IN THE CRIMINAL COURT FOR HAMILTON COUNTY, TENNESSEE
DIVISION 1

HAROLD WAYNE NICHOLS,	)	
Petitioner	)	
	)	**No. 205863**
v.	)	**(CAPITAL CASE)**
	)	**(POST-CONVICTION)**
STATE OF TENNESSEE,	)	**(MOTION TO REOPEN)**
Respondent.	)	

PRELIMINARY ORDER ON "MOTION TO REOPEN POST-CONVICTION PETITION"

I. Introduction

This matter is before this Court on Petitioner's June 24, 2016, motion to reopen his petition for post-conviction relief. Petitioner, Harold Wayne Nichols, by and through counsel, has filed this motion to reopen pursuant to Tenn. Code Ann. § 40-30-117(a)(1) claiming he is entitled to relief in this petition based upon new rules of law as announced in Johnson v. United States, 576 U.S. ____, 135 S. Ct. 2251 (2015). The State filed a response on September 29, 2016, asking for summary denial of Petitioner's motion to reopen. After reviewing the motion and the relevant authorities and for the reasons stated within this order, Petitioner's Motion To Reopen filed on June 24, 2016, is hereby GRANTED.

II. Procedural History

Trial

On May 9, 1990, Petitioner entered a plea of guilty to the felony murder of 21 year old Karen Pulley on September 30, 1988. The jury found the following aggravating circumstances beyond a reasonable doubt in sentencing Petitioner to death for the felony murder:

> (1) The defendant was previously convicted of one (1) or more felonies that involved the use or threat or violence; and
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> (2) The murder was committed while the defendant was engaged in committing, or was an accomplice in the commission of, or was attempting to commit, or was fleeing after committing or attempting to commit, any first degree murder, arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or unlawful throwing, placing, or discharging of a destructive device or bomb.

See Tenn. Code Ann. § 39-13-204(i)(2), and (7) (1982).

On appeal, the Tennessee Supreme Court affirmed both his convictions and sentences after determining the erroneous application of the felony murder aggravating circumstance was harmless error. State v. Nichols, 877 S.W.2d 722 (Tenn. 1994), cert. denied, 513 U.S.1114 (1995).

Post-Conviction

Petitioner subsequently filed a timely petition for post-conviction relief which was denied by the trial court following a full hearing. The denial of post-conviction relief was affirmed on appeal. NIchols v. State, 90 S.W.3d 576 (Tenn. 2002); see also, Nichols v. State, 2001 WL 55747 (Tenn. Crim. App. Jan. 19, 2001).

Federal Habeas Corpus Proceedings

Petitioner filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 which was denied by the federal district court and then affirmed on appeal. Nichols v. State, 725 F.3d 516 (6th Cir. 2013), cert. denied, 135 U.S. 704 (2014); see also, Nichols v. State, 440 F. Supp. 730 (E.D. Tenn. 2006) and Nichols v. State, 440 F. Supp. 847 (E.D. Tenn. 2006).

III. Applicable Law: Motions to Reopen

The Tennessee Supreme Court has summarized the statutes governing motions to reopen:

> 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
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> > (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.
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> (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).

Harris v. State, 102 S.W.3d 587, 590-91 (Tenn. 2003). Johnson was decided June 26, 2015, so Petitioner's motion is timely.

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 "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

Johnson and Relevant Case Law

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). Specifically, Petitioner claims the language of the prior violent felony aggravating circumstance in Tennessee's capital sentencing statute, Tenn. Code Ann. § 39-2-203(i)(2)(1982), is unconstitutionally vague under Johnson.

In Johnson, the United States Supreme Court summarized its precedent relevant to vagueness challenges to criminal statutes:

> The Fifth Amendment provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." Our cases establish that the Government violates this guarantee by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement. *Kolender v. Lawson,* 461 U.S. 352, 357–358, 103 S. Ct. 1855, 75 L.Ed.2d 903 (1983). The prohibition of vagueness in criminal statutes "is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law," and a statute that flouts it "violates the first essential of due process." *Connally v. General Constr. Co.,* 269 U.S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 322 (1926). **These principles apply not only to statutes defining elements of crimes, but also to statutes fixing sentences**. *United States v. Batchelder,* 442 U.S. 114, 123, 99 S. Ct. 2198, 60 L.Ed.2d 755 (1979).

Johnson, 135 S. Ct. at 2556-57 (emphasis added).

The Tennessee Supreme Court recently summarized its own longstanding vagueness standards as follows:

> "'It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined.'" *State v. Pickett,* 211 S.W.3d 696, 704 (Tenn. 2007) (quoting *Grayned v. City of Rockford,* 408 U.S. 104, 108, 92 S. Ct. 2294, 33 L.Ed.2d 222 (1972)). By virtue of the Due Process Clause of the Fourteenth Amendment to the Federal Constitution and article I, section 8 of the Tennessee Constitution, a

criminal statute cannot be enforced when it prohibits conduct " 'in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application.' " *Id.* (quoting *Leech v. Am. Booksellers Ass'n,* 582 S.W.2d 738, 746 (Tenn. 1979)). The primary purpose of the vagueness doctrine is to ensure that our statutes provide fair warning as to the nature of forbidden conduct so that individuals are not "held criminally responsible for conduct which [they] could not reasonably understand to be proscribed." *United States v. Harriss,* 347 U.S. 612, 617, 74 S. Ct. 808, 98 L. Ed. 989 (1954). In evaluating whether a statute provides fair warning, the determinative inquiry "is whether [the] statute's 'prohibitions are not clearly defined and are susceptible to different interpretations as to what conduct is actually proscribed.' " *Pickett,* 211 S.W.3d at 704 (quoting *State v. Forbes,* 918 S.W.2d 431, 447–48 (Tenn. Crim. App. 1995)); *see also State v. Whitehead,* 43 S.W.3d 921, 928 (Tenn. Crim. App. 2000).

A second, related purpose of the vagueness doctrine is to ensure that our criminal laws provide "minimal guidelines to direct law enforcement." *State v. Smith,* 48 S.W.3d 159, 165 (Tenn. Crim. App. 2000) (citing *Forbes,* 918 S.W.2d at 448). The vagueness doctrine does not permit a statute that "authorizes and encourages arbitrary and discriminatory enforcement," *State v. Harton,* 108 S.W.3d 253, 259 (Tenn. Crim. App. 2002) (citing *City of Chicago v. Morales,* 527 U.S. 41, 56, 119 S. Ct. 1849, 144 L.Ed.2d 67 (1999)), which typically occurs when a statute "delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis," *Davis–Kidd Booksellers, Inc. v. McWherter,* 866 S.W.2d 520, 531 (Tenn. 1993) (citing *Grayned,* 408 U.S. at 108–109, 92 S. Ct. 2294).

Despite the importance of these constitutional protections, this Court has recognized the "inherent vagueness" of statutory language, *Pickett,* 211 S.W.3d at 704, and has held that criminal statutes do not have to meet the unattainable standard of "absolute precision," *State v. McDonald,* 534 S.W.2d 650, 651 (Tenn. 1976); *see also State v. Lyons,* 802 S.W.2d 590, 592 (Tenn. 1990) ("The vagueness doctrine does not invalidate every statute which a reviewing court believes could have been drafted with greater precision, especially in light of the inherent vagueness of many English words."). In evaluating a statute for vagueness, courts may consider the plain meaning of the statutory terms, the legislative history, and prior judicial interpretations of the statutory language. *See Lyons,* 802 S.W.2d at 592 (reviewing prior judicial interpretations of similar statutory language); *Smith,* 48 S.W.3d at 168 ("The clarity in meaning required by due process may . . . be derived from legislative history.").

State v. Crank, 468 S.W.3d 15, 22-23 (Tenn. 2015).

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—
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> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
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> (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.[1] 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.
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> We are convinced that the indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to

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

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 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.[2] Does the ordinary

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

> 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.

Claims Regarding Prior Violent Felony Conviction Aggravating Circumstance

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; just as the residual clause was beset by unconstitutional "arbitrariness and unpredictability," so too does Petitioner argue the pre-1989 (i)(2) aggravating circumstance containing similar language to the residual clause must be set aside as unconstitutionally vague. Absent the unconstitutional aggravating circumstance, Petitioner argues, his death sentence must be set aside.

Petitioner's case is unusual. The pre-1989 statute was applicable to Petitioner's case, but the 1989 statute was actually charged to the jury at Petitioner's trial. The pre-1989 statutory aggravating circumstance applicable to Petitioner's case was later amended to read "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) (effective November 1, 1989)(emphasis added). This is the statute actually charged to the jury in Petitioner's case. Challenges to the current version of the (i)(2) aggravating circumstance, in this Court's opinion, would likely fail to state a claim in a motion to reopen, as 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", including the "elements test" provision of the federal act.[3] Johnson, 135 S. Ct. at 2562.

The pre-1989 version of the statutory aggravating circumstance which was applicable to Petitioner's case, however, had no such "elements test" language, but rather contained language which arguably was similar to the federal statutory clause recently found unconstitutionally vague in Johnson.[4]

It appears the death penalty statute under which Petitioner was sentenced and case law interpreting the statute may have offered little guidance to judges in determining whether an offense involved "the use or threat of violence to the person" and was, therefore, appropriate for the jury's consideration.[5] This alleged lack of guidance regarding the trial court's application of the pre-1989 prior violent felony conviction statutory aggravating circumstance forms part of the Court's basis for concluding Petitioner's motion states a colorable claim for relief. This Court notes the finding of a colorable claim here is not a finding of the language being unconstitutionally vague. "A colorable claim is a claim, in a petition for post-conviction relief, that, if taken in the light most favorable to petitioner would entitle petitioner to relief under the Post-Conviction Procedure Act." Tenn. S. Ct. R. 28, Section 2(H). The parties will be required to fully brief and argue this issue before this Court.

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[3] 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." This portion of the act was expressly omitted from the Johnson decision finding the residual clause unconstitutional.

[4] The relevant language in the ACCA was a crime punishable by more than one year which "otherwise involves conduct that presents a serious potential risk of physical injury to another", and the language in the applicable Tennessee (i)(2) aggravating circumstance was "one or more felonies, other than the present charge, which involve the use or threat of violence to the person."

[5] Of note, case law in effect at the time of trial instructed presiding judges to define vague terms "heinous, atrocious, or cruel," see State v. Williams, 690 S.W.2d 517, 533 (Tenn. 1985), and to define the elements of any felony upon which the "felony murder" aggravator was based, see State v. Moore, 614 S.W.2d 348, 350-51 (Tenn. 1981). There was no similar requirement the trial judge instruct the jury as to the elements of any previous violent felonies upon which the State sought imposition of the prior violent felony conviction aggravator, nor was there a requirement the trial judge define "violence" or "use or threat of violence."

Attachment A

The relative lack of guidance regarding the trial court's application of the pre-1982 prior violent felony conviction statutory aggravating circumstance forms part of the Court's basis for concluding Petitioner's motion states a colorable claim for relief. The Court's conclusion is also based upon the differing conclusions federal and state courts have reached in applying the Johnson holding to non-ACCA cases. As Petitioner points out in his motions, some courts have applied Johnson to conclude statutes with language similar to the ACCA residual clause are unconstitutionally vague. See, e.g., United States v. Calabretta, ___ F.3d ___, No. 14-3969, 2016 WL 3997215 (3d Cir. July 26, 2016) (Federal Sentencing Guidelines language stating in part "crime of violence" is "burglary of a dwelling, arson, extortion, involves use of explosives, or otherwise involves conduct which presents a serious potential risk of physical injury to another" is unconstitutionally vague); United States v. Pawlak, 822 F.3d 902, 905-06 (6th Cir. 2016) (also concluding sentencing guidelines language similar to ACCA residual clause is unconstitutionally vague); In re Smith, ___ F.3d ___, No. 16-14000-J, 2016 WL 3895243 (11th Cir. July 18, 2016) (18 U.S.C. § 924(c)(3)(B), defining violent felony in part as felony "that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense", "might be" unconstitutionally vague; case resolved on grounds unrelated to residual clause); Dimaya v. Lynch, 803 F.3d 1110, 1112-20 (9th Cir. 2015) (18 U.S.C. § 16(b), defining "crime of violence" in part as "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the defense," is unconstitutionally vague).

However, other federal and state courts have issued post-Johnson opinions on non-ACCA statutes concluding the statutes are not unconstitutionally vague. See, e.g, United States v. Gonzalez-Longoria, ___ F.3d ___, No. 15-40041, 2016 WL 4159127 (5th Cir. Aug. 5, 2016) (18 U.S.C. § 16(b), cited above, not unconstitutionally vague; § 16(b) language does not present same level of uncertainty as ACCA residual clause and § 16(b) has not been beset by same level of litigation as ACCA residual clause); United States v. Hill, ___ F.3d ___, No. 14-3872-cr, 2016 WL 4120667 (2d Cir. Aug. 3, 2016) ("crime of violence" as defined in 18 U.S.C. § 924(c)(3)(B) not unconstitutionally

Attachment A

vague); United States v. Taylor, 814 F.3d 340 376-79 (6th Cir. 2016) (18 U.S.C. § 924(c)(3)(B), cited above, not unconstitutionally vague; its definition of "crime of violence" is narrower than ACCA definition of "violent felony"); United States v. Matchett, 802 F.3d 1185, 1193-96 (11th Cir. 2015) (vagueness doctrine does not apply to advisory sentencing guidelines); People v. Graves, 368 P.3d 317, 324-29 (Colo. 2016) (public indecency statute not unconstitutionally vague; "lewd" was term which had plain meaning which could be easily understood); People v. McCoy, ___ P.3d ___, No. 11CA1195, 2015 WL 3776920 (Colo. Ct. App. June 18, 2015), as modified, (Colo. Ct. App. Dec. 3, 2015) (state statute criminalizing unlawful sexual contact and not containing language similar to ACCA residual clause not unconstitutionally vague; appeals court insisted Johnson holding was narrow and "did not explicitly overrule non-ACCA cases that decided vagueness challenges under the vague-in-all-its applications standard."); State ex rel. Richardson v. Green, 465 S.W.3d 60, 63-67 (Mo. 2015) (en banc) (Missouri statute allowing for sentence reduction if voluntary manslaughter "did not involve violence or the threat of violence" not unconstitutionally vague; state statute related to defendant's particular crime and not "idealized ordinary case of the crime" contemplated by Johnson); Joe Billy Russell v. State, No. M2015-02101-CCA-R3-PC (Tenn. Crim. App. August 22, 2016)(No Johnson vagueness issue for Tennessee evading arrest in a motor vehicle with risk of death or injury to a third party statute).

V. Conclusion

For the reasons stated above, the Court concludes Petitioner has stated a colorable claim for relief and his Motion to Reopen is GRANTED. In light of this conclusion, the Court hereby ORDERS the following:

1. Petitioner is indigent under the standards of Tennessee Code Annotated section 40-14-201. Accordingly, the Court appoints Deborah Drew and Christine Madjar of the Office of the Post-Conviction Defender, 404 James Robertson Parkway Suite 1100, Nashville, TN 37219, to represent him in these proceedings.

2. Counsel is hereby directed to review the petition, consult with petitioner, and investigate all possible constitutional grounds for relief for the purpose

of filing an amended petition, if necessary. In addition to addressing the issues raised by cases such as those cited in this Court's order, the Court directs Petitioner's counsel to address whether the application of an unconstitutional or otherwise improperly applied statutory aggravating circumstance may be deemed "harmless error." See State v. Howell, 868 S.W.2d 238 (Tenn. 1993). Counsel may also raise any additional issues counsel deems necessary. Such amended petition shall be due no later than sixty (60) days from the filing of this order. In the alternative, counsel may file a pleading asserting no amended petition shall be filed.

3. The State shall file an answer or other responsive pleading no later than forty-five (45) days after the filing of the amended pleading or filing indicating no amended petition shall be filed. The State's answer should address both Petitioner's motion to reopen and any amended pleading which may be filed. In addition, the State shall disclose all which is required to be disclosed under Rule 16 of the Tennessee Rules of Criminal Procedure, to the extent relevant to the grounds alleged in the petition/motion, and any other disclosure required by the state or federal constitutions.

4. This Court will contact the parties concerning the setting of a hearing in this matter.

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

Don R. Ash
Senior Judge
Sitting by Designation

CERTIFICATE OF SERVICE

I, _____, Clerk, hereby certify I have mailed a true and exact copy of same to Deborah Drew and Christine Madjar of the Office of the Post-Conviction Defender, 404 James Robertson Parkway Suite 1100, Nashville, TN 37219, and counsel of record for the State, DA Neil Pinkston, this the _____ day of _____, 2016.

Attachment A