

CAPITAL CASE

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

VINCENT SIMS,

Petitioner,

vs.

STATE OF TENNESSEE,

Respondent.

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

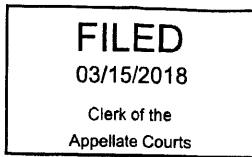
APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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IN THE SUPREME COURT OF TENNESSEE
AT JACKSON



VINCENT SIMS v. STATE OF TENNESSEE

**Criminal Court for Shelby County
No. P-25898**

No. W2016-02412-SC-R11-PD

ORDER

Upon consideration of the application for permission to appeal of Vincent Sims and the record before us, the application is denied.

PER CURIAM

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON

FILED

09/26/2017

Clerk of the
Appellate Courts

VINCENT SIMS v. STATE OF TENNESSEE

**Criminal Court for Shelby County
No. P-25898**

No. W2016-02412-CCA-R28-PD

ORDER

The Petitioner has filed an application for permission to appeal the trial court's denial of his motion to reopen his petition for post-conviction relief. The State has filed a response in opposition thereto. Tennessee Code Annotated section 40-30-117 provides that a motion to reopen a prior post-conviction petition may be filed in the trial court if certain limited circumstances warrant relief. "If the motion is denied, the petitioner shall have thirty (30) days to file an application in the court of criminal appeals seeking permission to appeal." Tenn. Code Ann. §40-30-217(c). The application must contain copies of all documents filed by both parties in the trial court, as well as the order denying the motion. *Id.* The instant application is timely, and based upon the information included, this Court is able to consider the merits thereof.

The Post-Conviction Procedure Act imposes limits on the nature, number, and timing of petitions for post-conviction relief. *See* Tenn. Code Ann. §§40-30-102, -103. Although the Act also provides a means for reopening previously filed petitions, the types of claims which may be raised in a motion to reopen are limited. *See* Tenn. Code Ann. §40-30-117. Relief will only be granted in a motion to reopen if the claim presented is based upon a final ruling of an appellate court establishing a constitutional right not previously recognized at the time of trial, if retrospective application is required, if the claim is based upon new scientific evidence establishing that the appellant is actually innocent of the crime, or if the claim presented seeks relief from a sentence that was enhanced because of a previous conviction which has subsequently been invalidated. Tenn. Code Ann. §40-30-117(a). Furthermore, the facts underlying the claim, if true, must establish by clear and convincing evidence that the appellant is entitled to have his conviction set aside or his sentence reduced. *Id.* This Court will grant the application for permission to appeal only if we conclude that the trial court abused its discretion in denying the motion to reopen. Tenn. Code Ann. §40-30-117(c).

Petitioner was convicted of especially aggravated burglary and first degree murder in 1998 and sentenced to death. The death sentence was based on four aggravating circumstances: 1) he previously had been convicted of violent felonies; 2) the murder was especially heinous, atrocious, or cruel; 3) the murder was committed for the purpose of avoiding, interfering with, or preventing his arrest or prosecution; and 4) the murder was committed during the commission of a burglary or theft. Both the convictions and sentences were affirmed by the Court of Criminal Appeals and our Supreme Court. The Petitioner unsuccessfully pursued a petition for post-conviction relief and two subsequent motions to reopen post-conviction proceedings.

On June 23, 2016, Petitioner filed a third motion to reopen post-conviction proceedings which was denied by the trial court. The Petitioner has sought permission to appeal.

The Petitioner argues that his post-conviction petition should be reopened in light of the United States Supreme Court's ruling in *Johnson v. United States*, 135 S.Ct. 2551 (2015), the United States Supreme Court's ruling in *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015), and Justice Breyer's dissenting opinion in *Glossip v. Gross*, 135 S.Ct. 2726 (2015).

His first argument in support of his application for permission to appeal is based on *Johnson v. United States*. In that case, the Supreme Court held that the "residual clause" contained in the definition of a violent felony of the federal Armed Career Criminal Act of 1984 (ACCA) is unconstitutionally vague. *Johnson*, 135 S.Ct. at 2557. The ACCA increases the punishment of a defendant convicted of being a felon in possession of a firearm if he or she has three or more previous convictions for a violent felony. 18 U.S.C. § 924(e)(1). The ACCA defines "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 the use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." §924(e)(2)(B).

The "otherwise involves conduct that presents a serious potential risk of physical injury to another" language is known as the ACCA's "residual clause." *Johnson*, 135 S.Ct. at 2556. The court observed that, "unlike the part of the definition of a violent felony that asks whether the crime 'has *as an element* the use ... of physical force,' the residual clause asks whether the crime '*involves conduct*' that presents too much risk of physical injury." *Id.* at 2557. (emphasis in original). In making its ruling, the Supreme Court reasoned that the residual clause is unconstitutionally vague because it "leaves grave uncertainty about how to estimate the risk posed by a crime" and it "leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony." *Id.* at 2557-58. In other words, "[d]eciding whether the residual clause covers a crime thus 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.” *Id.* at 2557. That “task goes beyond deciding whether creation of risk is an *element* of the crime.” *Id.* (emphasis added). As such, the majority declined the dissent’s suggestion that looking at the particular facts underlying the prior violent felony could save the residual clause from vagueness. *Id.* at 2561-62. Importantly, however, the court’s invalidation of the residual clause did not call into question the remainder of the ACCA’s definition of a violent felony, i.e., the elements clause. *Id.* at 2563.

The Petitioner alleges that the *Johnson* decision created a new constitutional right that would provide an avenue of relief pursuant to Tennessee Code Annotated section 40-30-117(a)(1). We must first look to determine if a new constitutional right was created. Tennessee Code Annotated section 40-30-122 addresses interpretation of a new rule of constitutional law stating in part:

For purposes of this part, a new rule of constitutional criminal law is announced if the result is not dictated by precedent existing at the time the petitioner’s conviction became final and application of the rule was susceptible to debate among reasonable minds.

Tenn. Code Ann. § 40-30-122. Further, the courts have determined that a “case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government [or] . . . if the result was not dictated by precedent existing at the time the defendant’s conviction became final.” *Teague v. Lane*, 489 U.S. 288, 301, 109 S.Ct. 1060, 1070 (1989) (citations omitted); *see also Van Tran v. State*, 66 S.W.3d 790, 810-11 (Tenn. 2001). On its face, the *Johnson* decision does not appear to create a new constitutional right but only applies an existing constitutional test to a statute. When referencing *Johnson*, the United States Supreme Court described the reasoning for the decision as follows:

“Last Term, this Court decided *Johnson v. United States*, 135 S.Ct. 2551 (2015). *Johnson* considered the residual clause of the Armed Career Criminal Act of 1984, 18 U.S.C. § 924(e)(2)(B)(ii). The Court held that provision *void for vagueness*.”

Welch v. United States, 136 S. Ct. 1257, 1260–61 (2016) (emphasis added). The court further stated:

“Less than three weeks later, this Court issued its decision in *Johnson* holding, as already noted, that the residual clause is *void for vagueness*.”

Id. (emphasis added). The ruling of the *Welch* court reinforces the idea that no new constitutional right was created by the *Johnson* opinion. The “void for vagueness” doctrine was not a new creation of the *Johnson* court in that the due process provisions of the 5th and 14th amendments have been utilized many times prior to *Johnson* to

determine that a statute is unconstitutionally vague. *City of Chicago v. Morales*, 119 S.Ct. 1849 (1999) (speculation as to meaning of statute not allowed); *Maynard v. Cartwright*, 108 S.Ct. 1853 (1988) (aggravating circumstance language held as unconstitutionally vague); *Kolender v. Lawson*, 103 S.Ct. 1855 (1983) (statute held to be unconstitutionally vague by requiring “credible and reliable” identification); *Colautti v. Franklin*, 99 S.Ct. 675 (1979) (statute vague due to required interpretation of “is viable” and “may be viable”); *Smith v. Goguen*, 94 S.Ct. 1242 (1974) (due process is denied where inherently vague statutory language permits selective law enforcement); *Grayned v. City of Rockford*, 92 S.Ct. 2294 (1972) (enactment is void for vagueness if its prohibitions are not clearly defined). As such, we cannot find that the United States Supreme Court established a new constitutional right through its ruling in *Johnson*.

Although this Court finds that *Johnson* does not present a new constitutional right which should be applied retroactively upon collateral review, the Court will address the substance of Petitioner’s argument.

In his application for permission to appeal, rather than argue against the underlying ruling of the post-conviction court, the Petitioner primarily argued against the prior ruling of our Supreme Court in the Petitioner’s earlier appeal. See *State v. Sims*, 45 S.W.3d 1 (Tenn. 2001). In addition, the Petitioner bases his arguments on other cases now pending in other post-conviction courts. However, the referenced cases involved sentencing under the pre-1989 statutory aggravating circumstances statutes and not the statute in effect at the time of the crime in this case.

The trial court based its decision upon an application of the *Johnson* decision to Tennessee Code Annotated section 39-13-204(i)(2) in effect at the time of the crime in this matter. The court observed that the language of the aggravating circumstance at issue herein “focuses the court’s inquiry on the elements of the predicate conviction rather than a judicially imagined hypothetical scenario as in the residual clause of the federal act.” As a result, the post-conviction court held that the Tennessee prior violent felony aggravating circumstance does not “suffer from the vagueness problems that rendered the ACCA’s Residual Clause unconstitutional.”

Johnson invalidated as vague that part of the federal statutory definition of “violent felony” requiring a court to examine whether an offense could potentially involve *conduct* which poses a risk of physical injury. It left intact the language defining a “violent felony” as one having the use of physical force as a statutory *element* of the offense. As the Supreme Court later stated: “For purposes of the residual clause, then, courts were to determine whether a crime involved a ‘serious potential risk of physical injury’ by considering not the defendant’s actual conduct but an ‘idealized ordinary case of the crime.’” *Welch v. United States*, 136 S. Ct. at 1262 (citing *Johnson*, 135 S.Ct. at 2561). “The residual clause failed not because it adopted a ‘serious potential risk’ standard but because applying that standard under the categorical approach required

courts to assess the hypothetical risk posed by an abstract generic version of the offense.” *Id.*

The plain language of the (i)(2) aggravating circumstance resembles that of the ACCA held to be valid. In order to qualify as an aggravating circumstance in Tennessee, a conviction for a prior felony must be for one whose statutory elements involve the use of violence. § 39-13-204(i)(2). Whether the *statutory elements* of an offense include the use of violence to the person is a question of law for the trial court. *Sims*, 45 S.W.3d at 11. However, whether the State has proven the defendant has a prior conviction for that offense pursuant to the (i)(2) aggravating circumstance remains a matter for the trier of fact. *See State v. Ivy*, 188 S.W.3d 132, 151 (Tenn. 2006) (citing *State v. Cole*, 155 S.W.3d 885, 904 (Tenn. 2005)). The finding of the trier of fact is subject to a sufficiency of the evidence analysis. In its analysis in *Johnson*, the Supreme Court explained that “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.” 135 S.Ct. at 2557 (internal citation omitted). Because the ACCA refers to a person who has previous “convictions,” instead of a person who “committed” previous offenses, the Supreme Court opined 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.” *Id.* at 2562 (internal citation omitted). The Petitioner’s argument in the case at hand is, therefore, misplaced and the *Johnson* ruling would have no effect on the Petitioner’s conviction or sentence.

The Petitioner further argues that the court should find that his sentence of death is unconstitutional after the decision of the United States Supreme Court in *Obergefell v. Hodges*. The *Obergefell* case held that “same-sex couples may exercise the fundamental right to marry” and that “under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and liberty.” *Obergefell*, 135 S.Ct. at 2604-05. The Petitioner argues that the death penalty, which has been imposed against him, denies him his fundamental right to life which is prohibited by *Obergefell*. However, the application of the death penalty has not been ruled unconstitutional by either the United States Supreme Court or the Tennessee Supreme Court. Therefore, the trial court did not abuse its discretion in holding that *Obergefell* did not entitle the Petitioner to relief and denying his petition as to that issue.

Relying upon a dissent by Justice Breyer in *Glossip v. Gross*, 135 S.Ct. 2726 (2015), the Petitioner argues that his sentence of death is unconstitutional. The Petitioner’s reliance upon a dissenting opinion to reopen his petition for post-conviction relief offers him no relief. To succeed in reopening a previously filed petition, the claim asserted must be “based upon a final ruling of an appellate court.” T.C.A. § 40-30-117(a)(1). The majority opinion in *Glossip* concluded that the method of execution utilized by the State of Oklahoma does not constitute cruel and unusual punishment under the Eighth Amendment. 135 S.Ct. at 2731. Accordingly, the trial court did not abuse its

discretion in denying relief to the Petitioner finding that Justice Breyer's dissent relied upon by the Petitioner did not create a new substantive rule of constitutional law as required by statute.

For these reasons, the trial court did not abuse its discretion in denying the motion to reopen. The Petitioner's application for permission to appeal is, therefore, denied. Because it appears the Petitioner is indigent, costs are taxed to the State.

PER CURIAM

JOHN EVERETT WILLIAMS, JUDGE

ALAN E. GLENN, JUDGE

CAMILLE R. McMULLEN, JUDGE

11-4-16
Filed
Richard L. DeSousa, Clerk
BY D.C.

**No. P-25898
(CAPITAL CASE)
(POST-CONVICTION)
(MOTION TO REOPEN)**

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II. Procedural History

Trial and Sentencing

In May 1998, a Shelby County Jury convicted Petitioner of especially aggravated burglary and first degree murder in connection with the April 1996 shooting death of Forrest Smith. Petitioner received consecutive sentences of 20 years for the especially aggravated burglary and a death sentence for the first degree murder. The jury found the following aggravating circumstances in sentencing Petitioner to death:

- (1) 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;
- (2) The murder was especially heinous, atrocious, or cruel in that it involved torture or serious physical abuse beyond that necessary to produce death;
- (3) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another; and
- (4) The murder was knowingly committed, solicited, directed, or aided by the defendant, while the defendant had a substantial role in committing or attempting to commit, or was fleeing after having a substantial role in committing or attempting to commit, any ... burglary,[or] theft ... [.]

See Tenn. Code Ann. § 39-13-204(i)(2), (5), (6), and (7) (1991 and 1996 Supp).

On appeal, the Tennessee Supreme Court affirmed both his convictions and sentences. *State v. Sims*, 45 S.W.3d 1 (Tenn.), *cert. denied*, 534 U.S.956 (2001).

Post-Conviction

Petitioner subsequently filed a timely petition for post-conviction relief on November 15, 2001, which was subsequently amended. After a hearing, the post-conviction court denied the petition by order on October 1, 2008. The Court of Criminal

Appeals affirmed the judgment of the post-conviction court, and the Tennessee Supreme Court denied Mr. Sims's application for permission to appeal. See *Vincent Sims v. State*, 2011 WL 334285 (Tenn. Crim. App. Jan. 28, 2011), *perm. app. denied*, (Tenn. Aug. 31, 2011).

On April 9, 2012, Petitioner filed his first motion to reopen his post-conviction proceedings alleging intellectual disability. On December 27, 2012, Petitioner amended his claims to include a petition for writ of error coram nobis. The trial court denied relief on all claims. The Tennessee Court of Criminal Appeals denied Petitioner's application for permission to appeal the denial of the first motion to reopen by order on February 5, 2014, and the Tennessee Supreme Court denied application to appeal on May 28, 2014. The Tennessee Court of Criminal Appeals also affirmed the trial court's denial of the petition for writ of error coram nobis, and the Tennessee Supreme Court again denied Petitioner's application for permission to appeal. *Vincent Sims v. Tennessee*, 2014 WL 7334202 (Tenn. Crim. App. Dec. 23, 2014), *perm. app. denied*, (Tenn. May 18, 2015).

In May 2015, Petitioner again filed a motion to reopen based upon *Hall v. Florida*, 134 S. Ct. 1986 (2014). The motion was denied by the trial court on August 10, 2015, and the denial was affirmed on appeal. *Vincent Sims v. State*, No. W2015-01713-CCA-R28-PD (Tenn. Crim. App. Order entered Jan. 28, 2016), *perm. app. denied*, (Tenn. May 6, 2016).

Federal Habeas Corpus Proceedings

Mr. Sims currently has federal habeas corpus proceedings pending in the United States District Court for the Western Division of Tennessee.

III. Applicable Law

The statutes governing motions to reopen were summarized in *Harris v. State*, 102 S.W.3d 587, 590-91 (Tenn. 2003).

Under the provisions of the Post-Conviction Procedure Act, a petitioner "must petition for post-conviction relief ... within one (1) year of the final action of the highest state appellate court to which an appeal is taken" Tenn. Code Ann. § 40-30-202(a). Moreover, the Act "contemplates the filing of only one (1) petition for post-conviction relief." Tenn. Code Ann. § 40-30-202(c). After a post-conviction proceeding has been completed and relief has been denied, ... a petitioner may move to reopen only "under the limited circumstances set out in 40-30-217." *Id.* These limited circumstances include the following:

(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. Such 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; or

(2) The claim in the motion is based upon new scientific evidence establishing that the petitioner is actually innocent of the offense or offenses for which the petitioner was convicted; or

(3) The claim in the motion seeks relief from a sentence that was enhanced because of a previous conviction and such conviction in the case in which the claim is asserted was not a guilty plea with an agreed sentence, and the previous conviction has subsequently been held to be invalid, in which case the motion must be filed within one (1) year of the finality of the ruling holding the previous conviction to be invalid; and

(4) It appears that the facts underlying the claim, if true, would establish by clear and convincing evidence that the petitioner is entitled to have the conviction set aside or the sentence reduced.

(Citing Tenn. Code Ann. § 40-30-217(a)(1)-(4))(now Tenn. Code Ann. § 40-30-117(a)(1)-(4)). The statute further states:

The statute of limitations shall not be tolled for any reason, including any tolling or saving provision otherwise available at law or equity. Time is of the essence of the right to file a petition for post-conviction relief or motion to reopen established by this chapter, and the one-year limitations period is an element of the right to file the action and is a condition upon its exercise. Except as specifically provided in subsections (b) and (c) [of section 102], the right to file a petition for post-conviction relief or a motion to reopen under this chapter shall be extinguished upon the expiration of the limitations period. Tenn. Code Ann. § 40-30-102(a).

The post-conviction statutes further provide

a new rule of constitutional criminal law is announced if the result is not dictated by precedent existing at the time the petitioner's conviction became final and application of the rule was susceptible to debate among reasonable minds. A new rule of constitutional criminal law shall not be applied retroactively in a post-conviction proceeding unless the new rule places primary, private individual conduct beyond the power of the criminal law-making authority to proscribe or requires the observance of fairness safeguards that are implicit in the concept of ordered liberty.

Tenn. Code Ann. § 40-30-122. Furthermore, as Petitioner asserts, the United Supreme Court's opinion in *Montgomery v. Louisiana*, 577 U.S. ___, 136 S. Ct. 718, 729 (2016) provides that "when a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule."

A motion to reopen "*shall be denied* unless the factual allegations, if true, meet the requirements of [Tenn. Code Ann. § 40-30-117](a)." Tenn. Code Ann. § 40-30-117(b) (emphasis added).

IV. Analysis

Petitioner's Claims under Glossip v. Gross Dissent

In *Glossip v. Gross*, 135 S. Ct. 2726 (2015), the Supreme Court concluded Oklahoma's three-drug lethal injection protocol did not violate the Eighth Amendment's protection against cruel and unusual punishment. Four justices wrote a dissent addressing the particular controversy at issue in *Glossip* (namely, the constitutionality of Oklahoma's lethal injection protocol), but in a separate dissent, joined by Justice Ginsburg, Justice Breyer argued for a reexamination of whether the death penalty itself should be held to be unconstitutional. See *id.* at 2755-80 (Breyer, J., dissenting). This

dissent forms the basis for one of Petitioner's issues in the current motion to reopen. Specifically, Petitioner argues on page 3 and 4 of his motion to reopen,

In *Glossip v. Gross*, 576 U.S. ___, 135 S. Ct. 2726 (2015) (Breyer, J., dissenting), Justices Breyer and Ginsburg concluded that the death penalty likely constitutes a prohibited cruel and unusual punishment, which violates the Eighth and Fourteenth Amendments (and in turn violates Article I §§ 8 & 16 of the Tennessee Constitution). Vincent Sims relies on all of the arguments and evidence contained and discussed in Justice Breyer's dissent in support of his discussion that the death sentence in this case is unconstitutional. Vincent Sims attaches Justice Breyer's *Glossip* opinion as Exhibit 1, as factual, legal, and evidentiary support for his request for an evidentiary hearing and for post-conviction relief given the unconstitutionality of the death penalty in this case.

As Justice Breyer has explained, the death sentence is unconstitutional here because it is: unreliable (*Glossip*, 135 S. Ct. at 2756-59 (Breyer, J., dissenting)); arbitrary (*Id.*, 135 S. Ct. at 2759-64 (Breyer, J., dissenting)); cruel, given excessive delays and its failure to serve any legitimate penological objective (*Id.*, 135 S. Ct. at 2764-72 (Breyer, J., dissenting)); and highly unusual or rare. (*Id.*, 135 S. Ct. at 2772-76 (Breyer, J., dissenting)). Vincent Sims need not repeat every specific point made by Justice Breyer on these particular matters, though he specifically relies upon those here. They are, in and of themselves, sufficient to entitle him to an evidentiary hearing and to vacation of his death sentence.

Initially, it is this Court's determination the *Glossip* dissent is not a "final ruling of an appellate court" that would entitle Petitioner to relief. The final ruling of the Supreme Court in *Glossip* affirmed Oklahoma's lethal injection protocol. Justice Breyer's separate dissenting opinion has no precedential value and cannot be considered "a new substantive rule of constitutional law [which] controls the outcome of a case[.]" *Montgomery*, 136 S. Ct. at 729 (describing a new substantive rule of constitutional law as one that controls the outcome of a case). In short, Petitioner's *Glossip* claim must be denied because "the facts underlying the claim, if true, would [not] establish by clear and convincing evidence that the petitioner is entitled to have the conviction set aside or the sentence reduced." Tenn. Code Ann. § 40-30-117(a)(4). See also *Edmund Zagorski v. State*, No. M2016-00557-CCA-R28-PD, slip op. at 2 (Tenn. Crim. App. May 4, 2016)

(order denying relief in appeal of motion to reopen decision based upon *Obergefell* opinion and *Glossip* dissent), *perm. app. denied* (Tenn. Aug. 18, 2016).

Petitioner's general assertions concerning the death penalty in Tennessee being unreliable, arbitrary, cruel, and highly unusual or rare are hardly new. Mindful of evolving standards of decency, the United States Supreme Court has concluded that executing certain classes of persons—such as the intellectually disabled¹ and persons committing capital offenses as juveniles²— are unconstitutional. However, both the federal and state supreme courts have repeatedly concluded the death penalty itself does not violate the United States and Tennessee constitutions. *E.g. Glossip v. Gross*, 135 S. Ct. 2726 (2015)(majority opinion); and *Keen v. State*, 398 S.W.3d 594, 600 n.7 (Tenn.2012). Whatever arguable merit the concerns set forth in the dissent in *Glossip* may or may not have, binding precedent, which is clearly contained in the majority opinion of the same case, requires this Court to find Petitioner's claims here do not rely upon a new substantive rule of constitutional law as required by the statute.

Petitioner's Claims Under *Obergefell v. Hodges*

Petitioner also asserts he is entitled to relief under the United States Supreme Court's opinion in *Obergefell v. Hodges*, 576 U.S. ___, 135 S. Ct. 2584 (2015), which concluded the right to marry is a fundamental right under the Due Process and Equal Protection Clauses of the Fourteenth Amendment and, therefore, is guaranteed to all couples regardless of sex. Specifically, Petitioner argues "[j]ust as no state can deny the fundamental right to marry, *a fortiori*, no state can deny the fundamental right to life,

¹ See *Atkins v. Virginia*, 536 U.S. 304 (2002).

² See *Roper v. Simmons*, 543 U.S. 551 (2005).

which is *the* fundamental human right and provides the predicate for the exercise of all other rights.” (Motion to Reopen, page 14, emphasis in original). He further states “Under *Obergefell*, the death sentence here must be struck down.” *Id.* This Court disagrees.

The government’s inability to deny any person his fundamental rights under the state or federal constitution is hardly a novel concept. Petitioner’s assertion the death penalty denies him his fundamental right to life is also not a new claim as numerous death row inmates have raised the claim in Tennessee’s courts, and both the Tennessee Supreme Court³ and the Court of Criminal Appeals⁴ have denied these claims. Petitioner argues *Obergefell*’s conclusions regarding fundamental rights, human dignity, and the prohibition against the diminishment of one’s personhood apply in all circumstances, not just the right to marry. However, this Court is not aware of any state

³ See *State v. Mann*, 959 S.W.2d 503, 536 (Tenn. 1997) (appendix); and *State v. Bush*, 942 S.W.2d 489, 524 (Tenn. 1997) (appendix). See also *State v. Freeland*, 451 S.W.3d 791, 825 (Tenn. 2014) (appendix); *State v. Sexton*, 368 S.W.3d 371, 427 (Tenn. 2012) (appendix); *State v. Hester*, 324 S.W.3d 1, 80 (Tenn. 2010); *State v. Holton*, 126 S.W.3d 845, 871-72 (Tenn. 2004) (appendix); and *Nichols v. State*, 90 S.W.3d 576, 604 (Tenn. 2002).

⁴ See *Cauthern v. State*, 145 S.W.3d 571, 629 (Tenn. 2004). See also *Robert Faulkner v. State*, No. W2012-00612-CCA-R3-PD (Tenn. Crim. App. Aug. 29, 2014); *Akil Jahi a.k.a. Preston Carter v. State*, No. W2011-02669-CCA-R3-PD (Tenn. Crim. App. Mar. 13, 2014); *David Ivy v. State*, No. W2010-01844-CCA-R3-PD (Tenn. Crim. App. Dec. 21, 2012); *Steven Ray Thacker v. State*, No. W2010-01637-CCA-R3-PD (Tenn. Crim. App. Mar. 23, 2012); *Gerald Lee Powers v. State*, No. W2009-01068-CCA-R3-PD (Tenn. Crim. App. Feb. 22, 2012); *John Michael Bane v. State*, No. W2009-01653-CCA-R3-PD (Tenn. Crim. App. July 21, 2011); *Christa Gail Pike v. State*, No. E2009-00016-CCA-R3-PD (Tenn. Crim. App. Apr. 25, 2011); *Vincent Sims v. State*, No. W2008-02823-CCA-R3-PD (Tenn. Crim. App. Jan. 28, 2011); *Detrick Cole v. State*, No. W2008-02681-CCA-R3-PD (Tenn. Crim. App. Mar. 8, 2011); *Perry Anthony Cribbs v. State*, No. W2006-01381-CCA-R3-PD (Tenn. Crim. App. July 1, 2009); *Tyrone Chalmers v. State*, No. W2006-00424-CCA-R3-PD (Tenn. Crim. App. June 25, 2008); *Anthony Darrell Hines v. State*, No. M2006-02447-CCA-R3-PC (Tenn. Crim. App. Jan. 29, 2008); *James A. Dellinger v. State*, No. E2005-01485-CCA-R3-PD (Tenn. Crim. App. Aug. 28, 2007), *aff’d in part, rev’d in part on other grounds*, 279 S.W.3d 282 (Tenn. 2009); *William R. Stevens v. State*, No. M2005-00096-CCA-R3-PD (Tenn. Crim. App. Dec. 29, 2006); *Farris Genner Morris, Jr., v. State*, No. W2005-00426-CCA-R3-PD (Tenn. Crim. App. Oct. 10, 2006); *David Keen v. State*, No. W004-02159-CCA-R3-PD (Tenn. Crim. App. June 5, 2006); *Kevin B. Burns v. State*, No. W2004-00914-CCA-R3-PD (Tenn. Crim. App. Dec. 21, 2005); *Kennath Henderson v. State*, No. W003-01545-CCA-R3-PD (Tenn. Crim. App. June 28, 2005); *Byron Lewis Black v. State*, No. 01C01-9709-CR-00422 (Tenn. Crim. App. Apr. 8, 1999); *State v. Ricky Thompson*, No. 03C01-9406-CR-00198 (Tenn. Crim. App. Jan. 24, 1996).

or federal appellate opinion extending *Obergefell* to criminal law in general or capital punishment in particular. The *Obergefell* opinion does not state explicitly that the Supreme Court's holding applies to areas of the law beyond the right to marry.

In addition and as previously referred to above, the Court of Criminal Appeals has already denied relief in a similar case. In October 2015, Edmund Zagorski, convicted in Robertson County of two counts of first degree murder and sentenced to death,⁵ filed a motion to reopen his post-conviction proceedings based upon the *Obergefell* opinion and the *Glossip* dissent discussed above. The post-conviction court denied the motion following a hearing, and on appeal the Court of Criminal Appeals affirmed the trial court:

The Appellant argues that his post-conviction petition should be reopened in light of the United States Supreme Court's ruling in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), and Justice Breyer's dissenting opinion in *Glossip v. Gross*, 135 S. Ct. 2726 (2015). The *Obergefell* case held that "same-sex couples may exercise the fundamental right to marry" and that "under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and liberty." *Obergefell*, 135 S. Ct. at 2604-05. The Appellant argues that the death penalty, which has been imposed against him, "denies his fundamental right to life, denies him inherent human dignity, and unconstitutionally diminishes his personhood — all of which are prohibited by *Obergefell*." The death penalty, however, has not been ruled unconstitutional by the United States Supreme Court or the Tennessee Supreme Court. Accordingly, the trial court did not abuse its discretion in holding that *Obergefell* simply has no bearing on the Appellant's case. Moreover, the Appellant's reliance upon a dissenting opinion in *Glossip* offers him no avail. In order to succeed in reopening a previously filed petition, the claim asserted must be "based upon a final ruling of an appellate court." § 40-30-117(a)(1). The majority opinion in *Glossip* concluded that the method of execution utilized by the State of Oklahoma does not constitute cruel and unusual punishment under the Eighth Amendment. 135 S. Ct. at 2731. Accordingly, the trial court did not abuse its discretion in denying relief to the Appellant based upon his reliance on Justice Breyer's dissent. Finally, the Appellant's reliance on *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), is misplaced. The Supreme Court held that "when a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule." *Id.* at 729. The issue in *Montgomery* dealt with juvenile offenders sentenced to life without the

⁵ See *State v. Zagorski*, 701 S.W.2d 808 (Tenn. 1985).

possibility of parole. As the trial court correctly noted, however, "the death penalty for the [Appellant] has not been eliminated" in this case. Again, the death penalty is currently a constitutionally acceptable form of punishment in this state and country.

For these reasons, the trial court did not abuse its discretion in denying the motion to reopen. The Appellant's application for permission to appeal is, therefore, denied.

Edmund Zagorski v. State, No. M2016-00557-CCA-R28-PD, slip op. at 2 (Tenn. Crim. App. May 4, 2016) (order denying relief in appeal of motion to reopen decision), *perm. app. denied*, (Tenn. Aug. 18, 2016).

Under existing precedents, this Court must conclude that while *Obergefell* indeed states a new rule of constitutional law related to same-sex marriage, that new rule does not alter the long-standing precedent under which the death penalty does not deny an inmate his fundamental right to life. *Obergefell* does not entitle Petitioner to relief, and, therefore, the motion to reopen should be denied as to this issue.

Petitioner's Claims Under *Johnson v. United States*

Finally, Petitioner argues he is entitled to relief pursuant to what he claims is a new rule announced in *Johnson v. United States*, 135 S. Ct. 2551 (2015). This Court again disagrees.

Johnson addressed the federal Armed Career Criminal Act (ACCA), which provides for more severe sentences if a person convicted of being a felon in possession of a firearm has three or more convictions for a "violent felony." See 18 U.S.C. § 924(e)(1). The ACCA defines "violent felony" in pertinent part 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). Mr. Johnson argued the portion of the statute emphasized above, known as the “residual clause,” was unconstitutionally vague. The Court agreed with Mr. Johnson and held:

Deciding whether the residual clause covers a crime thus 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. *James, supra*, at 208, 127 S. Ct. 1586.⁶ The court’s task goes beyond deciding whether creation of risk is an element of the crime. That is so because, unlike the part of the definition of a violent felony that asks whether the crime “has as an element the use ... of physical force,” the residual clause asks whether the crime “involves conduct” that presents too much risk of physical injury. What is more, the inclusion of burglary and extortion among the enumerated offenses preceding the residual clause confirms that the court’s task also goes beyond evaluating the chances that the physical acts that make up the crime will injure someone. The act of making an extortionate demand or breaking and entering into someone’s home does not, in and of itself, normally cause physical injury. Rather, risk of injury arises because the extortionist might engage in violence *after* making his demand or because the burglar might confront a resident in the home *after* breaking and entering.

We are convinced that the indeterminacy of 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 clause denies due process of law.

...

Two features of the residual clause conspire to make it unconstitutionally vague. In the first place, the residual clause leaves grave uncertainty about how to estimate the risk posed by a crime. It ties the judicial assessment of risk to a judicially imagined “ordinary case” of a crime, not to real-world facts or statutory elements. How does one go about deciding what kind of conduct the “ordinary case” of a crime involves? “A statistical analysis of the state reporter? A survey? Expert evidence? Google? Gut instinct?” *United States v. Mayer*, 560 F.3d 948, 952 (9th Cir. 2009) (Kozinski, C.J., dissenting from denial of rehearing en banc). To take an example, does the ordinary instance of witness tampering involve offering a witness a bribe? Or threatening a witness with violence? Critically, picturing the criminal’s behavior is not enough; as we have already discussed, assessing “potential risk” seemingly requires the judge to imagine how the idealized ordinary case of the crime subsequently plays out. *James* illustrates how speculative (and how detached from statutory elements) this enterprise can become. Explaining why attempted burglary poses a serious potential risk of physical injury, the Court said: “An armed would-be burglar may be spotted by a

⁶ *James v. United States*, 550 U. S. 192, 127 S. Ct. 1586, 167 L. Ed. 2d 532 (2007).

police officer, a private security guard, or a participant in a neighborhood watch program. Or a homeowner ... may give chase, and a violent encounter may ensue." 550 U.S., at 211, 127 S. Ct. 1586. The dissent, by contrast, asserted that any confrontation that occurs during an attempted burglary "is likely to consist of nothing more than the occupant's yelling 'Who's there?' from his window, and the burglar's running away." *Id.*, at 226, 127 S. Ct. 1586 (opinion of SCALIA, J.). The residual clause offers no reliable way to choose between these competing accounts of what "ordinary" attempted burglary involves.

At the same time, 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. By asking whether the crime "*otherwise* involves conduct that presents a serious potential risk," moreover, the residual clause forces courts to interpret "serious potential risk" in light of the four enumerated crimes—burglary, arson, extortion, and crimes involving the use of explosives. These offenses are "far from clear in respect to the degree of risk each poses." *Begay*, 553 U.S., at 143, 128 S. Ct. 1581.⁷ Does the ordinary burglar invade an occupied home by night or an unoccupied home by day? Does the typical extortionist threaten his victim in person with the use of force, or does he threaten his victim by mail with the revelation of embarrassing personal information? By combining indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony, the residual clause produces more unpredictability and arbitrariness than the Due Process Clause tolerates.

Johnson, 135 S. Ct. at 2557-58.

Petitioner urges this Court to conclude *Johnson* announces a new constitutional rule of law which would require his death sentence to be set aside. He argues the prior violent felony aggravating circumstance applied in his case is analogous to the ACCA residual clause, particularly in those instances in which the prior felony involves an offense which may or may not be committed by use of violence. This Court, however, disagrees.

The Court in *Johnson* concluded its decision is limited to the residual clause and its "decision does not call into question application of the Act to ... the remainder of the Act's definition of a violent felony." *Johnson*, at 2562. The "remainder" includes the

⁷ *Begay v. United States*, 553 U.S. 137, 128 S. Ct. 1581, 170 L. Ed. 2d 490 (2008).

"elements test" provision of the federal act.⁸ Tennessee's prior violent felony conviction aggravating circumstance, as applied to Petitioner, required a finding that "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. § 39-13-204(i)(2) (emphasis added). The Tennessee statute focuses the court's inquiry on the elements of the predicate conviction⁹ rather than a judicially imagined hypothetical scenario as in the residual clause of the federal act.

⁸ The "elements test" provision is the portion of the federal act which included the definition of violent felony as "any crime punishable by imprisonment for a term exceeding one year ... that ... has as an element the use, attempted use, or threatened use of physical force against the person of another" was expressly omitted from the *Johnson* decision finding the residual clause unconstitutional.

⁹ On direct appeal in Petitioner's case, the Tennessee Supreme Court first addressed the issue of a trial judge's duty to determine whether a predicate conviction qualifies under the Tennessee statute:

In determining whether the statutory elements of a prior felony conviction involve the use of violence against the person for purposes of § 39-13-204(i)(2), we hold that the trial judge must necessarily examine the facts underlying the prior felony if the statutory elements of that felony may be satisfied with or without proof of violence.

State v. Sims, 45 S.W.3d 1, 11-12 (Tenn. 2001). Although the court in *Sims* said that the trial court must "examine the facts underlying the prior felony," subsequent case law made clear that this language referred more to the court's process which is a legal determination of the offense at issue rather than an examination of the "potential risk" involved in the "ordinary case" of a crime.

The *Sims* procedure involves a legal determination ... The *Sims* procedure authorizes trial judges merely to examine the facts, record, and evidence underlying the prior conviction to ascertain which "statutory elements" served as the basis of the prior felony conviction. This is a legal determination that neither requires nor allows trial judges to make factual findings as to whether the prior conviction involved violence. This legal determination is analogous to the preliminary questions trial judges often are called upon to decide when determining the admissibility of evidence.

State v. Cole, 155 S.W.3d 885, 904 (Tenn. 2005) (emphasis added).

In *State v. Young*, 196 S.W.3d 85, 112 (Tenn. 2006), the Tennessee Supreme Court held as follows regarding the procedure for trial court's to follow in determining if a prior felony conviction involved the use of violence to the person:

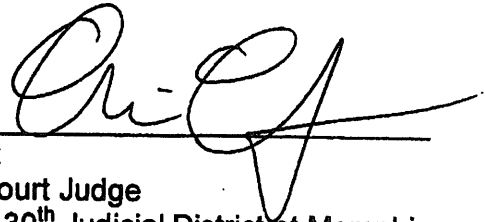
... In *Rice*, 184 S.W.3d at 668-69, we considered the *Sims* procedure in light of the United States Supreme Court's recent decision in *Shepard v. United States*, 544 U.S. 13, 125 S. Ct. 1254, 161 L. Ed. 2d 205 (2005). In *Shepard*, the Court held that, in determining the underlying character of a predicate offense to which the defendant had pled guilty, the trial court "is generally limited to examining the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." *Id.* at 16. ... In *Rice*, we determined that "*Shepard* does not change a judge's ability to find the 'fact of a prior conviction,'" but simply limits "the scope of the judge's inquiry to reliable judicial records

For the reasons stated, the prior violent felony aggravating circumstance does not suffer from the vagueness problems that rendered the ACCA's Residual Clause unconstitutional. Accordingly, any new rule of law announced by *Johnson* would not warrant a new sentencing hearing in this case. Petitioner's motion to reopen his post-conviction petition is, therefore, DENIED as to this issue as well.

V. Conclusion

For the reasons stated above, Mr. Sims's motion to reopen his petition for post-conviction relief is DENIED. Mr. Sims is indigent, so any costs associated with these proceedings are taxed to the State

IT IS SO ORDERED this 4th day of November, 2016.



Chris Craft
Criminal Court Judge
Division 8, 30th Judicial District at Memphis

CERTIFICATE OF SERVICE

I, Frances Golden, PCC, Clerk, hereby certify that I have mailed a true and exact copy of same to Counsel for Petitioner, Kelly Gleason, Office of the Post-Conviction Defender, 404 James Robertson Parkway, Nashville, TN 37219, and counsel for the State, ADA Steve Jones, this the 4 day of November, 2016.

regarding the prior conviction and precludes the judge from re-examining the facts underlying that conviction." 184 S.W.3d at 669. Similarly, we held in *State v. Ivy*, 188 S.W.3d 132, 151 (Tenn. 2006), that "Shepard clarifies but does not invalidate the procedures this Court adopted in *Sims*." Thus, when the State alleges prior violent felony convictions, the statutory elements of which do not necessarily involve the use of violence to the person, the trial court must conduct the *Sims* analysis, limiting its inquiry to the records delineated by Shepard.

(emphasis added).

Respectfully Submitted,

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By: */s/ Christopher M. Minton*

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was placed in the United States mail, first-class postage prepaid, addressed to James E. Gaylord, Office of the Attorney General, P.O. Box 20207, Nashville, Tennessee 37202, on this 12th day of June, 2018.

/s/ Christopher M. Minton