IN THE CRIMINAL COURT FOR HAMILTON COUNTY, TENNESSEE
DIVISION I

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

ORDER

I. Introduction

Petitioner, Harold Wayne Nichols, by and through counsel, filed a motion to reopen June 24, 2016, pursuant to Tenn. Code Ann. § 40-30-117(a)(1), claiming he is entitled to relief 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. In October 2016, this Court granted Petitioner's motion as stating a colorable claim. On January 13, 2017, Petitioner filed an Amended Petition For Post-Conviction Relief, and the State filed its response on November 2, 2017. The amended petition raises the claim pursuant to Johnson as well as several other claims. Subsequently, the parties notified this Court of a proposed agreed settlement of the case and the matter was set for hearing on January 31, 2018. Prior to the hearing, this Court reviewed all materials in preparation of an order to address all the claims in the January 2017 Amended Petition as required by statute. See Tenn. Code Ann. § 40-30-106.

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After reviewing the Amended Petition, the record, the submitted agreement, and the law, this Court had concerns regarding the basis for the agreed order. On January 31, 2018, this Court addressed the parties and sought any additional information concerning the proposed agreement to set aside the sentence of death and enter an agreed upon non-capital sentence. The parties were given an opportunity to submit additional authority and argument following the hearing. This Court has now reviewed the pleadings of the parties, the record, and applicable law, and hereby enters this order pursuant to statute. See Tenn. Code Ann. § 40-30-106.

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
>
> (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. § 39-2-203(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. Heidle, 725 F.3d 516 (6th Cir. 2013), cert. denied, 135 U.S. 704 (2014); see also, Nichols v. Bell, 440 F. Supp. 2d 730 (E.D. Tenn. 2006) and Nichols v. Bell, 440 F. Supp. 2d 847 (E.D. Tenn. 2006).

III. Post-Conviction Standards

Relief under the Post-Conviction Procedure Act is available when a petitioner's "conviction or sentence is void or voidable because of the abridgment of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States." Tenn. Code Ann. § 40-30-103 (2014). "The petition must contain a clear and specific statement of all grounds upon which relief is sought, including full disclosure of the factual basis of those grounds." Tenn. Code Ann. § 40-30-106(d) (2014). The court preliminarily reviews the petition to determine if any issues raised should be dismissed as either previously determined and/or waived. Tenn. Code Ann. § 40-30-106(f)-(h)(2014). The procedural bars of previous determination and waiver are statutorily defined:

> (g) A ground for relief is waived if the petitioner personally or through an attorney failed to present it for determination in any proceeding before a court of competent jurisdiction in

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> which the ground could have been presented unless:
>
> (1) The claim for relief is based upon a constitutional right not recognized as existing at the time of trial if either the federal or state constitution requires retroactive application of that right; or
>
> (2) The failure to present the ground was the result of state action in violation of the federal or state constitution.
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> (h) A ground for relief is previously determined if a court of competent jurisdiction has ruled on the merits after a full and fair hearing. A full and fair hearing has occurred where the petitioner is afforded the opportunity to call witnesses and otherwise present evidence, regardless of whether the petitioner actually introduced any evidence.

Tenn. Code Ann. § 40-30-106(g) and (h); see Tenn. S. Ct. R. 28, Section 2(D) and (E). In a post-conviction proceeding, the petitioner has the burden of presenting his case and establishing the factual grounds alleged by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f) and Tenn. S. Ct. R. 28, Section 8(D)(1); see also Davidson v. State, 453 S.W.3d 386, 392 (Tenn. 2014).

IV. Analysis of *Johnson* Claim

Petitioner argues in his Motion to Reopen and his Amended Petition for Post-Conviction Relief 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.

Initially, when this Court ruled Petitioner had stated a "colorable claim" as to Johnson, there was no authority in Tennessee which addressed this issue. Since then, the Tennessee Court of Criminal Appeals has decided Donnie Johnson v. State, No. W2017-00848-CCA-R28—PD (Tenn. Crim. App. September 11, 2017), perm. app. denied, (Tenn. January 19, 2018). In Johnson, the court held

> In [*Johnson v. United States*], 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

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(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) (emphasis added).

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.

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 at *Johnson* 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."

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*, 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*.

Even if a new retroactively applicable constitutional right was created by the *Johnson* decision, such ruling would not offer relief to the Petitioner. The argument of the Petitioner is that one of the aggravating factors found by the jury to sentence the Petitioner to death is vague and under the ruling espoused by the *Johnson* court would be unconstitutional. The statute referenced by the Petitioner has been amended since the time of his trial and conviction but at the time of trial stated: "The defendant was previously convicted of one or more felonies, other than the present charge, which involve the use or threat of violence to the person." Tenn. Code Ann. §39-13-204(i)(2)(1988). A comparison of the two clauses the ACCA and the pre-1989 (i)(2) provision reveals that application of the *Johnson* court ruling would not result in the finding that the pre-1989 (i)(2) provision is unconstitutionally vague.

The "residual clause" of the ACCA defines a violent felony as a felony that "otherwise involves conduct that presents a serious risk of physical injury to another" while the pre-1989 (i)(2) provision required that the felony "involve the use or threat of violence to the person." The vagueness of the ACCA provision arose out of the multitude of potential means for physical injury to arise from a crime. As set out in the *Johnson* opinion, the phrasing of the ACCA required the trier of fact to determine any number of outcomes of a crime that may result in injury. *Id.* at 2557-2558. The determination was not a fact based determination upon the actual crime for which the defendant was being tried but a determination that in the ordinary course of the listed crime could the risk of physical injury arise. *Id.* The reason for this interpretation of the ACCA was the prior ruling by the Supreme Court in *Taylor v. United States* requiring the court to use the "categorical approach" in applying the ACCA. *Id.* (*citing Taylor v. United States*, 110 S. Ct. 2143 (1990)). Under this "categorical approach", the court must assess "whether a crime qualifies as a violent felony 'in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion.'" *Id.* (*citing Begay v. United States*, 128 S. Ct. 1581 (2008)). With these constraints, the ACCA, as written, required the trier of fact to imagine some far reaching machination to determine any number of possible outcomes not specifically related to the underlying felony.

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> The pre-1989 (i)(2) provision differs from the ACCA in its specificity that the prior felonies involve the use or threat of violence to a person and the governance of how the prior crime is to be interpreted. Unlike the ACCA, which had been limited in interpretation by *Begay* and *Taylor*, there was no such limitation requiring the "ordinary case" interpretation of the prior felony portion of the (i)(2) aggravator at the time of the trial of the Petitioner. The Tennessee Supreme Court had previously taken up the issue of how to determine if the prior felony involved violence to a person pursuant to the (i)(2) provision as then written. *See State v. Moore*, 614 S.W.2d 348 (Tenn. 1981). The instruction given from the Tennessee Supreme Court in *Moore* distinguishes itself from the stated unconstitutional weakness in *Johnson* in that the *Moore* court required a determination of the existence of violence to a person to be made on the facts of the actual crime charged. *Id.* at 351. *Moore* centered its determination around prior crimes of arson and burglary, both of which the court found could be crimes that did or did not involve violence to the person depending upon the facts of the specific case. *Id.* With *Moore* as guidance for the application of the "use or threat of violence" language of the pre-1989 (i)(2) provision, the vagueness shortcoming of the ACCA as found in *Johnson* would not apply. *Moore* did not limit determination of the pre-1989 (i)(2) provision to an "ordinary case" of the prior felony but required the court to look at the specific acts of the prior felony to determine if the use or threat of violence to a person was present. As such, the ruling of the Supreme Court in *Johnson* would have no effect upon the pre-1989 version of Tennessee Code Annotated section 39-13-204(i)(2) and the post-conviction court did not abuse its discretion in denying the Petitioner's motion.

In Andre Benson v. State, 2018 WL 486000 (Tenn. Crim. App. January 19, 2018), the Court discussed the post-conviction process and stated as follows:

> A colorable claim is a claim that, "if taken as true, in the light most favorable to petitioner, would entitle petitioner to relief under the Post-Conviction Procedure Act." *Arnold v. State*, 143 S.W.3d 784, 786 (Tenn. 2004)(quoting Tenn. Sup. Ct. R. 28, § 2(H)). A post-conviction court may also dismiss the petition later in the process but still prior to a hearing, after reviewing the petition, the State's response, and the records and files associated with the petition, on the basis that a petitioner is conclusively not entitled to relief. T.C.A. § 40-30-109(a).

Here, this Court initially granted the motion to reopen to determine if Johnson was applicable to the Tennessee capital sentencing statute. As previously stated, the appellate courts have now addressed this issue and determined Petitioner is not entitled to relief on this issue. Accordingly, this Court finds this issue is appropriate for disposition without a hearing.[1]

[1] In his motion to approve the settlement agreement, Petitioner asserts "[b]y finding that Petitioner demonstrated a colorable claim regarding the application of Johnson to his prior violent felony conviction aggravator, this Court recognized that the Johnson claim has merit." This Court does not agree. If true, this would mean every colorable claim in a petition would entitle a petitioner to relief without a hearing, and this is certainly not the law. Otherwise, no hearings would be necessary because relief would be established merely upon the pleadings.

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V. Analysis of Non-*Johnson* Claims Raised In January 2017 Petition

In his January 2017 Amended Petition, Petitioner raised several claims not related to his Johnson v. United States claim.

Initially, this Court finds the additional claims raised in Claims II, III, IV, and V were not covered by the order granting the motion to reopen. Although the order may have included general language, it was this Court's intention the petitioner was only permitted to reopen his proceedings as it related to the Johnson claim. Therefore, Claims II-V are beyond the intended scope of the current proceedings.

Due to the general language of the October 2016 order, however, this Court will conduct a standard preliminary review pursuant to Tenn. Code Ann. § 40-30-106 as to each of these non-Johnson claims.

Claim II

In Claim II, Petitioner asserts Hurst v. Florida, 136 S. Ct. 616 (Tenn. 2016), announced a new "constitutional right which was not recognized as existing at the time of trial" and "retroactive application of that right is required." In Hurst v. Florida, the United States Supreme Court held Florida's capital sentencing scheme violated Ring v. Arizona, 536 U.S. 584 (2002). Under the Florida law addressed in Hurst, a jury rendered an advisory verdict on capital sentencing, but the trial judge made the ultimate factual determinations necessary to sentence a defendant to death. Hurst, 136 S. Ct. at 621-22. The Hurst Court held this procedure was invalid because it did "not require the jury to make the critical findings necessary to impose the death penalty" in violation of the Sixth Amendment. Id. at 622.

Here, Petitioner claims (1) the trial court rather than the jury made the critical finding Petitioner was previously convicted of one or more felonies, other than the charged offense, which

involved the use of violence to the person which was required for the imposition of the death penalty, and (2) the appellate court rendered findings required for the imposition of the death penalty when it struck down one of the two aggravating circumstances and then it, rather than a jury, reweighed the evidence to determine any error in the application of the inapplicable sentencing factor was harmless.

In Hurst, the Court held as follows:

> The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury...." This right, in conjunction with the Due Process Clause, requires that each element of a crime be proved to a jury beyond a reasonable doubt. *Alleyne v. United States*, 570 U.S. ——, ——, 133 S. Ct. 2151, 2156, 186 L.Ed.2d 314 (2013). In *Apprendi v. New Jersey,* 530 U.S. 466, 494, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000), this Court held that any fact that "expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict" is an "element" that must be submitted to a jury. In the years since *Apprendi,* we have applied its rule to instances involving plea bargains, *Blakely v. Washington,* 542 U.S. 296, 124 S. Ct. 2531, 159 L.Ed.2d 403 (2004), sentencing guidelines, *United States v. Booker,* 543 U.S. 220, 125 S. Ct. 738, 160 L.Ed.2d 621 (2005), criminal fines, *Southern Union Co. v. United States,* 567 U.S. ——, 132 S. Ct. 2344, 183 L.Ed.2d 318 (2012), mandatory minimums, *Alleyne,* 570 U.S., at ——, 133 S. Ct., at 2166 and, in *Ring,* 536 U.S. 584, 122 S. Ct. 2428, 153 L.Ed.2d 556, capital punishment.
>
> In *Ring,* we concluded that Arizona's capital sentencing scheme violated *Apprendi*'s rule because the State allowed a judge to find the facts necessary to sentence a defendant to death. An Arizona jury had convicted Timothy Ring of felony murder. 536 U.S., at 591, 122 S. Ct. 2428. Under state law, "Ring could not be sentenced to death, the statutory maximum penalty for first-degree murder, unless further findings were made." *Id.,* at 592, 122 S. Ct. 2428. Specifically, a judge could sentence Ring to death only after independently finding at least one aggravating circumstance. *Id.,* at 592–593, 122 S. Ct. 2428. Ring's judge followed this procedure, found an aggravating circumstance, and sentenced Ring to death.
>
> The Court had little difficulty concluding that "'the required finding of an aggravated circumstance exposed Ring to a greater punishment than that authorized by the jury's guilty verdict.'" *Id.,* at 604, 122 S. Ct. 2428 (quoting *Apprendi,* 530 U.S., at 494, 120 S. Ct. 2348; alterations omitted). Had Ring's judge not engaged in any factfinding, Ring would have received a life sentence. *Ring,* 536 U.S., at 597, 122 S. Ct. 2428. Ring's death sentence therefore violated his right to have a jury find the facts behind his punishment.
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> The analysis the *Ring* Court applied to Arizona's sentencing scheme applies equally to Florida's. Like Arizona at the time of *Ring,* Florida does not require the jury to make the critical findings necessary to impose the death penalty. Rather, Florida requires a judge to find these facts. Fla. Stat. § 921.141(3). Although Florida incorporates an advisory jury verdict that Arizona lacked, we have previously made clear that this distinction is immaterial: "It is true that in Florida the jury recommends a sentence, but it does not make specific factual findings with regard to the existence of mitigating or aggravating

> circumstances and its recommendation is not binding on the trial judge. A Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona." *Walton v. Arizona,* 497 U.S. 639, 648, 110 S. Ct. 3047, 111 L.Ed.2d 511 (1990); accord, *State v. Steele,* 921 So.2d 538, 546 (Fla.2005) ("[T]he trial court alone must make detailed findings about the existence and weight of aggravating circumstances; it has no jury findings on which to rely").
>
> As with Timothy Ring, the maximum punishment Timothy Hurst could have received without any judge-made findings was life in prison without parole. As with Ring, a judge increased Hurst's authorized punishment based on her own factfinding. In light of *Ring,* we hold that Hurst's sentence violates the Sixth Amendment.

136 S. Ct. at 621-22.

As stated previously, a jury convicted Petitioner of first degree murder and sentenced him to death based upon its finding of two aggravating circumstances proven beyond a reasonable doubt. Subsequently, the appellate court struck down the (i)(7) aggravating factor and performed a harmless error analysis of the record to determine if the application of the inapplicable factor was or was not a harmless error as it related to sentencing.

At the hearing on January 31, 2018, the parties submitted Petitioner's claim as it related to Hurst entitled him to relief. This Court, however, finds the law does not support the parties' position.

Initially, this must consider whether Hurst announced a new rule of constitutional law which should be applied retroactively.

> 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 (1989) (citations omitted); *see also Van Tran v. State*, 66 S.W.3d 790, 810–11 (Tenn.2001). Courts addressing whether *Apprendi* sets forth a new rule have held that, in *Apprendi*, "the Supreme Court announced a new constitutional rule of criminal procedure by holding that 'other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to the jury, and proved beyond a reasonable doubt.' " *In re Clemmons*, 259 F.3d 489, 491 (6th Cir.2001) (quoting *Apprendi*, 530 U.S. at 491); *see also United States v. Sanders*, 247 F.3d 139, 147 (4th Cir.2001) (holding that "*Apprendi* is certainly a new rule of criminal procedure"); *United States v. Moss*, 252 F.3d 993, 997 (8th Cir.2001)(holding that "*Apprendi* is obviously a 'new rule' "). Because *Apprendi* sets forth a new constitutional rule of criminal procedure, the fundamental question becomes whether *Apprendi* applies retroactively to the petitioner's case.
>
> New rules of constitutional criminal procedure are generally not applied retroactively on collateral review. *Teague*, 489 U.S. at 310. However, this general rule is subject to two exceptions.

> *Id* . "First, a new rule should be applied retroactively if it places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.' " *Id.* at 307. Second, a new rule should be applied retroactively if it is a "watershed rule of criminal procedure, ... which implicates both the accuracy and fundamental fairness of criminal proceedings." *Moss*, 252 F.3d at 998 (citing *Teague*, 489 U.S. at 312). Clearly, the first exception is not applicable to the petitioner's claim, because the rule set forth in *Apprendi* "did not decriminalize any class of conduct or prohibit a certain category of punishment for a class of defendants." *McCoy v. United States*, 266 F.3d 1245, 1256 (11th Cir.2001). Furthermore, the great weight of authority holds that *Apprendi* is not the type of watershed rule of criminal procedure that qualifies for retroactive application under the second exception. *Dukes v. United States*, 255 F.3d 912, 913 (8th Cir.2001) (holding that "*Apprendi* presents a new rule of constitutional law that is not of 'watershed' magnitude and, consequently, petitioners may not raise *Apprendi* claims on collateral review"); *Sanders*, 247 F.3d at 151 (holding that "the new rule announced in *Apprendi* does not rise to the level of a watershed rule of criminal procedure which 'alters our understanding of the bedrock elements essential to the fairness of a proceeding" '); *McCoy*, 266 F.3d at 1257 (agreeing with the other circuits that "*Apprendi* is not sufficiently fundamental to fall within *Teague's* second exception"). Accordingly, we conclude that the new constitutional rule of criminal procedure announced in *Apprendi* does not apply retroactively on collateral review.

William Steve Greenup v. State, No. W2001–01764–CCA–R3–PC, 2002 WL 31246136 (Tenn.Crim.App., at Jackson, Oct. 2, 2002).

In Dennis Wade Suttles v. State, No. E2017-00840-CCA-R28-PD (Tenn. Crim. App. Order, September 18, 2017), perm. app. denied, (Tenn. January 18, 2018), the Tennessee Court of Criminal Appeals addressed claims related to Hurst, which included the first issue raised here by Petitioner. In Suttles, the court held the decision in Hurst did not announce a new constitutional rule requiring retrospective application.

In Cauthern v. State, 145 S.W.3d 571 (Tenn. 2004), a very similar argument to the issue raised by Petitioner related to the appellate court's decision was raised and also found not to require retroactive application of Apprendi or Ring. In Cauthern, the petitioner collaterally attacked the harmless error analysis undertaken on his direct appeal from his 1995 resentencing trial. The Tennessee Supreme Court had found the instruction given on one of the aggravating circumstances in 1995 to have been the wrong instruction. The court, however, had gone further to find the error was harmless. On collateral review, petitioner Cauthern argued the harmless error finding improperly substituted the court's judgment for one of a correctly-charged jury and thus

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violated Ring. The Tennessee Supreme Court, however, found neither Apprendi nor Ring provided the petitioner any relief on his post-conviction claims.

This Court has carefully considered Petitioner's claims related to Hurst and the applicable law. This Hurst Court simply applied its previous holdings in Apprendi and Ring to Florida's capital-sentencing scheme. Thus, the Court did not announce a new rule of constitutional law, nor did it expand its holdings in Apprendi and Ring.

Although this Court does not find Hurst presents a claim under Tennessee law which should be applied retroactively on collateral review, this Court will address the substance of the claim as well.

In Tennessee at the time of Petitioner's offense, a capital trial was bifurcated into two phases. See Tenn. Code Ann. § 39-2-203. In the first phase of the trial, often referred to as the guilt phase, the jury determined whether the defendant was guilty of first degree murder as charged.[2] If the jury found the defendant guilty of first degree murder, and the State had filed a notice of death eligible aggravating factors, the second phase of the trial, referred to as the penalty phase or sentencing phase, began. Tenn. Code Ann. § 39-2-203(a). At the penalty phase, the parties could present to the jury any evidence relevant to sentencing, particularly relating to the statutory aggravating circumstances[3] contained in the State's notice, and any mitigating circumstances as listed in §39-2-203(j), or as raised by the evidence during either phase of the trial. Tenn. Code Ann. § 39-2-203(c).

Pursuant to statute, the jury was required to find the existence of at least one statutory aggravating circumstance beyond a reasonable doubt before it could consider a sentence of death. If no aggravating factor was found, the jury was instructed to return a sentence of life imprisonment. Tenn. Code Ann. § 39-2-203(f). If the jury unanimously found one or more

[2] First degree murder may be either premeditated first degree murder or first degree felony murder.

[3] Tenn. Code Ann. §39-2-203(i).

aggravating circumstances existed, but found they did not outweigh the mitigating circumstances, the jury was required to sentence the defendant to a sentence of life imprisonment. Id. If the jury unanimously found one or more aggravating circumstances existed and found they outweighed any mitigating circumstances, the jury was required to return a sentence of death. Tenn. Code Ann. § 39-2-203(g).

Therefore, in Tennessee a capital defendant such as Petitioner became eligible for the death penalty upon the finding of at least one of the aggravating circumstances found in §39-2-203(i) and noticed by the State. There is a distinction between when a person is "eligible" for the death penalty and whether or not the death penalty is "appropriate" in a particular case for a capital defendant who *is* eligible for the death penalty.

Ring and Hurst both require any factual finding which exposes a defendant to or makes a defendant eligible for a sentence of death must be proven to a jury beyond a reasonable doubt. However, once the jury unanimously finds the fact or facts which expose a defendant to imposition of the death penalty, i.e. an aggravating circumstance, Ring and Hurst have no further application. Under Apprendi, the trial court may "exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing ... sentence within statutory limits in the individual case." Apprendi, 530 U.S. at 481.

Here, Petitioner first argues when the trial court instructed the jury certain offenses constituted offenses involving the use or threat of violence to the person it impermissibly constituted a "finding" of the (i)(2) aggravating circumstance and, therefore, rendered his death sentence unconstitutional.

The Tennessee Supreme Court examined the same issue in State v. Cole, 155 S.W.3d 885 (Tenn. 2005), pre-Hurst. The appellate court examined the relevant case law as follows:

> The defendant's death sentence is based upon aggravating circumstance (i)(2), which applies when "[t]he 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) (1999)....

The defendant maintains that by instructing the jury that the statutory elements of these felonies involve the use of violence to the person, the trial court violated the Fifth and Sixth Amendments to the United States Constitution. Relying upon *Apprendi v. New Jersey,* 530 U.S. 466, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000) and *Ring v. Arizona,* 536 U.S. 584, 122 S. Ct. 2428, 153 L.Ed.2d 556 (2002), the defendant maintains that when the prosecution is relying upon the (i)(2) aggravating circumstance to support imposition of the death penalty, the United States Constitution mandates that the jury, not the judge, determine whether "the statutory elements" of the prior felony conviction "involve the use of violence to the person." The defendant concedes that the trial court followed the procedure enunciated by this Court in *State v. Sims,* 45 S.W.3d 1 (Tenn. 2001), and applied in more recent decisions of this Court. Nonetheless, the defendant maintains that the *Sims* procedure is not constitutionally sound in light of the United States Supreme Court decisions in *Apprendi* and *Ring.* The State, in contrast, maintains that the trial court's jury instruction and the procedure enunciated by this Court in *Sims* do not violate *Apprendi* and *Ring.*

. . .

We begin our analysis with *Sims,* in which this Court considered how trial courts should proceed when the prior felony convictions upon which the prosecution relies to establish the (i)(2) aggravating circumstance include alternative statutory elements that do not necessarily involve the use of violence to the person. In *Sims,* after carefully considering the language of the aggravating circumstance as well as the procedure utilized by the trial court, this Court held that in determining whether the statutory elements of a prior felony conviction involve the use of violence against the person, "the trial judge must necessarily examine the facts underlying the prior felony...." 45 S.W.3d at 11–12. We explained that

> [t]o hold otherwise would yield an absurd result, the particular facts of this case being an ideal example. A plain reading of the statute indicates that the legislature intended to allow juries to consider a defendant's prior violent crimes in reaching a decision during the sentencing phase of a first degree murder trial. The underlying facts of Sims's prior felony convictions involve his shooting two people sitting in a car. To hold that these prior convictions do not involve use of violence against a person would be an absurd result contrary to the objectives of the criminal code. We cannot adhere to a result so clearly opposing legislative intent.

Id. at 12.

This Court has since reaffirmed the procedure developed in *Sims.* For example, in *State v. McKinney,* 74 S.W.3d 291, 305 (Tenn. 2002), we pointed out that, the "critical issue" for purposes of the (i)(2) aggravating circumstance is "whether the statutory elements of [the prior felony] involve the use of violence to the person *by definition.*" (Emphasis added.) We reiterated that *Sims* provided the "appropriate analytical framework" for resolving this important issue. *Id.* at 306. In rejecting the defendant's challenge to the sufficiency of the evidence and in concluding that McKinney's prior conviction for aggravated robbery had been premised upon statutory elements that involve the use of violence to the person, this Court stated:

> Here, the defendant testified during sentencing that he did not participate in the aggravated robbery that served as the basis of the aggravating circumstance. The defendant admitted, however, that his co-defendant was armed with a weapon and that he waited in the getaway car while the co-defendant carried out the robbery. Moreover, as the State observes, the defendant pled guilty to an indictment alleging that he and his co-defendant "violently by the use of a deadly weapon" robbed the victim. This Court has frequently held that the entry of an informed and counseled guilty plea constitutes an admission of all of the facts and elements necessary to sustain a conviction and a waiver of any non-jurisdictional defects or constitutional irregularities.

Id. at 306 (citations omitted). The following summary of the *Sims* procedure from *State v. Powers,* 101 S.W.3d 383, 400–01 (Tenn. 2003), also provides guidance on the issue presented in this appeal:

> In *Sims,* the State introduced evidence of two prior convictions for aggravated assault to establish the prior violent felony circumstance. We recognized that the statutory elements of aggravated assault do not necessarily involve the use of violence. Accordingly, we approved a procedure in which the trial judge, outside the presence of the jury, *considers the underlying facts of the prior assaults to determine whether the elements of those offenses involved the use of violence to the person. If the trial court determines that the statutory elements of the prior offense involved the use of violence, the State may introduce evidence that the defendant had previously been convicted of the prior offenses. The trial court then would instruct the jury that those convictions involved the use of violence to the person.*

Id. at 400–01 (emphasis added).

Having summarized *Sims* and its progeny, we turn to *Apprendi* and *Ring.* In *Apprendi,* the defendant had been convicted of second-degree unlawful possession of a firearm, an offense carrying a maximum penalty of ten years imprisonment. 530 U.S. at 469–70, 120 S. Ct. 2348. On the prosecutor's motion, the sentencing judge found by a preponderance of the evidence that the crime had been committed "'with a purpose to intimidate ... because of race, color, gender, handicap, religion, sexual orientation or ethnicity.'" *Id.* at 468–69, 120 S. Ct. 2348 (quoting N.J. Stat. Ann. § 2C:44–3(e) (West Supp. 1999–2000)). This judicial finding of racial motivation had the effect of doubling from ten years to twenty years the maximum sentence to which Apprendi was exposed. *Id.* at 469, 120 S. Ct. 2348. The judge sentenced Apprendi to twelve years in prison, two years more than the maximum that would have applied but for the judicial finding of racial motivation. Apprendi challenged the constitutionality of his sentence, arguing that under the Due Process Clause of the Fourteenth Amendment and the notice and jury trial guarantees of the Sixth Amendment, he was entitled to have a jury determine on the basis of proof beyond a reasonable doubt whether his crime had been racially motivated. *Id.* at 471–72, 120 S. Ct. 2348.

The United States Supreme Court concluded that Apprendi's constitutional

challenge had merit. After commenting that its answer to the question presented had been "foreshadowed by [its] opinion in *Jones v. United States,* 526 U.S. 227, 119 S. Ct. 1215, 143 L.Ed.2d 311 (1999)," the Court in *Apprendi* held, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490, 120 S. Ct. 2348. Applying this rule, the Court struck down the challenged New Jersey procedure as "an unacceptable departure from the jury tradition that is an indispensable part of our criminal justice system." *Id.* at 497, 120 S. Ct. 2348.

Two years later, in *Ring,* the Court applied *Apprendi* to the Arizona capital sentencing statutes. 536 U.S. at 588–89, 122 S. Ct. 2428. The narrow question presented in *Ring* was "whether [an] aggravating factor may be found by the judge, as Arizona law specifies, or whether the Sixth Amendment's jury trial guarantee, made applicable to the States by the Fourteenth Amendment, requires that the aggravating factor determination be entrusted to the jury." *Id.* at 597. The Court emphasized the limited nature of the issue presented, noting that of the thirty-eight states with capital punishment, twenty-nine, including Tennessee, "commit sentencing decisions to juries." *Id.* at 608 n. 6, 122 S. Ct. 2428. Overruling its prior decision in *Walton v. Arizona,* 497 U.S. 639, 110 S. Ct. 3047, 111 L.Ed.2d 511 (1990), the Court in *Ring* held that, because Arizona's enumerated aggravating factors operate as "'the functional equivalent of [ ] element[s] of a greater offense,' " the Sixth Amendment requires that they be found by a jury, rather than by a judge. *Id.* at 609, 122 S. Ct. 2428 (quoting *Apprendi,* 530 U.S. at 494 n. 19, 120 S. Ct. 2348); *see Holton,* 126 S.W.3d at 863 (discussing the decision in *Ring*). Explaining its holding, the Court stated:

> The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the *factfinding* necessary to increase a defendant's sentence by two years, but not the *factfinding* necessary to put him to death. We hold that the Sixth Amendment applies to both.

536 U.S. at 609, 122 S. Ct. 2428 (emphasis added). Thus, the holdings of *Apprendi* and *Ring* were succinctly described by the following language from *Ring:* "If a State makes an increase in a defendant's authorized punishment contingent on the *finding of a fact,* that *fact*—no matter how the State labels it—must be found by a jury beyond a reasonable doubt." *Ring,* 536 U.S. at 602, 122 S. Ct. 2428 (emphasis added).

More recently, in *Blakely v. Washington,* 542 U.S. 296, [301], 124 S. Ct. 2531, 2536, 159 L.Ed.2d 403 (2004), the United States Supreme Court "appl[ied] the rule [ ] expressed in *Apprendi.*" The petitioner in *Blakely* had been:

> sentenced to more than three years above the 53–month statutory maximum of the standard range because he had acted with "deliberate cruelty." The facts supporting that finding were neither admitted by petitioner nor found by a jury. The State [of Washington] nevertheless contends that there was no *Apprendi* violation because the relevant "statutory maximum" is not 53 months, but the 10–year maximum for class B felonies in [Wash. Rev.Code Ann.] § 9A.20.021(1)(b). It observes that no exceptional sentence may exceed that limit. *See* [Wash. Rev. Code Ann.] §

> 9.94A.420. Our precedents make clear, however, that the "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. See Ring, supra,* at 602, 122 S. Ct. 2428 (" 'the maximum he would receive if punished according to the facts reflected in the jury verdict alone' " (quoting *Apprendi, supra,* at 483, 120 S. Ct. 2348)); *Harris v. United States,* 536 U.S. 545, 563, 122 S. Ct. 2406, 153 L.Ed.2d 524 (2002) (plurality opinion) (same); *cf. Apprendi, supra,* at 488, 120 S. Ct. 2348 (facts admitted by the defendant). In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment," [1 J.] Bishop, [Criminal Procedure] § 87, at 55, and the judge exceeds his proper authority.
>
> *Id.* at [303-04], 124 S. Ct. at 2537.
>
> Clearly, *Apprendi* and its progeny preclude judges from finding "additional facts," *id.,* that increase a defendant's sentence beyond the "statutory maximum," *id.,* which is defined as the maximum sentence a judge may impose "*solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" *Id.* Equally as clear is that *Apprendi* and its progeny do not limit a judge's authority to make *legal* determinations that precede a jury's fact-finding and imposition of sentence.

Cole, 155 S.W.3d at 899-903. Applying this case law to Mr. Cole's stated issue, the Court concluded,

> The *Sims* procedure involves a legal determination, and as such this procedure does not transgress the dictates of *Apprendi* and its progeny. The (i)(2) aggravating circumstance requires only that the *statutory elements* of the prior felony involve the use of violence to the person. 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. *See* Tenn. R. Evid. 104.
>
> Furthermore, by making this legal determination, the trial court neither inflicts punishment nor usurps or infringes upon the jury's role as fact-finder. Once the trial court determines as a matter of law that the statutory elements of the prior convictions involve the use of violence, the jury must then determine as matters of fact whether the prosecution has proven the (i)(2) aggravating circumstance beyond a reasonable doubt and whether aggravating circumstances outweigh

> mitigating circumstances beyond a reasonable doubt. The jury alone must decide these factual questions, and these are the factual questions that determine whether the maximum sentence of death will be imposed. Additionally, the facts underlying prior convictions are themselves facts that either were found by a jury's verdict of guilt or facts that were admitted by a plea of guilty. Permitting the trial judge to examine such facts merely to determine which of the *statutory elements* formed the basis of the prior conviction does not violate *Apprendi* and its progeny.

Id. at 904.

After carefully considering the record, the issue raised and the applicable law, this Court finds the trial court's determination the prior offenses which the State relied upon in Mr. Nichols's case involved the use or threat of violence to the person was a legal determination which did not violate Petitioner's rights under the Sixth Amendment or Hurst. Therefore, Petitioner is not entitled to the relief sought on this issue.

Petitioner's alternative position here asserts a capital defendant is not eligible for the death penalty in Tennessee unless the jury finds the aggravating circumstances outweigh the mitigating circumstances. This assertion is simply incorrect. A Tennessee jury need only unanimously find the existence of a statutory aggravating circumstance beyond a reasonable doubt to render a capital defendant *eligible* for the death penalty. Whether the aggravating circumstance or circumstances outweigh the mitigating circumstances is not a finding of fact necessary to make a capital defendant eligible for the death penalty. After a defendant has already been found to be death penalty eligible, any subsequent weighing processes for sentencing purposes do not implicate Apprendi and Ring; weighing is *not* a fact-finding process subject to the Sixth Amendment, because "[t]hese determinations cannot increase the potential punishment to which a defendant is exposed as a consequence of the eligibility determination." State v. Belton, 74 N.E. 3d 319 (Ohio April 20, 2016)(quoting and citing State v. Gales, 265 Neb. 598, 628, 658 N.W.2d 604 (2003); see, e.g., State v. Fry, 138 N.M. 700, 718, 126 P.3d 516 (2005); *Ortiz v. State,* 869 A.2d 285, 303–305 (Del.2005); Ritchie v. State, 809 N.E.2d 258, 268 (Ind.2004)). "Instead, the weighing process amounts to "a complex moral judgment" about what penalty to impose upon a defendant who is

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already death-penalty eligible." Belton, (quoting United States v. Runyon, 707 F.3d 475, 515–516 (4th Cir.2013) (citing cases from other federal appeals courts).

In addition, the United States Supreme Court has recently denied certiorari in two cases which raised issues pursuant to Hurst.

In Burnside v. State, 352 P.3d 627 (Nev. June 25, 2015), rehearing denied, (Nev. Oct. 22, 2015), the Nevada Supreme Court invalidated one of two statutory aggravating circumstances, reweighed the evidence, found the remaining aggravator outweighed the mitigation, and affirmed the sentence of death. Subsequently, Burnside cited Ring and Hurst in his petition for a writ of certiorari to the United States Supreme Court. Burnside attempted to present the same argument presented here concerning whether a reweighing of evidence on appeal after invalidating one of the aggravating circumstances was a violation of the Sixth Amendment. The United States Supreme Court, however, denied certiorari on March 21, 2016. Burnside v. Nevada, 136 S. Ct. 1466 (2016).

In Davila v. Davis, 650 Fed. Appx. 860 (5th Cir. 2016), petitioner was denied a certificate of appealability in federal habeas proceedings on the issue of whether the Sixth Amendment and Hurst placed a burden on the State to prove a lack of mitigating evidence beyond a reasonable doubt. The jury did make the finding under the statute; however, it was not required to be beyond a reasonable doubt. Petitioner Davila filed a petition for writ of certiorari in the United States Supreme Court presenting the following question: "In light of Hurst v. Florida, 136 S. Ct. 616, 622 (2016), must Texas' second punishment special issue,[4] which is a necessary finding for a sentence of death, be decided by the jury beyond a reasonable doubt?" The United States Supreme Court again did not find Hurst established any right which warranted hearing the issue and denied

[4] The "second punishment special issue" referred to is "Taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, do you find that there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed?" Tex. Code Crim. Pro. art. 37.071.

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certiorari. Davila v. Davis, __ U.S. __, 137 S. Ct. 810 (January 13, 2017)(certiorari granted as to separate issue).

After carefully considering the record, the issue raised and the applicable law, and for the reasons stated above, this Court finds Petitioner is not entitled to the relief sought on this issue.

Claim III

Claim III asserts the State committed prosecutorial misconduct in its closing statements at trial in violation of his constitutional rights, and counsel was ineffective as it related to this issue. Specifically, he alleges the State made an improper argument concerning Petitioner's future dangerousness if subsequently released on parole, and counsel failed to object. Petitioner has also submitted several affidavits from jurors on this claim. Claim III is not newly discovered and would clearly be time-barred under Tenn. Code Ann. § 40-30-102.

In addition, the issues raised in Claim III were either raised unsuccessfully on direct appeal or post-conviction making them previously determined, and/or they are waived as not having been previously raised when available. This Court does not agree this Court should reconsider the issue as asserted by Petitioner based upon affidavits from jurors who could have been interviewed at any time post trial. This Court finds Claim III does not entitle Petitioner to any relief sought.

Claim IV

In Claim IV, Petitioner asserts the death penalty is unconstitutional because the system is fundamentally "broken." However, as the Court and the parties are well aware, the constitutionality of capital punishment in the United States and in Tennessee has been upheld on numerous occasions. Furthermore, this Court notes the Tennessee Supreme Court has addressed this issue previously in the direct appeal of a capital case:

Mr. Hester contends that the current system of capital punishment in the State of

> Tennessee is fundamentally "broken." Accordingly, he invites this Court to begin dismantling the system by vacating his death sentence. Because this invitation reflects Mr. Hester's misunderstanding of the role of the courts, we respectfully decline.
>
> Tennessee's courts should never hesitate to perform their constitutionally assigned role as a check and balance on the actions of the other branches of government. However, in performing this responsibility, Tennessee's courts must maintain appropriate respect for the breathing room needed for a representative democracy to thrive. At the core of our representative democracy is the principle that the people are the ultimate sovereign. Therefore, the courts must give full effect to the will of the people, expressed through laws duly enacted by their elected representatives, subject only to the limitations imposed by the federal and state constitutions.
>
> The people, through their elected representatives, are primarily responsible for establishing the public policy of this State. The Constitution of Tennessee does not empower us to sit as "Platonic guardians" or as a super-legislature with the power to dismantle statutory systems because they do not meet our standards of desirable social policy. By accepting Mr. Hester's invitation to tear down Tennessee's system of capital punishment, we would be arrogating to ourselves power that is not ours to exercise. This we decline to do.

State v. Hester, 324 S.W.3d 1, 81 (Tenn. 2010) (footnote omitted). The Tennessee Supreme Court's prior review of this claim in Hester makes clear this issue is not a new constitutional issue which would be cognizable here.

Furthermore, the Tennessee Supreme Court continuously reviews capital punishment system in light of evolving standards of decency. See, e.g., State v. Pruitt, 415 S.W.3d 210-12 (Tenn. 2013) (extensive analysis of proportionality review system in light of evolving standards of decency). Such analysis by the Tennessee Supreme Court helps ensure the death penalty in Tennessee does not become a broken system. Furthermore, as a trial court, this Court is bound by appellate court precedent. Any assertion the capital punishment system is broken in this state must be addressed to the appellate courts and the General Assembly.

In addition to not being a cognizable issue here, this Court would find this issue has been waived by not having been previously raised. Petitioner is not entitled to relief on this issue.

Claim V

Petitioner claims he is entitled to relief based upon the cumulative effect of the errors

contained in his Claims I through V. This Court, however, already has found Claims II-IV are time-barred, previously determined, and/or waived. The only issue remaining for consideration by this Court is Claim I. This Court finds no basis for a claim of cumulative error which would warrant consideration here.

VI. Conclusion

Petitioner asserts this Court, in its discretion, may accept a proposed agreed disposition of a post-conviction case prior to an evidentiary hearing, and should accept the agreement here. However, this Court, in its discretion, finds it is not appropriate to accept such a proposed agreement under the circumstances of this case where there is no claim for post-conviction relief before this Court which should survive this Court's statutorily required preliminary order.

For the reasons stated above, Petitioner's Motion to Approve Settlement Agreement is DENIED, and this matter is DISMISSED.

IT IS SO ORDERED this the 7 day of March, 2018.

Don R. Ash
Senior Judge

CERTIFICATE OF SERVICE

I, _____, Clerk, hereby certify I have mailed a true and exact copy of same to Counsel of Record for Petitioner, and the State this the _____ day of _____, 20___.

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