

**IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT KNOXVILLE**

**HAROLD WAYNE NICHOLS,**     )  
  )  
                  **Appellant,**     )  
  )  
**v.**                                     )  
  )  
**STATE OF TENNESSEE,**     )  
  )  
                  **Appellee.**     )

**HAMILTON COUNTY  
NO. E2018-00626-CCA-R3-PD**

**ON APPEAL AS OF RIGHT FROM THE JUDGMENT  
OF THE HAMILTON COUNTY CRIMINAL COURT**

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**BRIEF OF THE STATE OF TENNESSEE**

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**B. The post-conviction court correctly denied petitioner’s *Johnson* claim summarily.**

*Johnson* announced a new rule; it is retroactive under federal law, *Welch v. United States*, 136 S.Ct. 1257, 1265 (2016); and federal retroactivity principles govern state post-conviction procedure, *Montgomery v. Louisiana*, 136 S.Ct. 718, 731-32 (2016). But the decision is simply irrelevant to petitioner’s case.

In *Johnson*, the Court held that the “residual clause” of the ACCA was impermissibly vague. The ACCA defines a “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 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). The emphasized portion of this definition is referred to as the “residual clause,” and deciding whether a particular crime fell within the residual clause “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.” *Johnson*, 135 S.Ct. at 2557.

The Court in *Johnson* held that this “ordinary case” analysis rendered the residual clause unconstitutionally vague for two reasons. First, the residual clause left “grave uncertainty” about how to estimate the risk posed by a crime, as it tied the judicial assessment of risk to a judicially-imagined “ordinary case” of a crime, not to real-world facts or statutory elements. *Id.* Second, the residual clause left uncertainty