

Case No. _____

In The
Supreme Court of the United States

SEIFULLAH ABDUL-SALAAM,
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA
Respondent.

On Petition for a Writ of Certiorari to the
Supreme Court of Pennsylvania

PETITION FOR A WRIT OF CERTIORARI

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THIS IS A CAPITAL CASE

QUESTIONS PRESENTED

In *Johnson v. United States*, 135 S. Ct. 2551 (2015), this Court held the residual clause in the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(2)(B), unconstitutionally vague, a ruling found to apply retroactively. *Welch v. United States*, 136 S. Ct. 1257 (2016). More recently, in *Dimaya v. Lynch*, 803 F.3d 1110, 1120 (2015), this Court applied *Johnson*'s reasoning to a similar but textually distinct statute, 18 U.S.C.S. § 16(b). This case involves one of Pennsylvania's capital aggravating circumstances, 42 Pa. C.S. § 9711(d)(9), which is materially indistinguishable from the statutes invalidated in *Johnson* and *Dimaya*.¹ Yet, the Supreme Court of Pennsylvania denied relief, finding the rule set forth in *Johnson* applied solely to "federal statutes." Thus, this petition presents two questions:

1. Does the void for vagueness test set forth in *Johnson v. United States*, 135 S. Ct. 2551 (2015) and held to be retroactive in *Welch v. United States*, 136 S. Ct. 1257 (2016) apply with equal force to state statutes that share the same infirmities that rendered the ACCA statute at issue in *Johnson* unconstitutional?
2. Is Pennsylvania's "significant history" aggravating circumstance, 42 Pa. C.S. § 9711(d)(9), unconstitutionally vague?

¹ 42 Pa. C.S. § 9711(d)(9) asks whether the defendant has a significant history of felony convictions "involving the use or threat of violence to the person," whereas ACCA's residual clause defines a violent felony as one that "involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B).

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Petitioner, Seifullah Abdul-Salaam, respectfully petitions for a writ of certiorari to review the decision of the Supreme Court of Pennsylvania in this capital case.

OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania affirmed the denial post-conviction relief. *Commonwealth v. Abdul-Salaam*, 174 A.3d 1049 (Pa. 2017) App-1. As that opinion relied on the reasoning of *Commonwealth v. Spatz*, 171 A.3d 675, 681 (Pa. 2017), the *Spatz* opinion is appended as well. App-2. The opinion of the post-conviction court, *Commonwealth v. Abdul Salaam*, CP–21–CR–0001499–1994 (March 28, 2017) is unpublished. App-8.

JURISDICTION

The judgment of the Supreme Court of Pennsylvania was entered December 19, 2017. Justice Alito extended the time within which to file a petition for a writ of certiorari to and including May 18, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

The Supreme Court of Pennsylvania affirmed the lower court in a one-sentence order: “AND NOW, this 19th day of December, 2017, the Order of the Court of Common Pleas is AFFIRMED. *See Commonwealth v. Spatz*, — Pa. —, 171 A.3d 675 (2017).” In turn, in *Spatz*, the Supreme Court of Pennsylvania took a narrow view of the reach of *Johnson’s* constitutional mandate, finding simply that “a state prisoner cannot seek redress based upon constitutional rulings that extend only to federal statutes, as is the case here.” *Commonwealth v. Spatz*, 171 A.3d 675,

681 (Pa. 2017). Conflating merits and procedure. it concluded, “[b]ecause *Spotz* has not satisfied the newly-recognized constitutional right exception, like the PCRA court, we lack that jurisdiction.” *Id.* at 682.

The lower post-conviction court in this case also ostensibly rejected Petitioner’s claim on timeliness grounds. However, reference to that opinion makes clear it was likewise a merits ruling; the post-conviction timeliness exceptions invoked by Petitioner² were held to be inapplicable solely because the claim was deemed to lack merit. In a cursory analysis, the post-conviction court addressed the textual distinction between the language at issue in *Johnson* and the § (d)(9) aggravating circumstance (“threat” of violence as opposed to “risk”). Noting that the significant history aggravating circumstance had thus far survived constitutional scrutiny, the court commented:

² In Pennsylvania, timeliness of challenges predicated on new, and retroactive, constitutional provisions are triggered by the date the rule was held to be retroactive, not the date the right accrued. 42 Pa. C.S. § 9545 (b)(1)(iii) (“the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.”). *See Commonwealth v. Abdul-Salaam*, 571 Pa. 219, 812 A.2d 497 (2002):

Subsection (iii) of Section 9545[(b)(1)] has two requirements. First, it provides that the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or this [C]ourt after the time provided in this section. Second, it provides that the right “has been held” by “that court” to apply retroactively. Thus, a petitioner must prove that there is a “new” constitutional right and that the right “has been held” by that court to apply retroactively. The language “has been held” is in the past tense. These words mean that the action has already occurred, i.e., “that court” has already held the new constitutional right to be retroactive to cases on collateral review.

This is perhaps because in reviewing the Defendant's history of felony convictions neither the court nor the jury is called upon to assess the "risk" of physical injury to another attendant in the prior convictions. It was, of course, the assessment of "risk" which gave the court in *Johnson* 'grave uncertainty.

APP-11. It thus found, "Because we conclude that *Johnson* is inapposite to the petition sub judice, we are satisfied that Abdul -Salaam cannot satisfy the PCRA's threshold jurisdictional time requirements." *Id.*

Where the state court ruling does not clearly rest on an adequate and independent state ground, this Court has jurisdiction to entertain the matter. *Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985) ("we will not assume that a state-court decision rests on adequate and independent state grounds when the 'state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion,'" *quoting Michigan v. Long*, 463 U.S. 1032, 1040-1041 (1983)). Under such circumstances, this Court has jurisdiction to entertain the matter. *Caldwell*, 472 U.S. at 327 (reaching merits as "[a]n examination of the decision below reveals that it contains no clear or express indication that separate, adequate, and independent state-law grounds were the basis for the court's judgment (internal quotations omitted); *Florida v. Powell*, 559 U.S. 50, 57 (2010) (finding jurisdiction where, "Although invoking Florida's Constitution and precedent in addition to this Court's decisions, the Florida Supreme Court treated state and federal law as interchangeable and interwoven;

the court at no point expressly asserted that state-law sources gave Powell rights distinct from, or broader than, those delineated in *Miranda*").

Similarly, where a state rule conflicts with constitutional protections, the state bar may not be deemed adequate and independent. *Reece v. Georgia*, 350 U.S. 85, 89–90 (1955) (federal review not foreclosed where state court decision rested on procedural rule requiring defendant to challenge the racial composition of the grand jury before indictment, because application of the rule, which ran before counsel was appointed and thus the defendant had no reasonable opportunity to challenge the jury, would violate due process); *Kimmelman v. Morrison*, 477 U.S. 365, 378 (1986) (in declining to extend the rule announced in *Stone v. Powell* to habeas review of claims of ineffectiveness assistance of counsel in raising Fourth Amendment claims, the Court stated, “Because collateral review will frequently be the only means through which an accused can effectuate the right to counsel, restricting the litigation of some Sixth Amendment claims to trial and direct review would seriously interfere with an accused’s right to effective representation.”).

The Supreme Court of Pennsylvania’s opinion makes clear relief was denied because that court viewed *Johnson* as inapplicable. Where collateral review is available, states are required to apply new substantive law that has been made retroactive by this Court. *Montgomery v. Louisiana*, 136 S. Ct. 718, 727 (2016) (“If . . . the Constitution establishes a rule and requires that the rule have retroactive application, then a state court’s refusal to give the rule retroactive effect is reviewable by this Court”). The Pennsylvania court declined to apply a rule this

Court had made retroactively available, on grounds that rested primarily on its own erroneous interpretation of federal law or, at best, were interwoven with that erroneous interpretation. This Court accordingly has jurisdiction to review the state court's ruling.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides “....nor shall any State deprive any person of life, liberty, or property, without due process of law....”

The Fifth Amendment to the United States Constitution provides: “No person shall be ... deprived of life, liberty, or property, without due process of law...”

The Eighth Amendment to the United States Constitution provides: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”

42 Pa. C.S. § 9711(d)(9) holds: “Aggravating circumstances shall be limited to the following: . . . 9) The defendant has a significant history of felony convictions involving the use or threat of violence to the person.”

STATEMENT

In its zeal to convict and sentence to death Seifullah Abdul-Salaam, an African-American man of the Muslim faith, for the killing of Police Officer Willis Cole, the Commonwealth of Pennsylvania routinely ignored its due process obligations, both at trial and sentencing.

Petitioner was arrested on August 19, 1994, and charged with the first degree

murder of Cole during the robbery of D & S Coins in the town of New Cumberland, Cumberland County, Pennsylvania. Crucial to the Commonwealth's case was its evidence that the blood recovered from the steering wheel of the getaway car belonged to Petitioner. At trial, Petitioner was prevented from challenging this highly incriminating blood evidence because the Commonwealth falsely claimed that all the blood had been consumed in testing, thus precluding independent analysis. When it was learned that in fact blood remained in sufficient quantity to conduct DNA testing, such testing showed the very opposite of the trial evidence – the blood on the wheel belonged solely to alleged co-conspirator Scott Anderson, and not Petitioner. The violation was compounded by the prosecution's suppression of an eyewitness who said the man who planned the robbery with Anderson prior to its execution was not Petitioner.³

Due process was ignored at sentencing as well. One of the aggravating circumstances the Commonwealth sought to prove was 42 Pa. C.S. § 9711(d)(9) (significant history of felony convictions involving the use or threat of violence to the

³ In federal habeas corpus proceedings, the district court found Petitioner failed to demonstrate materiality. *Abdul-Salaam v. Beard*, 16 F. Supp. 3d 420, 456 (M.D. Pa. 2014) (“In light of [the] evidence of guilt relied upon by the state court, this Court concludes that Abdul-Salaam has not established that the Clifton material or new blood evidence was material and would have changed the outcome of the trial”). A certificate of appealability was denied. Notably, the prosecutor who tried the case, J. Michael Eakin, was later elected to the Supreme Court of Pennsylvania, but resigned in disgrace in 2016 after disclosures he routinely trafficked in sexist, racist, and bigoted emails. Craig R. McCoy, *The Morning Call*, *Ex Pa. Supreme Court Justice Michael Eakin Fined \$50,000 For Lewd Emails; Keeps Pension* (March 24, 2016).

person).⁴ Although Petitioner’s adult record was *per se* insufficient to support the circumstance, the prosecutor invoked Petitioner’s juvenile record pursuant to *Commonwealth v. Baker*, 614 A.2d 663 (Pa. 1992) (permitting use of juvenile adjudications in support of § (d)(9)), even though these adjudications were made prior to Pennsylvania’s recognition that juveniles enjoyed the right to effective assistance of counsel. *Matter of Smith*, 573 A.2d 1077, 1078, 1079-80 (Pa. Super. 1990) (finding as a matter of “first impression” that juveniles are entitled to *effective* counsel).

In pre-*Johnson* litigation, Petitioner unsuccessfully challenged this aggravating circumstance. *Commonwealth v. Abdul-Salaam*, 808 A.2d 558, 560 (Pa. 2001) (counsel not ineffective for failing to challenge the aggravating circumstance 42 Pa.C.S. § 9711(d)(9) as unconstitutionally vague). Now, this Court has found similar language to be violative of due process. Specifically, the language found to be unconstitutional in *Johnson* regarded any felony that **“involves conduct that presents a serious potential risk of physical injury to another.”** 18 U.S.C. § 924(e)(2)(B)(ii). Comparably, Pennsylvania’s (d)(9) circumstance applies if the defendant has a significant history of felony convictions **“involving the use or threat of violence to the person.”** Notwithstanding the material similarities, the Supreme Court of Pennsylvania, citing prior precedent, denied relief on the ground that “a

⁴ Under Pennsylvania law, if one circumstance is found to be invalid, a new sentencing hearing is required; the appellate courts do not engage in reweighing mitigation against the remaining aggravating circumstances. *Commonwealth v. Bolden*, 753 A.2d 793, 799 (Pa. 2000) (whenever the jury finds both aggravating and mitigating circumstances, “but one of the aggravating circumstances was erroneously determined, the penalty of death [must be] vacated.”)

state prisoner cannot seek redress based upon constitutional rulings that extend only to federal statutes, as is the case here.” *Commonwealth v. Spotz*, 171 A.3d 675, 681 (Pa. 2017).

REASONS FOR GRANTING THE WRIT

Certiorari is required for two reasons. First, the state court’s holding that *Johnson*’s constitutional mandate “extend[s] only to federal statutes” is plainly wrong. This Court’s guidance is necessary to reaffirm that *Johnson* put forth a new test for vagueness that is binding on states that employ an “ordinary” case approach to eligibility for non-enumerated predicate crimes.

Second, 42 Pa. C.S § 9711(d)(9) shares the same infirmities this Court found constitutionally intolerable in *Johnson* and *Dimaya* –the “ordinary-case inquiry and a hazy risk threshold.” *Sessions v. Dimaya*, 138 S. Ct. 1204, 1218 (2018). Because Mr. Abdul Salaam’s death sentence rested in substantial part on an unconstitutional aggravating circumstance, this Court should grant certiorari and so rule.

- A. *Johnson*’s holding is broader than the construction given by the Supreme Court of Pennsylvania; state courts employing an “ordinary case” approach to eligibility for non-enumerated predicate crimes are bound by *Johnson*’s new vagueness test.**

Mr. Abdul-Salaam’s death sentence rested substantially on the jury’s finding of aggravating circumstance 42 Pa. C.S § 9711(d)(9) (“The defendant has a significant history of felony convictions involving the use or threat of violence to the person.”). The statute is materially indistinguishable from the one struck down in *Johnson*.

In *Johnson*, this Court held that the residual clause of the Armed Career Criminal Act (“ACCA”), 18 U.S.C. § 924(e)(2)(B)(ii), was unconstitutionally vague.⁵The clause at issue in *Johnson* aggravates the sentence of a defendant who has a history of convictions for violent offenses, defined as any crime that “involves conduct that presents a serious potential risk of physical injury to another.” 18 U.S.C. § 924(e)(2)(B)(ii). This Court found the provision unconstitutionally vague because it required the factfinder to evaluate two undefined and unquantified circumstances. In combination, those requirements meant that courts applying the residual clause had to “assess the hypothetical risk posed by an abstract generic version of the offense.” *Welch*, 136 S. Ct. at 1262. It was the “unpredictability and arbitrariness” resulting from those two features which made the statute unconstitutionally vague. *Johnson*, 135 S. Ct. at 2558.

The holding in *Johnson* is not simply the result; *Johnson* dictates the analysis that is constitutionally required when prior crimes are categorically invoked (as is the case with Pennsylvania’s § (d)(9)) to enhance a sentence. Under this “ordinary case” approach, “a court assesses 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 2557 (internal citations omitted). First, the court must “imagine” the kind of conduct presented in the “ordinary case.” Second, it must apply the relevant

⁵ The relevant portion of the ACCA defining a violent felony has two clauses. The first, § 924(e)(2)(B)(i), is commonly referred to as the force clause. The second, § 924(e)(2)(B)(ii), is commonly referred to as the residual clause. It is the residual clause which was at issue in *Johnson*.

operator (in *Johnson*, “risk”; here, “threat”), and then, viewing the two steps in conjunction, determine whether a result can be achieved with sufficient certainty so as not to offend due process.

This constitutionally-mandated approach is akin to instructions governing other constitutional protections. *See, e.g., Batson v. Kentucky*, 476 U.S. 79, 97 (1986) (establishing three-step burden-shifting process in evaluating claims of purposeful discrimination in jury selection); *Brady v. Maryland*, 373 U.S. 83, 87 (1963). (establishing three-part inquiry in claims of suppression of exculpatory evidence).

In this case, the Supreme Court of Pennsylvania, perhaps anticipating *Dimaya*, found that the rule in *Johnson* was limited to “federal statutes.” Other states have taken a different approach. *See, e.g., Commonwealth v. Beal*, 474 Mass. 341, 351 (2016) (looking to *Johnson* for “guidance” in finding state ACCA statute unconstitutionally vague); *People v. Ledesma*, 14 Cal. App. 5th 830, 838 (Ct. App. 2017) (recognizing *Ledesma*’s claim “that *Johnson* announced a new test for unconstitutional vagueness” but finding *Johnson* inapplicable because the statute in issue “compels juries and courts to apply a legal standard to real world facts”). This Court’s guidance is required to resolve the extent to which *Johnson* is binding on the states.

- B. The minor textual differences between the ACCA’s residual clause and 42 Pa. C.S. § 9711(d)(9) are immaterial and if anything compound the latter’s vagueness.

In every material respect, 42 Pa. C.S. § 9711(d)(9) is similar to the residual clause. The ACCA allows for a more severe punishment if a defendant convicted of being a felon in possession of a firearm has three or more previous convictions for a “violent felony,” a term defined to include any felony **that “involves conduct that presents a serious potential risk of physical injury to another.”** 18 U.S.C. § 924(e)(2)(B)(ii). Comparably, the (d)(9) circumstance applies if the defendant has significant history of felony convictions **“involving the use or threat of violence to the person.”** As is *Dimaya*, the textual variance is a “distinction without a difference.” *Sessions v. Dimaya*, 138 S. Ct. at 1218.

1. *Johnson v. United States*

The residual clause defines a “violent felony” as any crime that “involves conduct that presents a serious potential risk of physical injury to another.” 18 U.S.C. § 924(e)(2)(B). Rejecting an “elements based approach,” this Court has instead construed the residual clause as requiring the factfinder to consider whether the “ordinary case” of the offense at issue “involves” some risk of injury. *Johnson*, 135 S. Ct. at 2557. In order to employ the framework of this categorical approach, the factfinder was required to imagine whether a hypothetical, abstract instance of the offense could pose a risk of injury. *Id.*

This Court in *Johnson* found this process “leaves grave uncertainty about how to estimate the risk posed by a crime” where the assessment of risk is tied “to a

judicially imagined ‘ordinary case’ of a crime, not to real-world facts or statutory elements.” *Id.* Noting that many predicate crimes could be committed in either violent or non-violent ways and yet accord with the statute, this Court decided the residual clause supplied “no reliable way to choose between . . . competing accounts.” *Id.* at 2557-58.

Thus, the residual clause was void for vagueness because of the combination of two features: the requirement that the factfinder determine whether the predicate offense, in the “ordinary case” involved violence, and whether the risk of such violence in the imagined case surpassed an undefined threshold. These two features together “conspire[d] to make [the residual clause] unconstitutionally vague.” *Id.*

2. *Sessions v. Dimaya*

In *Dimaya*, this Court made clear that the new test announced in *Johnson* extended to similarly worded, though not textually identical statutes. The respondent, James Dimaya was a lawful permanent resident who had two first-degree burglary convictions. An Immigration Judge and the Board of Immigration Appeals held that Dimaya’s convictions were “crime[s] of violence” under 18 U.S.C.S. § 16(b), which made him deportable. Relying on *Johnson*, the Ninth Circuit held that § 16(b) was also unconstitutionally vague, and ruled in Dimaya’s favor. *Dimaya v. Lynch*, 803 F.3d 1110, 1120 (2015).

Before this Court, the Government argued that the textual distinctions between the statutes removed § 16(b) from the purview of *Johnson*. The government

noted § 16(b)'s express requirement, not found in ACCA, that the risk arise from acts taken “in the course of committing the offense,” arguing that the temporal constraints imposed made a difference. Second, it pointed out that § 16(b) focused on the risk of “physical force” whereas ACCA’s residual clause asked about the risk of “physical injury,” claiming the former allowed for a more specific inquiry. Third, it pointed to ACCA’s “confusing” list of designated as violent felonies independent of the residual clause, a feature not present in § 16(b).

This Court rejected the argument that the textual variations made a difference:

[The government] points to three textual discrepancies between ACCA’s residual clause and § 16(b), and argues that they make § 16(b) significantly easier to apply. But each turns out to be the proverbial distinction without a difference. None relates to the pair of features—the ordinary-case inquiry and a hazy risk threshold—that *Johnson* found to produce impermissible vagueness.

Sessions v. Dimaya, 138 S. Ct. 1204, 1218 (2018). Thus, like ACCA, § 16(b) was “void for vagueness.”

3. 42 Pa. C.S. § 9711(d)(9) is unconstitutionally vague.

In all material ways, § (d)(9) shares the attributes—“the ordinary-case inquiry and a hazy risk threshold”—that doomed ACCA and § 16(b). Application of § (d)(9) requires an “ordinary case,” rather than “real world,” approach to applicable offenses, and the risk assessment required is every bit as “hazy.”

Ordinary case approach. Pennsylvania courts apply the same “ordinary case” approach critical to the *Johnson* Court’s analysis. Rather than employing a case-by-case inquiry, in applying § (d)(9), courts look to the *category* of conviction, not the

underlying facts of the actual predicate offense, to determine whether it qualifies as a violent offense. *See, e.g., Commonwealth v. Rolan*, 549 A.2d 553, 559 (Pa. 1988) (concluding that robbery and burglary fall under § 9711(d)(9) because “[e]very robber or burglar knows when he attempts to commit his crime that he is inviting dangerous resistance”); *Commonwealth v. Spatz*, 47 A.3d 63, 104 (Pa. 2012) (“Burglary is a crime of violence as a matter of law, and a defendant’s prior burglary convictions are properly admitted as evidence of a significant history of violent felony convictions pursuant to subsection 9711(d)(9).”).

Applicability under § (d)(9) rejects assessment of a defendant’s actual conduct and instead requires a determination that the prior offense involved a potential threat of violence in an “ordinary case” scenario.

Textual similarities. At issue in *Johnson* was an enhancement provision for any prior felony that “involves conduct that presents a serious potential risk of physical injury to another.” 18 U.S.C. § 924(e)(2)(B). The (d)(9) circumstance applies if the defendant has significant history of felony convictions “involving the use or threat of violence to the person.” The clauses are materially indistinguishable. Both the residual clause and § 9711(d)(9) require evaluation of whether the predicate conviction “involves” a risk of violence. Section 924(e) speaks of “physical injury to another [person]” whereas § (d)(9) speaks of “violence to the person.”

The lower state post-conviction court rested its ruling on a single textual distinction. The residual clause asks whether the conduct involves “risk” of violence, whereas the “significant history” aggravating circumstance, § (d)(9), speaks to the

“threat” of violence. The PCRA court suggested that “perhaps” this distinction mattered, noting “in reviewing the Defendant’s history of felony convictions neither the court nor the jury is called upon to assess the ‘risk’ of physical injury to another attendant in the prior convictions.” APP-11. But as in *Dimaya*, this is a distinction without substance. Like “risk,” the abstract assessment of “threat” fails to provide the certainty in application that due process requires.

First, Pennsylvania courts have interpreted “threat” synonymously with “risk” in the context of § (d)(9). *See Commonwealth v. Thomas*, 561 A.2d 699, 709 (Pa. 1989) (“[U]nprivileged entries into buildings and structures where people are *likely* to be found is a clear *threat* to the safety of those therein.”) (emphasis added); *Rolan*, 549 A.2d at 559; *id.* at 560–61 (Zappala, J., dissenting) (describing the majority opinion assessing applicability of burglary under § 9711(d)(9) as “confus[ing] the concepts ‘risk’ and ‘threat’”); *id.* (“It is true that the types of structures subject to being burgled . . . *might* be occupied, but it is not necessary that the structure in fact be occupied.”). As interpreted, both the residual clause (risk) and § 9711(d)(9) (threat) focus on the *probability* of violence, with little guidance on how to apply this concept to the “ordinary case.”

Second, the term “threat,” abstractly applied, engenders every bit as much uncertainty as “risk.” The *Johnson* Court noted “the residual clause leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony. 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.” *Johnson*, 135

S. Ct. at 2558. Similarly, although a “threat” may be readily divined from real-life facts, the same cannot be said when applied to the hypothetical ordinary case. *See, e.g., Commonwealth v. Christy*, 515 A.2d 832, 841 (Pa. 1986) (noting in dicta that “[e]very felony has the potential for violence if the actor is caught”). These concerns are echoed in *Johnson*. 135 S. Ct. at 2559 (prior precedent “failed to establish any generally applicable test that prevents the risk comparison required by the residual clause from devolving into guesswork and intuition.”).

CONCLUSION

Johnson’s test for vagueness applies to the states and the Supreme Court of Pennsylvania was wrong to conclude otherwise. The § (d)(9) aggravating circumstance is materially indistinguishable from the statutes invalidated in *Johnson* and *Dimaya*. It is similarly also void for vagueness. Certiorari should be granted.

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