of certiorari.

REASONS WHY THE PETITION SHOULD BE DENIED

Petitioner presents the question whether the Sixth Amendment requires Tennessee courts to employ a categorical approach when determining whether a prior conviction involved the use or threat of violence to the person. (Pet. i, 4-6.) Petitioner raised no Sixth Amendment claim below, and this Court has no jurisdiction to take it up now. The only question that Petitioner could present concerns the Fourteenth Amendment—namely, whether the *Johnson* decision rendered Tennessee’s pre-1989 prior violent felony aggravating circumstance unconstitutionally vague. That claim has no merit. The rule in *Johnson*—whether it creates a new “constitutional right” or no—has no application to Petitioner’s case. The petition should be denied.

Petitioner raised no Sixth Amendment claim in his state-court motion to reopen his post-conviction proceedings. Rather, he claimed that “*Johnson v. United States* establishes that application of the pre-1989 prior violent felony aggravating circumstance violated due process.” Application for Permission to Appeal at 1, *Johnson v. State*, No. W2017-00848-CCA-R28-PD (Tenn. Crim. App. filed Apr. 27, 2017). Because Petitioner presented no jury-trial claim below, the Court of Criminal Appeals did not decide one, and there is no Sixth Amendment decision for this Court to review. Moreover, Petitioner could not have raised the Sixth Amendment claim that he now fashions in a Tennessee motion to reopen. Tennessee’s Post-Conviction Procedure Act limit motions to reopen, as relevant here, to “a final ruling of an appellate court establishing a constitutional right that was not recognized as existing at the time of trial.” Tenn. Code Ann. § 39-13-207(a)(1). But according to Petitioner, his Sixth Amendment claim presents an issue that this Court “recognized but did not address” in *Sessions v. Dimaya*, 138 S.Ct. 1204 (2018). (Pet. 4.) Should the Court in fact address the issue (and make its ruling retroactive), then perhaps Petitioner can get further proceedings with a Tennessee motion to reopen. As it stands now,

however, his claim is procedurally barred by the Post-Conviction Procedure Act. Petitioner's question, in short, is not properly before the Court.

The question that Petitioner could present—whether *Johnson* makes Tennessee's pre-1989 prior violent felony aggravating circumstance unconstitutionally vague—is not a substantial one. *Johnson* invalidated the “residual clause” of the Armed Career Criminal Act (ACCA) as violative of the Due Process Clause's prohibition on vague criminal laws. *Johnson*, 135 S.Ct. at 2557, 2563. The ACCA defines a “violent felony” as “any crime punishable by imprisonment for a term exceeding one year . . . that—(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another.*” 18 U.S.C. § 924(e)(2)(B) (emphasis added). The emphasized portion of this definition is referred to as the “residual clause,” and deciding whether a particular crime fell within the residual clause “requires a court to picture the kind of conduct that the crime involves in ‘the ordinary case,’ and to judge whether that abstraction presents a serious potential risk of physical injury.” *Johnson*, 135 S.Ct. at 2557.

The Court in *Johnson* held that this “ordinary case” analysis rendered the residual clause unconstitutionally vague for two reasons. First, the residual clause left “grave uncertainty” about how to estimate the risk posed by a crime, as it tied the judicial assessment of risk to a judicially-imagined “ordinary case” of a crime, not to real-world facts or statutory elements. *Id.* Second, the residual clause left uncertainty about how much risk was required to qualify a crime as a violent felony. *Id.* at 2558. As explained by the Court, “It is one thing to apply an imprecise ‘serious potential risk’ standard to real-world facts; it is quite another to apply it to a judge-imagined abstraction.” *Id.*

The rule in *Johnson*, then, is this: a law is unconstitutionally vague if it “requires a court to picture the kind of conduct that the crime involves in ‘the ordinary case,’ and to judge whether that abstraction presents a serious potential risk” of some result. *Id.* at 2557. Even if this rule established a new “constitutional right” (something the Court of Criminal Appeals doubted), it has nothing to do with the prior violent felony aggravating circumstance in place at the time of Petitioner’s trial. The former Tenn. Code Ann. § 39-13-204(i)(2) provided: “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.”

The Tennessee Supreme Court construed this provision in the 1981 case of *State v. Moore*. There the Court was faced with the question whether burglary in the second degree and arson constituted felonies involving the use or threat of violence to the person. 614 S.W.2d 348, 351 (Tenn. 1981). The Court recognized that there are some crimes, such as rape and murder, “which by their very definition involve the use or threat of violence to a person.” *Id.* But for those offenses that do “not necessarily in all cases or as a matter of law” involve the use or threat of violence to another person, the Court instructed that it is incumbent upon the State “to show that there was in fact either violence to another or the threat thereof” *Id.* On this analysis, the Court concluded that the trial judge had erred in charging the jury as a matter of law that arson was a crime which involves the use or threat of violence to the person. *Id.*

Moore shows that Petitioner has no viable claim under *Johnson*. Pursuant to *Moore*, courts considered the *definition* of the offense and asked whether it *necessarily* involved the use or threat of violence to a person. *Id.* And if there were any doubt, the State was required to prove that the offense *in fact* involved either violence to another or the threat thereof. *Id.* But a court following *Moore*’s tenets was not called upon to envision the “ordinary case” presented by the prior felony.

Nor was it required to gauge the seriousness of a potential risk created in that “judge-imagined abstraction.” The Court of Criminal Appeals correctly determined that the rule in *Johnson* does not apply to the former Tenn. Code Ann. § 39-13-204(i)(2). No writ should issue to retread that ground.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

HERBERT H. SLATERY III
Attorney General & Reporter

ANDRÉE S. BLUMSTEIN
Solicitor General

s/James E. Gaylord
JAMES E. GAYLORD
Senior Counsel
425 Fifth Avenue North
P.O. Box 20207
Nashville, Tennessee 37202-0207
(615) 532-7356
Counsel of Record for Respondent

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing document has been sent by first class mail, to: Christopher M. Minton, Assistant Federal Public Defender, 810 Broadway, Suite 200, Nashville, TN 37203, on this the 21st day of May, 2018

s/James E. Gaylord
JAMES E. GAYLORD
Senior Counsel