CAPITAL CASE
EXECUTION SCHEDULED FOR FEBRUARY 20, 2020, AT 7:00 P.M., CST

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

NICHOLAS TODD SUTTON,

Petitioner,

v.

STATE OF TENNESSEE,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

In its June 26, 2015 decision in *Johnson v. United States*, ___ U.S. ___, 135 S. Ct. 2551 (2015), this Court held a statute imposing additional punishment for a prior conviction of "[a]ny crime punishable by imprisonment for a term exceeding one year ... that ... *involves conduct that presents a serious potential risk of physical injury to another*[,]" "fails to give ordinary people fair notice of the conduct it punishes" and, as applied, "invites arbitrary enforcement by judges." *Id.* at 2555-56.

On January 15, 1985, the day on which Mr. Sutton took the life of fellow inmate Carl Estep, a Tennessee aggravating circumstance provided for additional, indeed the ultimate, punishment for a defendant committing such an act if that defendant had a prior conviction of, "*one or more felonies other than the present charge which involved the threat or use of violence to the person.*" Tenn. Code Ann. § 39-13-204(i)(2) (1988) (repealed and replaced 1989) (emphasis added). That circumstance was applied to Mr. Sutton.

No party, and no court, currently maintains that the language of these two statutes can be distinguished in any meaningful way. Indeed, no reasonable person could.

Over three years ago, on June 8, 2016, after this Court held in *Welch v. United States*, ___ U.S. ___, 136 S. Ct. 1257 (2016), that *Johnson* has retroactive effect in cases on collateral review, Sutton (along with other affected Tennessee inmates) filed a motion to reopen his state post-conviction petition alleging Tennessee's prior violent felony aggravating circumstance, like the statute at bar in

Johnson, "is unconstitutionally vague, was arbitrarily enforced, and failed to give fair notice."

Though the petition to reopen was promptly granted, it was not until almost two years later, in April of 2018, the Tennessee post-conviction trial court denied Sutton's reopened petition and not until, January 31, 2020, 20 days before his scheduled execution, that the Tennessee Court of Criminal Appeals affirmed its decision. Only five days ago, February 13, 2020, the Tennessee Supreme Court issued an order refusing Sutton's application for permissive appeal.

As had all other Tennessee appellate courts, the *Sutton* court addressed only whether Tennessee decisions applying the prior violent felony aggravating circumstance suffered from the same failings as the pre-*Johnson* decisions this Court had overruled. As had all other Tennessee appellate courts, it neither inquired, resolved, or mentioned whether Tennessee's facially-vague prior violent felony aggravating circumstance provided Sutton with the fair notice *Johnson* found lacking in the federal statute and the Fifth Amendment requires. In short, it simply read the Fifth and Fourteenth Amendments' notice requirement out of this Court's clear guidance announced in *Johnson*.

Despite multiple requests to address both of *Johnson's* requirements, one Tennessee court after another has failed to look past the manner in which its facially-vague aggravating circumstance is applied. Only one Court is left to restore *Johnson* to its original meaning. That is the Court which issued it. Accordingly, the following question is presented:

Did Tennessee decisions applying the facially-vague prior violent felony aggravating circumstance, not handed down until after Sutton committed his capital offense, provide Sutton the fair notice required under *Johnson v. United States* and the Fifth and Fourteenth Amendments to the Constitution?

TABLE OF CONTENTS

LIST OF APPENDICES

TABLE OF AUTHORITIES

Federal Cases

State Cases

Federal Statutes

Constitutional Provisions

State Statutes

Other

OPINIONS BELOW

The Tennessee Court of Criminal Appeal's decision affirming the judgment of the Criminal Court for Morgan County, Tennessee's denial of Sutton's reopened Amended Petition for Post-Conviction Relief, *Nicholas Todd Sutton v. State of Tennessee*, No. E2018-00877-CCA-R3-PD, 2020 WL 525169 (Tenn. Crim. App. Jan. 31, 2020), is unpublished and is attached as Appendix A. The Tennessee Supreme Court's February 13, 2020 Order denying discretionary review of the Court of Criminal Appeals decision, *State of Tennessee v. Nicholas Todd Sutton*, No. E2019-01062-SC-R11-ECN (Tenn. Feb. 13, 2020), is unpublished and is attached hereto as Appendix B. The Tennessee Supreme Court's February 14, 2020 Order denying Sutton's application for stay pending appeal, *State of Tennessee v. Nicholas Todd Sutton*, No. E2000-00712-SC-DDT-DD (Tenn. Feb. 14, 2020), is unpublished and is attached hereto as Appendix C. The April 12, 2018 judgment of the Criminal Court for Morgan County, Tennessee, denying Sutton's Amended Petition for Post-Conviction Relief, *Nicholas Todd Sutton v. State of Tennessee*, No. 7555 (Morgan Cnty. Crim. Ct. Apr. 12, 2018), is unpublished and attached hereto as Appendix D.

JURISDICTION

Jurisdiction over the final judgment of the Tennessee Court of Criminal Appeals on the merits of a claim where the validity of a statute of the State of Tennessee is drawn into question on the grounds of being repugnant to the Constitution of the United States is invoked pursuant to 28 U.S.C § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part that: "No state shall make or enforce any law which shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Fifth Amendment to the United States Constitution provides that: "No person shall ... be deprived of life, liberty or property, without due process of law[.]"

STATEMENT OF CASE

Nicholas Todd Sutton, who comes before this Court only five days after the Tennessee Supreme Court denied discretionary review of the Amended Petition for Post-Conviction Relief he initiated over three years ago, will be executed on February 20, 2020, unless this Court intervenes.

On January 15, 1985, Mr. Sutton, who was serving a life sentence for a prior offense, killed Carl Estep, a fellow inmate at Morgan County Correctional Institution. According to State witness Cary Scoggins, the killing occurred after Mr. Sutton had refused to pay Mr. Estep for drugs Estep had provided to Sutton and Estep had responded by threatening Sutton's life. *State v. Sutton*, 761 S.W.2d 763, 766 (Tenn. 1988). At the time Sutton killed Estep, Tennessee's capital sentencing statute provided that the maximum punishment for first degree murder would be increased to death if "[t]he 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) (repealed and replaced

1989). The statue was applied during Sutton's capital sentencing. *State v. Sutton*, 761 S.W.2d at 767. Sutton was sentenced to death.

On June 26, 2015, this Court handed down its decision in *Johnson v. United States*, 135 S. Ct. 2551. There it held a statute imposing additional punishment for a prior conviction of "[a]ny crime punishable by imprisonment for a term exceeding one year ... that ... *involves conduct that presents a serious potential risk of physical injury to another*[,]" "fails to give ordinary people fair notice of the conduct it punishes" and, as applied, "invites arbitrary enforcement by judges." *Id.* at 2555-56. On June 8, 2016, less than four months after *Welch v. United States*, 136 S. Ct. 1257, recognizing *Johnson* was to be applied retroactively in cases on collateral review, Sutton filed a motion to reopen his state post-conviction petition, alleging Tennessee's prior violent felony aggravating circumstance, like the statute at bar in *Johnson*, "is unconstitutionally vague, was arbitrarily enforced, and failed to give fair notice."

On April 12, 2018, after allowing Sutton to reopen his state collateral proceeding to raise his *Johnson* challenge, the Criminal Court for Morgan County, Tennessee denied Sutton's claim. In that opinion, the court determined that Tennessee's cases applying the prior violent felony enhancement did not suffer from the same failings as this Court's cases applying the residual clause. (App. D at 31a). (Tennessee courts do not apply either the "categorical approach" or the "ordinary case" comparison from *Taylor v. United States*, 128 U.S. 2143 (1990) [and *James v.*

United States, 550 U.S. 192, 208 (2007)]). The notice requirement was not addressed.

Mr. Sutton appealed the criminal trial court's decision to the Tennessee Court of Criminal Appeals. On January 31, 2020, the court issued its opinion. In affirming the denial of Sutton's *Johnson* claim, the appellate court, like the Tennessee trial court, found, "[u]nlike the approach to the ACCA's residual clause 'our precedent has never required the use of a judicially imagined ordinary case in applying the prior violent felony.'" (App. A at 11a). Again, the notice requirement was not addressed. Five days ago, the Tennessee Supreme Court declined discretionary review, (App. B), as well as Sutton's request for a stay pending appeal. (App. C).

Sutton now files this petition for writ of certiorari. Simultaneously, he has filed a separate request for a stay of execution so the matter may be fully considered before his sentence of death is carried out.

REASONS FOR GRANTING THE WRIT

I. Review is needed to prevent derogation of this Court's decision in *Johnson v. United States* and of the notice requirements of the Fifth and Fourteenth Amendments to the Constitution of the United States.

The language of Tennessee's prior violent felony aggravating circumstance is vague not (merely) in its application, but on its face. In *Johnson v. United States*, 135 S. Ct. 2551, this Court held a statute imposing additional punishment for a prior conviction of "[a]ny crime punishable by imprisonment for a term exceeding one year ... that ... *involves conduct that presents a serious potential risk of physical*

injury to another" "fails to give ordinary people fair notice of the conduct it punishes" and, as applied, "invites arbitrary enforcement by judge." *Id.* at 2555-56. Accordingly, such a statute violates the Fifth Amendment to the Constitution. On January 15, 1985, the day on which Mr. Sutton took the life of fellow inmate Carl Estep, a Tennessee aggravating circumstance provided for additional, indeed the ultimate, punishment for a defendant committing such an act if that defendant had a prior conviction of, "one or more felonies other than the present charge which involved the threat or use of violence to the person." Tenn. Code Ann. § 39-13-204(i)(2)(1988) (repealed and replaced 1989). That circumstance was applied in Mr. Sutton's case and his jury was instructed to consider it when he was sentenced to death.

Because the void-for-vagueness doctrine is embodied in the Due Process Clauses of the Fifth and Fourteenth Amendments, *see* 16B Am. Jur. 2d Constitutional Law § 972 (2009), it should give pause when the Tennessee court here boldly declares Tennessee's method for applying the language of its prior violent felony aggravating circumstance accomplishes what this Court found it was unable to do. *See Johnson v. United States*, 135 S. Ct. at 2558 ("Here, this Court's repeated attempts and repeated failures to craft a principled and objective standard out of the residual clause confirm its hopeless indeterminacy.") It should give even greater pause when it declares that its method removes the Tennessee statute from *Johnson*'s purview. As Justice Alito observed in his dissenting opinion in *Johnson*:

> [*Johnson*] precludes a sentencing court that is applying ACCA from counting convictions for even those specific offenses that this Court

> previously found to fall within the residual clause. Still worse, the Court holds that vagueness bars the use of the residual clause in other cases in which its applicability can hardly be questioned.

Johnson v. United States, 135 S. Ct. at 2581 (internal citations omitted) (Alito, J. dissenting). Even if the Tennessee court's method of applying the facially-vague language of its statute can be distinguished from those methods rejected in *Johnson*, that distinction alone cannot cure the vagueness inherent in this statute, and the Tennessee courts have offered no explanation how it does.

Notwithstanding the fact that the Tennessee courts cannot do what they claim to have done, *i.e.* cure the vagueness of its prior violent felony statute by applying it in a "constitutional manner," there is a more salient flaw in the Tennessee Court of Criminal Appeals' refusal to afford Mr. Sutton *Johnson* relief. The statute also fails to provide a defendant notice of the consequences of his anticipated conduct. The process by which the Tennessee courts aver they have accomplished this impossible task does not occur until long after that point in time when the constitution requires Mr. Sutton to be on notice of the consequences of his actions. As this Court observed, a facially-vague statute does not violate constitutional due process simply because it invites arbitrary enforcement.

> 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 (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 (1926).

Johnson v. United States, 135 S. Ct. at 2556-57. Though the Fifth Amendment's (and, accordingly the Fourteenth Amendment's) fair notice requirement lays at the heart of *Johnson*, the court below, and indeed every Tennessee court tasked with addressing the applicability of that decision to Tennessee's prior violent felony statute, proceeded as if the notice requirement did not exist. By stopping where it did, it stripped both *Johnson* and the Fifth and Fourteenth Amendments of the "first essential of due process." *Id.* at 2557. It is not enough for a court to be able to devise a method to remove the indeterminacy of a vague criminal statute during its application. The method must accomplish that task before the defendant commits the act for which he is to receive the enhanced punishment.

A court's after-the-fact, case-by-case, application of a facially-vague statute, even if done in a constitutional manner, does not provide a criminal defendant with the fair notice required by the Constitution. *Smith v. Goguen,* 415 U.S. 566 (1974); *Gregory v. City of Chicago*, 394 U.S. 111, 121 (1969); *Lanzetta v. State of New Jersey*, 306 U.S. 451 (1939).

Almost a hundred years ago, this Court observed in *Lanzetta*:

> Appellants were convicted before the opinion in *State v. Gaynor*. It would be hard to hold that, in advance of judicial utterance upon the subject, they were bound to understand the challenged provision according to the language later used by the court.

Lanzetta, 306 U.S. at 456.

Consistent with its decision in *Lanzetta*, this Court held in *Gregory v. City of Chicago*:

> [T]he construction of the Illinois Supreme Court is as authoritative as if this limitation were written into the ordinance itself. But this cannot be the end of our problem. The infringement of First Amendment rights will not be cured if the narrowing construction is so unforeseeable that men of common intelligence could not have realized the law's limited scope at the only relevant time, when their acts were committed.

394 U.S. at 121 (emphasis added).

Five years later, in *Smith v. Goguen,* this Court again affirmed that the prior notice requirement mandates that any judicial narrowing of a vague statute must occur before the defendant commits the crime for which the enhanced punishment is to be imposed.

> In its terms, the language at issue is sufficiently unbounded to prohibit, as the District Court noted, 'any public deviation from formal flag etiquette ....' 343 F.Supp., at 167. Unchanged throughout its 70-year history, the [vague language in the] 'treats contemptuously' phrase was also devoid of a narrowing state court interpretation at the relevant time in this case. We are without authority to cure that defect.

415 U.S. at 575 (emphasis added) (footnotes omitted).

At the relevant time here, neither the Tennessee legislature, nor its courts, had narrowed the scope of the Tennessee prior violent felony aggravating circumstance. It failed to give any fair notice and is therefore unconstitutional.

II. Review should be granted here because the Tennessee has not only applied its facially-vague prior violent felony aggravating to increase Sutton's maximum punishment, and those of similarly-situated Tennessee death row inmates. It continues to apply the statute to increase the punishment of Tennessee defendants currently charged with first degree murder.

Tennessee's erasure of *Johnson*'s notice requirement goes far beyond merely depriving Sutton of the Fifth and Fourteenth Amendments' guarantees of due process. In fact, it goes beyond depriving other similarly-situated of its guarantee. Operating under the belief that it may cure statutory vagueness through what it believes to be a reliable sentencing process, Tennessee continues to use the prior violent felony aggravating circumstance to enhance the maximum penalty available in first degree murder cases even when the determination whether the defendant's prior felony "involved the threat or use of violence to the person" is not made until long after the defendant committed their capital offense.

It is reason enough to grant review here that the Tennessee Court of Criminal Appeals avoids even mentioning the core holding of this Court's decision in *Johnson* and deny relief to someone so clearly denied fair notice that his prior conduct would expose him to the greatest penalty available under Tennessee law. Less than two months after this Court's decision in *Welch v. United States*, 136 S. Ct. 1257, opened the door for Sutton to ask the Tennessee courts to remedy the Fourteenth Amendment violation identified here, he filed his petition to reopen his post-conviction proceedings. The trial court left his reopened petition undecided for almost two years until April 12, 2018, two months after the State of Tennessee asked the Tennessee Supreme Court to set his execution date. There, it rejected

Sutton's *Johnson* claim without even addressing its notice requirement. (App. D). Sutton promptly appealed to the Tennessee Court of Criminal Appeals. The Tennessee Supreme Court, on November 13, 2018, almost as promptly set his execution date for two days from today, February 20, 2020. Even with that date pending, the Court of Criminal Appeals did not issue an opinion until barely more than two weeks ago, almost the eve of Sutton's execution. (App. A). Again, the Tennessee court declined to even acknowledge that *Johnson* notice requirement.

That Sutton comes to this Court at such a late date is through no fault of his own, he does however, come with a clear entitlement to relief. The State of Tennessee bears full responsibility for both the timing of this petition and the urgent need for this Court to act.

However, it is not just for Mr. Sutton's case that this Court must act. In case after case, the Tennessee courts have denied relief to other defendants based upon their belief that Tennessee's process for applying their facially-vague statute during the course of the capital sentencing process has cured its constitutional infirmity. In *Nichols v. State*, No. E2018-00626-CCA-R3-PD, 2019 WL 5079357 (Tenn. Crim. App. Oct. 10, 2019), *app. den.* (Jan. 15, 2020), the Tennessee Court of Criminal Appeals denied Mr. Nichols' request for *Johnson* relief, again without even acknowledging *Johnson*'s notice requirement and again with doing no more to defend the constitutionality of its method of applying Tennessee's vague circumstance than to distinguish it from the "ordinary case" comparison this Court rejected in *Johnson*. *Id.* at *6.

In both *Donnie E. Johnson v. State*, No. W2017-00848-CCA-R28-PD, Order (Tenn. Crim. App. Sept. 11, 2017), *perm. app. den.* (Tenn. Jan. 19, 2018) (App. E) and *Gary W. Sutton v. State*, No. E2016-02112-CCA-R28-PD, Order (Tenn. Crim. App. Jan. 23, 2017), *perm. app. denied* (Tenn. May 18, 2017) (App. F), it has boldly done the same. In both of these cases, the Tennessee courts go so far as to declare that Tennessee's method of applying the statute is so beyond reproach that it allows a Tennessee trial judge to examine the facts of the prior offense during the capital sentencing process. *Id.* In *Derick Quintero v. State*, No. M2017-02272-CCA-R28-PD, Order (Tenn. Crim. App. Jun. 29, 2008) (App. G), the court affirmed the denial of Mr. Quintero's *Johnson* claim based upon the same reasoning. Once again, the Court of Criminal Appeals reached that conclusion in *Vincent Sims v. State*, No. W2016-02412-CCA-R28-PD, Order (Tenn. Crim. App. Sept. 26, 2017) (App. H).

It is not only Mr. Sutton and other current Tennessee death row inmates who bear the brunt of the Tennessee court's disregard for the full scope of the Fifth and Fourteenth Amendment protections set out in *Johnson*. The Tennessee courts are currently so convinced that their method of applying the facially vague version of Tennessee's prior violent felony statute in effect at the time Mr. Sutton committed his crime cures its constitutionality that they have judicially-broadened the scope of Tennessee's now-current statute which, on its face, applies only if the actual elements of the prior offense include the "threat or use of violence to the person." Under the Tennessee courts' broadened interpretation, the statute also applies to offenses where the actual elements of the offense do not "involve the threat or use of

violence to the person," but the trial court determines at the time of trial that the defendant's conduct in perpetrating the prior offense does. Accordingly, the Tennessee Court of Criminal Appeals recognized that, even under Tennessee's new "elements" version of the prior violent felony statute, a trial court is allowed to examine a defendant's prior conduct regardless of the elements of the prior offense:

> Lastly, we consider the sufficiency of the evidence to support the (i)(2) aggravating circumstance: "[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). …
>
> This Court has recognized that the statutory elements of aggravated assault do not necessarily involve the use of violence the person. *State v. Sims,* 45 S.W.3d 1, 11–12 (Tenn.2001). As a result, prior convictions for aggravated assault may serve as the basis for a jury's finding of the (i)(2) aggravating circumstance only if the trial court makes a legal determination in a jury-out hearing that the statutory elements of the prior convictions involved the use of violence to the person. *Id.; see also State v. Cole,* 155 S.W.3d 885, 901–02 (Tenn.2005); *State v. Powers,* 101 S.W.3d 383, 400–01 (Tenn.2003); *State v. McKinney,* 74 S.W.3d 291, 305 (Tenn.2002). In determining whether the statutory elements of prior aggravated assault convictions involve the use of violence to the person, trial courts are limited to examining "the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented."

State v. Rollins, 188 S.W.3d 553, 572-73 (Tenn. 2006) (footnotes omitted). Regardless of the reliability of the evidence upon which the capital trial judge relies, a determination of the factual question of whether a prior offense "involve[s] the threat or use of violence to the person," the fact remains that this determination does not occur until long after the defendant has committed the crime for which an enhanced sentence is sought. Even under current Tennessee law, as broadened by

the Tennessee courts, a capital defendant has no notice of what that determination will be.

Should review not be granted here, Mr. Sutton will be executed in mere days even though there is no doubt but that Tennessee put a thumb squarely and unconstitutionally on death's side of the scale. Without review, other similarly-situated Tennessee death row inmates will die as well. Each day Tennessee's unconstitutional prior violent felony aggravating circumstance continues to stand, other persons, including persons not yet arrested and/or not yet charged, will take actions without fair notice of the maximum punishment they may face. This, as this Court observed in *Johnson*, the Fifth Amendment (and therefore the Fourteenth Amendment) does not allow. For Mr. Sutton, for other Tennessee inmates, for persons who have yet to act, *certiorari* should be granted now.

III. Review is needed here for the same reasons it was granted in this Court's post-*Johnson* cases.

This Court has recognized the fundamental nature of the due process right protected in *Johnson* permits neither technical distinctions, nor judicial recalcitrance. It should do so again here.

Less than a year after *Johnson* was decided, this Court held in *Welch v. United States*, 136 S. Ct. at 1260, that its decision enforcing the vague-for-voidness doctrine against sentencing statutes which increased the maximum punishment a defendant could receive was so essential to basic notions of due process the Founding Fathers intended to be the cornerstone to the nascent American judicial system that it gave the decision retroactive effect. Indeed, it did so knowing full well

that it would disturb the sentences imposed in thousands upon thousands of cases. Not even a year after *Welch*, the Court rejected the Government's argument that textual variations between the ACCA residual clause and the residual clause in the definition of "aggravated felony" in 18 U.S.C. § 16(b) removed it from *Johnson*'s purview. *Sessions v. Dimaya*, 138 S. Ct. 1204, 1217, 1220 (2018). Important here, it also rejected the argument that 18 U.S.C. § 16(b) could be distinguished from *Johnson* because the statute lacked the same history of—what were ultimately determined in *Johnson* to be unworkable—judicial precedents interpreting the residual clause of the ACCA. *Id.* at 1223. This rejected reasoning is the same as that employed by the Tennessee Court of Criminal Appeals in defending Tennessee's prior violent felony aggravating circumstance against Sutton's *Johnson* challenge. (App. A at 11a). Only last term, this Court returned to *Johnson* to make clear that it would not allow *Johnson*'s affirmation of the most fundamental tenant of due process to be avoided by novel constructions of vague statutory language as it struck down the residual clause of 18 U.S.C. § 924(c)(1)(A). *United States v. Davis*, 139 S. Ct. 2319 (2019). Beginning with the proclamation "a vague law was no law at all," *id.* at 2323, this Court again rejected prior attempts to "fix" language which, on its face is unconstitutionally vague.

The significance of this Court's decisions in *Johnson* and its rapidly-following progeny lies not merely in its insistence that legislatures, not courts, cure the vagueness in various variations of the language struck down in *Johnson*. The utter lack of fair notice provided by Tennessee's "cure" answers that question already.

Here, their significance lies more in the fact that they unquestionably stand for the proposition that this Court will not wait any longer for legislative bodies to remove indeterminate sentencing statutes from their books (or for courts to conjure up a more reasons not to follow *Johnson*'s clear mandate). This Court has not hesitated to put a halt to the denial of this essential element of the rule of law, *see, e.g.*, *Sessions v. Dimaya*, 138 S. Ct. at 1225 (Gorsuch, J. concurring). It should not do so now.

CONCLUSION

For the foregoing reasons, Petitioners request that this Court grant the Petition for Writ of Certiorari.

Dated: February 18, 2020.

Respectfully submitted,

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