

**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

APPLICATION FOR STAY OF EXECUTION

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Dated: February 18, 2020

APPLICATION FOR STAY OF EXECUTION

To the Honorable Sonia Sotomayor, Associate Justice of the United States and Circuit Justice for the Sixth Circuit:

Applicant, Nicholas Todd Sutton respectfully applies to this Court for an order staying his execution which is set for February 20, 2020, 7:00 p.m., CST, pending this Court's consideration of his Petition for *certiorari* review of the decision of the Tennessee Court of Criminal Appeals denying him relief under this Court's decision in *Johnson v. United States*, ___ U.S. ___, 135 S. Ct. 2551 (2015).

INTRODUCTION

Mr. Sutton seeks a stay pending review of the Tennessee Court of Criminal Appeals decision affirming Criminal Court for Morgan County, Tennessee's judgment denying 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), which seeks relief under this Court's decision in *Johnson v. United States*, 135 S. Ct. 2551.

The language of the Tennessee prior violent felony aggravating circumstance in effect at the time of Sutton's crime, and which was used to enhance the maximum penalty for that crime to death, was materially identical to the language of the residual clause found to be unconstitutionally vague on its face in *Johnson*. No serious argument exists otherwise and the Court of Criminal Appeals did not distinguish their language. Nonetheless, the Tennessee Court of Criminal Appeals held that Tennessee courts' method for applying Tennessee's prior violent felony aggravating circumstance during a capital sentencing was distinguishable from the

methods employed in the pre-*Johnson* cases overturned in *Johnson*, and therefore *Johnson* did not apply. The Tennessee court failed to even mention *Johnson*'s fair notice requirement, much less explain how Tennessee's method of applying the facially-vague statute during Mr. Sutton's capital sentencing hearing could provide Sutton the fair notice to which he was entitled prior to committing his offense. It simply read out the fair notice requirement of the void-for-vagueness doctrine that *Johnson* and the Fifth and Fourteenth Amendments mandate.

As he explains in his Petition for Writ of *Certiorari*, Sutton has come to this Court asking it to restore the fair notice requirement erased from *Johnson* by the decision of the Tennessee Court of Criminal Appeals, to order relief in his case, and, by doing so, to halt the Tennessee courts' continuing disregard of this essential aspect of the *Johnson* decision.

Because there is a reasonable probability that this Court will grant Sutton *certiorari* review of his *Johnson* claim, and there is a fair prospect that he will thereafter prevail on that claim, a stay should issue.

JUDGMENT FOR WHICH REVIEW IS SOUGHT

The Tennessee Court of Criminal Appeal 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 attached hereto as Appendix A.

JURISDICTION

Your Honor and this Court have jurisdiction to grant a stay of execution. The All Writs Act gives your Honor and this Court the power to issue a stay to maintain jurisdiction of the underlying matter. “The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.” 28 U.S.C. § 1651(a). Furthermore, “[i]n any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court.” 28 U.S.C. § 2101(f).

STANDARD FOR GRANTING A STAY

Mr. Sutton meets the standard for granting a stay because there is a reasonable likelihood this Court will grant review and, absent a stay, he will be executed and denied the benefit of this Court’s judgment. Four factors guide the issuance of a stay: (1) whether the Petitioner makes a strong showing of the likelihood of success on the merits; (2) whether the Petitioner will be irreparably injured absent a stay; (3) whether the issuance of a stay will injure the opposing party; and, (4) whether a stay is in the public interest. *Nken v. Holder*, 556 U.S. 418, 434 (2009). When the Government is the opposing party, assessing the harm to the opposing party and weighing the public interest merge. *Nken*, 556 U.S. at 435. Where a stay is sought pending a petition for certiorari, the petitioner need only show a “reasonable probability” that this Court will grant certiorari and a “fair

prospect” that the decision below will be reversed. *Maryland v. King*, 567 U.S. 1301 (2012) (Chief Justice Roberts, as Circuit Justice). In *Barefoot v. Estelle*, 463 U.S. 880 (1983) (superseded on other grounds by 28 U.S.C. § 2253(c)), this Court held that a stay may be granted when there are “a reasonable probability that four members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari ...; a significant possibility of reversal of the lower court’s decision; and ... a likelihood that irreparable harm will result if that decision is not stayed.” *Barefoot*, 463 U.S. at 895 (quoting *White v. Florida*, 458 U.S. 1301, 1302 (1982)). Further, a stay should be granted when necessary to “give non-frivolous claims of constitutional error the careful attention that they deserve” and when a court cannot “resolve the merits [of a claim] before the scheduled date of execution, ... to permit due consideration of the merits.” *Id.* at 888-89. These factors weigh in favor of a stay in Mr. Sutton’s case.

REASONS FOR GRANTING A STAY

1. **There is a reasonable probability that this Court will grant certiorari and a fair prospect that Mr. Sutton will succeed on the merits.**

Three times in the past four terms of this Court, it has granted relief upon *certiorari* review to enforce its prohibition against the enhancement of a criminal sentence based upon a statute which is vague on its face—first in *Welch v. United States*, 136 S. Ct. 1257 (2016); then *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018); then *United States v. Davis*, 139 S. Ct. 2319 (2019). In fact, in *Dimaya*, it rejected an argument that the statute, though textually similar to the residual clause of the ACCA, did not violate the void for vagueness doctrine because it lacked the

problematic judicial precedents which had plagued the ACCA—the same argument offered by the Tennessee Court of Criminal Appeals in Sutton’s case. *Sessions v. Dimaya*, 138 S. Ct. at 1223. The significance of this Court’s decisions in *Johnson’s* rapidly-following progeny lies not merely in their 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. For the purposes of Sutton’s application for a stay of execution, their significance lies in the fact that they unquestionably stand for the proposition that this Court has not waited for legislative bodies to remove indeterminate sentencing statutes from their books (or for courts to conjure up more reasons not to follow *Johnson’s* clear mandate) before putting an end to their continued use. Given that fact, and given the unquestionable merit of Sutton’s claim, it can be reasonably expected that this Court will grant review here.

Moreover, there is at least a “fair prospect” that the Court, upon review, will grant relief. The fair notice requirement of the void for vagueness doctrine is among the most firmly-established tenets of the Fifth and Fourteenth Amendments’ guarantees of due process. *See 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). Indeed, Justice Gorsuch recently observed:

Perhaps the most basic of due process’s customary protections is the demand of fair notice. *See Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926); *see also* Note, *Textualism as Fair Notice*, 123 Harv. L. Rev. 542, 543 (2009) (“From the inception of Western culture, fair notice has been recognized as an essential element of the rule of law”).

Sessions v. Dimaya, 138 S. Ct. 1204, 1225 (2018) (Gorsuch, J. concurring). Given its importance, The Tennessee court’s refusal to even acknowledge this core principle, particularly in a case where, not only does it demand a different outcome, but in which a man’s life hangs in the balance, cannot be explained, excused or even tolerated. This is even more so here where the members of this Court have repeatedly and recently emphasized its importance, such as they did in the quoted language from *Dimaya*. Given its importance there is a fair prospect this Court will determine first that the claimed absence of “problematic” precedent does not remove the facially-vague language of its prior violent felony aggravating circumstance from *Johnson*’s purview, as it recognized in *Dimaya*. Moreover, given that the circumstance must comply with *Johnson* and its fair notice requirement, there is an even greater prospect this Court will determine that, even if the facial vagueness of Tennessee’s prior violent felony statute could be “cured” by applying it in a constitutionally permissible manner, it cannot do so when that “cure” comes long after that point at which fair notice was required. *Lanzetta*, 306 U.S. 451.

This equity weighs in favor of a stay of execution

2. Without a stay of execution, Mr. Sutton will be irreparably injured pending this Court’s decision on his petition.

Absent a stay, Mr. Sutton plainly faces irreparable injury, his death. Further, Mr. Sutton will be prejudiced by the denial of a stay because he would not receive the benefit of a decision on the meritorious issues raised in his petition for certiorari.

3. The public interest lies in favor of granting a stay and issuance of a stay will not substantially prejudice the State.

While the public may have an interest in seeing judgments carried out, it also has an interest that its citizens not suffer punishment in violation of their due process rights. “[I]t is always in the public interest to prevent violation of a party’s constitutional rights.” *G & V Lounge, Inc. v. Michigan Liquor Control Comm’n*, 23 F.3d 1071, 1079 (6th Cir. 1994) (citing *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 383 (1979)); *see also In re Morris*, 328 F.3d 739, 741 (5th Cir. 2003) (the public interest is served when an applicant for a stay makes a showing of a likelihood of success on the merits).

Likewise, a State suffers no substantial harm when, as in this case, an execution is delayed in order to determine whether the very sentence Tennessee seeks to carry out on February 20, 2020, was constitutionally-imposed. *In re Holladay*, 331 F.3d 1169, 1177 (11th Cir. 2003); *In re Morris, supra*. And “if the plaintiff shows a substantial likelihood that the challenged law is unconstitutional, no substantial harm to others can be said to inhere in its enjoinder.” *Deja Vu of Nashville, Inc. v. Metro. Gov’t of Nashville & Davidson Cty., Tennessee*, 274 F.3d 377, 400 (6th Cir. 2001).

Mr. Sutton seeks a stay of execution for a prompt and accurate determination as to whether Tennessee’s use of its unconstitutionally vague prior violent felony aggravating circumstance to expose him to the greatest penalty available under the law violated the most fundamental of constitutional rights. Without a stay Mr. Sutton will be denied that opportunity. Finally, it must be remembered that a stay

serves the State of Tennessee's interests, and the public's interest, in ensuring that the penalty of death is imposed in compliance with the Eighth and Fourteenth Amendments.

CONCLUSION

For the foregoing reasons, the Court should grant this Application and stay Mr. Sutton's execution pending disposition of his Petition for Writ of Certiorari.

Dated: February 18, 2020.

Respectfully submitted,



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