

CAPITAL CASE

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

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IN THE  
SUPREME COURT OF THE UNITED STATES

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VINCENT SIMS,

Petitioner,

vs.

STATE OF TENNESSEE,

Respondent.

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

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PETITION FOR WRIT OF CERTIORARI

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Christopher M. Minton  
Assistant Federal Public Defender  
Office of the Federal Public Defender  
Middle District of Tennessee  
810 Broadway, Suite 200  
Nashville, Tennessee 37203  
(615) 736-5047

## CAPITAL CASE

### QUESTION PRESENTED

Prior to his capital sentencing hearing, the State charged Mr. Sims with two counts of aggravated assault. While the Tennessee aggravated assault statute provided violent and non-violent elements for a conviction, Mr. Sims pled guilty to that part of the statute setting out non-violent elements.

At his capital sentencing hearing, a jury applied an aggravating circumstance upon finding that Mr. Sims “was previously convicted of one (1) or more felonies ... whose statutory elements involve the use of violence to the person.” Tenn. Code Ann. § 39-13-204(i)(2).

On direct appeal, the Tennessee Supreme Court relied on an affidavits of complaint to find that Mr. Sims’s conduct during the prior crimes was violent, and the jury therefore properly applied the prior violent felony circumstance.

In the proceedings below, Mr. Sims argued that *Johnson v. United States* established that application of the prior violent felony circumstance violated the Fourteenth Amendment to the United States Constitution. The State court declined to grant relief, ruling that *Johnson* has no application because the (i)(2) circumstance, unlike the ACCA residual clause, focuses a court’s attention “on the elements of the predicate conviction.”

This Court should grant certiorari to address the State courts’ shifting, contradictory, reasons for upholding the jury’s application of the prior violent felony circumstance. As to the State court’s current reasoning, by setting out that the dispositive inquiry focuses “on the elements of the predicate *conviction*,” the State court concedes that application of the prior violent felony circumstance violated Mr. Sims’s Eighth and Fourteenth Amendment rights. While the statute that Mr. Sims admitted violating provided violent and non-violent elements for a conviction, Sims pled guilty to, and therefore was convicted of, a part of the statute enumerating non-violent elements. The evidence is therefore insufficient to support the jury’s application of the prior violent felony circumstance. This petition asks:

Given the State courts’ shifting, contradictory reasons for rejecting Mr. Sims’s challenge to the jury’s application of the prior violent felony aggravating circumstance, and given that the State court’s reasoning below establishes that the evidence is insufficient to support application of that circumstance, should this Court grant certiorari to consider the constitutionality of Mr. Sims’s death sentence?

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## **OPINIONS BELOW**

The Tennessee Supreme Court order denying Mr. Sims's application for permission to appeal is unreported. *Sims v. State*, No. W2016-02412-SC-R11-PD (Tenn. March 15, 2108)(App. at 1). The opinion of the Tennessee Court of Criminal Appeals denying permission to appeal is also unreported. *Sims v. State*, No. W2016-02412-CCA-R28-PD (Tenn. Crim. App. September 26, 2017)(App. at 2). The opinion of the trial court denying Mr. Sims's motion asking that court to reopen his post-conviction petition is unreported. *Sims v. State*, No. P-25898 (30th Judicial District Criminal Court November 4, 2016)(App. at 8).

## **JURISDICTION**

This Court has jurisdiction under 28 U.S.C. § 1257. On March 15, 2018, the Tennessee Supreme Court entered its order denying relief. Mr. Sims files this certiorari petition within ninety days of that court's order.

## **CONSTITUTIONAL PROVISIONS INVOLVED**

U.S. Const. Amend. VIII, provides: "Cruel and unusual punishments (shall not be) inflicted."

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

## **STATEMENT OF THE CASE**

On February 15, 1991, a Shelby County Grand Jury indicted Mr. Sims on two counts of aggravated assault. Although one part of the Tennessee aggravated assault statute provided serious bodily injury to another as an element, *see* Tenn.

Code Ann. § 39-13-102(a)(1)(A)(repealed), a separate part provided as an alternative element displaying a deadly weapon to put another in fear of sustaining bodily injury. *See* Tenn. Code Ann. §§ 39-13-101(a)(2), 39-30-102(a)(1)(B)(repealed). The indictments against Mr. Sims charged the latter, *see State v. Sims*, 45 S.W.3d 1, 11 (Tenn. 2001), and they therefore charged Mr. Sims with crimes having non-violent elements.

Mr. Sims pled guilty to the crimes charged in the indictments. *See Sims*, 45 S.W.3d at 10-11. He therefore pled guilty to, and was convicted of, two crimes having non-violent elements. *Id.*

At the time of Mr. Sims's capital sentencing hearing, the Tennessee death penalty statute provided that the jury could find an aggravating circumstance if "the defendant was previously *convicted* of one (1) or more felonies . . . whose statutory elements involve the use of violence to the person." Tenn. Code Ann. § 39-13-204(i)(2)(emphasis added). At Mr. Sims's sentencing hearing, the State sought to rely on his aggravated assault convictions in support of that circumstance. *Sims*, 45 S.W.3d at 7. Mr. Sims contended that the aggravating circumstance did not apply because the statutory elements of his aggravated assault convictions did not involve violence to the person. *Sims*, 45 S.W.3d at 10.

The trial judge agreed that a conviction for aggravated assault does not necessarily involve violence to the person and recognized the offense may instead be committed by intentionally or knowingly causing the victim to reasonably fear imminent bodily injury. *Sims*, 45 S.W.3d at 10-11. But because the conduct of an

aggravated assault conviction *could* involve violence, the trial judge examined the facts alleged in the affidavits of complaint to assess Mr. Sims's conduct at the time of the offense. *Id.* Based on his review of those affidavits, the trial judge instructed the jury that both of Mr. Sims's aggravated assault convictions were for felonies involving the use of violence to the person. *Id.*

The jury did not consider the statutory elements of Mr. Sims's prior convictions. *See Sims*, 45 S.W.3d at 7. The jury simply found, erroneously, that Mr. Sims "was previously convicted of one or more felonies other than the present charge, the statutory elements of which involved the use of violence to the person[.]" *see Sims*, 45 S.W.3d at 10, and it relied on this circumstance in sentencing Mr. Sims to death. *See id.*, 45 S.W.3d at 7.

On direct appeal, Mr. Sims asserted that the jury's application of the prior violent felony aggravating circumstance was improper. *Sims*, 45 S.W.3d at 10-12. He argued that only the elements of his prior convictions should control its applicability: "Sims asserts that the statutory definition of the prior violent felony aggravator only permits an examination of the statutory elements of the felony without regard for the facts in a particular case." *Id.*, 45 S.W.3d at 11. The Tennessee Supreme Court rejected Mr. Sims's argument and concluded that the scope of the aggravator is not limited to the statutory elements of the specific prior conviction. *Id.*, 45 S.W.3d at 11-12. Rather, the Court held that when the statutory elements of a prior conviction may be satisfied with or without proof of violence, courts must look to the defendant's conduct at the time of the offense. *Id.*, 45 S.W.3d

at 12. Doing so, the Court concluded that Mr. Sims's prior convictions supported application of the prior violent felony circumstance because the affidavits of complaint contained averments of violence to the person. *Id.*, 45 S.W.3d at 11-12.

After completing post-conviction proceedings, Mr. Sims filed a motion to reopen his post-conviction petition. He asserted that this Court's decision in *Johnson v. United States* establishes that application of the prior violent felony circumstance violated the Tennessee and United States Constitutions. The Tennessee Court of Criminal Appeals (TCCA) concluded that *Johnson* did not provide a basis for Mr. Sims's motion to reopen, reasoning that (1) *Johnson v. United States* did not establish a new constitutional right (Appx. at 4-5); and (2) even if it did, unlike *Johnson*, the focus of the prior violent felony inquiry is "on the elements of the predicate conviction." (Appx. at 5-6).

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

Tennessee's courts have expressed two contradictory rationales to uphold application of the prior violent felony aggravating circumstance at Mr. Sims's sentencing hearing. On direct appeal, the Tennessee Supreme Court relied on affidavits of complaint to find that during the prior felonies Mr. Sims engaged in violent conduct, and the prior violent felony circumstance therefore encompassed his convictions. But in the proceedings below, the TCCA concluded that *Johnson* did not apply to his case because the prior violent felony inquiry turns "on the elements of the predicate *conviction*." (emphasis added). By so ruling, the TCCA admits that the jury unconstitutionally applied the prior violent felony

circumstance. Mr. Sims pled guilty to, and thereby was convicted of, crimes having non-violent elements. The TCCA's elements of conviction inquiry thus produces one inescapable conclusion: the evidence is insufficient to support the jury's application of the prior violent felony circumstance. This Court should grant certiorari to consider this capital case error and determine whether it invalidates Mr. Sims's death sentence.

I. *Johnson v. United States*

The ACCA establishes a sentencing enhancement if a defendant has prior violent felony convictions. *Johnson v. United States*, 135 S.Ct. 2551, 2555 (2015). The statute sets out two ways for proving a requisite prior conviction.

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

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

In *Johnson*, this Court concluded that the ACCA's residual clause violated the Constitution by "den[ying] fair notice to defendants and invit[ing] arbitrary enforcement by judges." *Johnson*, 135 S. Ct. at 2557. This Court reasoned that,

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

## II. *Johnson* Establishes A New Rule

The TCCA ruled that Mr. Sims was not entitled to relief because *Johnson* did not establish a new rule of constitutional criminal law. (App. at 4-5). In doing so the court clearly erred. *Welch v. United States*, 136 S.Ct. 1257, 1264 (2016)(“it is undisputed that *Johnson* announced a new rule”).

## III. The TCCA’s Reasoning Establishes That Application Of The Prior Violent Felony Circumstance Violated The Eighth And Fourteenth Amendments To The United States Constitution

On direct appeal, the Tennessee Supreme Court ruled that because Tennessee’s aggravated assault statute provides violent and non-violent elements for a conviction, in determining whether a violation of that statute supports application of the prior violent felony circumstance, courts must engage in a backward looking conduct inquiry. *Sims*, 45 S.W.3d at 11-12. The Court then relied on averments in affidavits of complaint to hold that during the prior crimes Mr. Sims engaged in violent conduct, and therefore application of the prior violent felony circumstance was proper. *Id.*

In the proceedings below, Mr. Sims asserted that *Johnson v. United States* established that application of the prior violent felony circumstance violated the Fourteenth Amendment. In denying relief, the TCCA distinguished *Johnson* on the ground that, unlike the ACCA residual clause, the prior violent felony circumstance “focuses the court’s inquiry on the elements of the predicate *conviction* ....” (Appx. at 5)(emphasis added). As a result, “(i)n 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.” (Appx. at 6)(emphasis added). But an analysis of the elements of Mr. Sims’s prior *convictions* leads to only one conclusion: application of the prior violent felony circumstance was unconstitutional.

The indictments against Mr. Sims asserted as aggravated assault elements that Mr. Sims displayed a deadly weapon, and by doing so he put others in fear of sustaining bodily injury. (TCCA Appx. at 330-31, 332-33). The indictments did not assert as alternative elements that Mr. Sims caused serious bodily injury to others. (*Id.*). As a result, the indictments charged Mr. Sims with non-violent offenses. Mr. Sims pled guilty to the crimes charged in the indictments. *See Sims*, 45 S.W.3d at 10-11 (Tenn. 2001). He therefore was convicted of crimes having non-violent elements. *Id.*

Employing the analysis the TCCA set out below, when one “focuses on the elements of the predicate *conviction*” one finds that Mr. Sims was previously convicted of non-violent felonies. The TCCA’s analysis thus establishes that

application of the prior violent felony circumstance at Mr. Sims’s capital sentencing hearing violated the Eighth and Fourteenth Amendments.

The Eighth and Fourteenth Amendments preclude submitting an aggravating circumstance to a jury if the evidence, viewed in the light most favorable to the prosecution, is insufficient to prove it. *Lewis v. Jeffers*, 497 U.S. 764, 781–82 (1990). Similarly, the Eighth and Fourteenth Amendments preclude a jury from finding an aggravating circumstance for which there is insufficient evidence. *Id.*; *Jackson v. Virginia*, 443 U.S. 307 (1979). Given the statutory elements of the crimes to which Mr. Sims pled guilty, it’s clear that he was *convicted* of crimes having non-violent elements. Given that under the TCCA’s analysis below, the prior violent felony circumstance required a finding that Mr. Sims was previously *convicted* of felonies “whose statutory elements involve the use of violence to the person,” it’s also clear that application of that circumstance at his sentencing hearing violated the Eighth and Fourteenth Amendments.

## CONCLUSION

When Mr. Sims challenged the prior violent felony circumstance on direct appeal, the Tennessee Supreme Court engaged in a conduct inquiry to deny him relief. When Mr. Sims challenged that circumstance below, the TCCA denied him relief by engaging in an elements inquiry that contradicts the Tennessee Supreme Court’s conduct inquiry. Setting aside the unseemliness of the State courts’ shifting explanations for denying Mr. Sims relief, the State court opinion below concedes that the evidence is insufficient to support the jury’s application of the prior violent

felony circumstance. This Court should therefore grant certiorari to consider whether this capital case error invalidates Mr. Sims's death sentence.

Respectfully Submitted,

Christopher M. Minton  
Assistant Federal Public Defender  
Office of the Federal Public Defender  
Middle District of Tennessee  
810 Broadway, Suite 200  
Nashville, Tennessee 37203  
(615) 736-5047

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*