NO. 19-7689, 19A910

IN THE
SUPREME COURT OF THE UNITED STATES

NICHOLAS TODD SUTTON,
Petitioner,

v.

TENNESSEE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE TENNESSEE COURT OF CRIMINAL APPEALS AND
APPLICATION FOR STAY OF EXECUTION

RESPONDENT'S BRIEF IN OPPOSITION

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CAPITAL CASE

RESTATEMENT OF THE QUESTIONS PRESENTED

I

Whether the rule in *Johnson v. United States*, 135 S. Ct. 2551 (2015), is applicable to Tennessee's former prior-violent-felony aggravating circumstance, which provided for eligibility for the death penalty when the defendant was previously convicted of one or more felonies "which involve the use or threat of violence to the person."

II

Whether this Court should grant the petitioner a last-minute stay of execution when he cannot show a significant possibility of success on the merits.

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Order, *In re Sutton*, No. 20-5127 (6th Cir. Feb. 12, 2020) D.E. 8 (denying motion to file second or successive petition for writ of habeas corpus).

OPINIONS BELOW

The order of the Tennessee Supreme Court denying the petitioner's application for permission to appeal is unreported.[1] Order, *Sutton v. State*, No. E2018-00877-SC-R11-PD (Tenn. Feb. 13, 2020). The opinion of the Tennessee Court of Criminal Appeals affirming the denial of relief in the petitioner's reopened state post-conviction proceedings is also unreported. *Sutton v. State*, No. E2018-00877-CCA-R3-PD (Tenn. Crim. App. Jan. 31, 2020); (Pet's App'x, 01-17).

JURISDICTIONAL STATEMENT

The Tennessee Supreme Court denied the petitioner's application for permission to appeal on February 13, 2020. (Pet's App'x, 038.) Petitioner filed his petition on February 18, 2020. He invokes this Court's jurisdiction under 28 U.S.C. § 1257(a). (Pet., 1.)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., art. III, § 2 provides in pertinent part:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority
>
> . . . .
>
> In all the other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

28 U.S.C. § 1257(a) provides:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the

[1] The petitioner appended to his petition the Tennessee Supreme Court's order denying discretionary review in a separate case that he has not appealed in this petition. (Pet's App'x B.) For the Court's convenience, the respondent has appended the proper order to this brief in opposition as Appendix A.

> Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

At the time of the petitioner's conviction, Tennessee's first-degree murder statute provided as follows.

> (i) No death penalty shall be imposed but upon a unanimous finding, as heretofore indicated, of the existence of one or more of the statutory aggravating circumstances, which shall be limited to the following:
>
> . . . .
>
> (2) 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;
>
> . . . .
>
> (5) The murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind;
>
> . . . .
>
> (8) The murder was committed by the defendant while he was in lawful custody or in a place of lawful confinement or during his escape from lawful custody or from a place of lawful confinement[.]

Tenn. Code Ann. § 39-2-203(i) (1982).

STATEMENT OF THE CASE

On January 15, 1985, while serving a life sentence for the murder of his grandmother, the petitioner and other inmates stabbed Mr. Carl Estep 38 times. *State v. Sutton*, 761 S.W.2d 763, 764-65 (Tenn. 1988). A Morgan County jury convicted the petitioner of first-degree murder. *Id*. at 764. In imposing a death sentence, the jury applied three aggravating circumstances: 1) the petitioner was previously convicted of one or more felonies, other than the present charge, which involve the use or threat of violence to the person; 2) the murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind; and 3) the murder was committed while the petitioner was in lawful custody or in a place of lawful confinement or during his escape from lawful custody or from a place of lawful confinement. *Id*. (citing Tenn. Code Ann. § 39-2-

203(i)(2), (5), (8) (1982) (repealed)). The State relied on the petitioner's first-degree murder conviction to support the prior-violent-felony aggravating circumstance. *Id*. at 767. "The jury found no mitigating circumstances sufficiently substantial to outweigh the aggravating circumstances." *Id*. at 764.

On direct appeal, the Tennessee Supreme Court affirmed the petitioner's conviction and death sentence. *Id*. at 764, 767. It found that the evidence supported the jury's finding of the prior-violent-felony aggravating circumstance. *Id*. at 767. This Court denied certiorari. *Sutton v. Tennessee*, 497 U.S. 1031 (1990).

The petitioner subsequently filed a petition for post-conviction relief, raising a plethora of claims. *Sutton v. State*, No. 03C01-9702-CR-00067, 1999 WL 423005, at *1 (Tenn. Crim. App. June 25, 1999), *perm. app. denied* (Tenn. Dec. 20, 1999). The Court of Criminal Appeals affirmed the denial of post-conviction relief, and the Tennessee Supreme Court declined discretionary review. *Id*. at *32. This Court likewise denied certiorari. *Sutton v. Tennessee*, 530 U.S. 1216 (2000).

Thereafter, the petitioner filed a petition for writ of habeas corpus in the federal district court. *Sutton v. Bell*, 645 F.3d 752, 755 (6th Cir. 2011). On appeal, the Sixth Circuit affirmed the denial of habeas relief. *Id*. at 765. Once again, this Court denied certiorari. *Sutton v. Colson*, 566 U.S. 938 (2012).

After the petitioner's three-tier appeals process was completed, the Tennessee Supreme Court scheduled his execution for November 17, 2015. It then vacated that execution date pending the outcome of litigation challenging the State's lethal injection protocol. When that litigation concluded, it rescheduled the petitioner's execution date for February 20, 2020.

In 2016, the petitioner asked the Sixth Circuit for authorization to file a second or

successive habeas petition, asserting in relevant part that *Johnson v. United States*, 135 S. Ct. 2551 (2015), announced a new rule of constitutional law that applied retroactively to his case.[2] *In re Sutton*, No. 16-5945 (6th Cir. Aug. 3, 2016) (Resp's App'x B). The Sixth Circuit denied his request and rejected the petitioner's attempt to equate the unconstitutionally vague "residual clause" at issue in *Johnson* with the elements-and-conduct based prior-violent-felony aggravating circumstance applied in Sutton's case. *Id*. It held that *Johnson* did not apply to the petitioner's case "because the language of the applicable Tennessee statute is materially similar to the language set forth in the elements clause, rather than the residual clause, of the Armed Career Criminal Act" and that *Johnson* "explicitly noted that the residual clause was the only portion of the ACCA held to be unconstitutional." *Id*.

Around the same time, the petitioner also filed a motion to reopen his post-conviction proceedings based on *Johnson*, which the state court initially granted. *Sutton v. State*, No. E2018-00877-CCA-R3-PD, 2020 WL 525169, at *4 (Tenn. Crim. App. Jan. 31, 2020), *perm. app. denied* (Tenn. Feb. 13, 2020). He then filed an amended petition for post-conviction relief, reasserting the *Johnson* claim. *Id*. The post-conviction court denied relief, finding that "*Johnson* was inapplicable to Tennessee's prior violent felony aggravator." *Id*. at *5. On appeal, the Court of Criminal Appeals held that "Tennessee's prior violent felony aggravating circumstance is not void for vagueness under *Johnson*." *Id*. at *7 (citing *Nichols v. State*, No. E2018-00626-CCA-R3-PD, 2019 WL 5079357, at *6 (Tenn. Crim. App. Mar. 26, 2019), *perm. app. denied* (Tenn. Jan. 15, 2020)). The Tennessee Supreme Court denied discretionary review. Order, *Sutton v. State*, No. E2018-00877-CCA-R3-PD (Tenn. Feb. 13, 2020).

[2] On February 4, 2020, the petitioner sought leave to file another second or successive petition based upon *Johnson*. The Sixth Circuit denied his application on February 12, 2020. *In re Sutton*, No. 20-5127 (6th Cir. Feb. 12, 2020) (Resp's App'x C.)

REASONS FOR DENYING THE PETITION AND THE STAY

The petitioner claims that Tennessee's application of the prior-violent-felony aggravator violates the holding of *Johnson*. (Pet. 4-15.) This claim is without merit because *Johnson* does not apply to his case. To the extent that he couches his argument as Tennessee's failure to provide him fair notice, at the time he committed the murder, as to whether the prior-violent-felony aggravator could apply to him, his claim still fails. Tennessee had created a uniform construction of the aggravator in 1981, four years prior to the murder committed by the petitioner for which he was sentenced to death. Regardless, the petitioner's prior violent felony was the first-degree murder of his grandmother, which was inherently violent and required no clarifying construction for determining its applicability. Murder is by definition violent and by definition involves the use of violence to the victim. The petition should be denied. For the same reasons, the petitioner cannot establish a likelihood of success on the merits, and his application for a stay should also be denied.

A. The prior-violent-felony aggravator is not unconstitutionally vague under *Johnson*.

To the extent that the petitioner is arguing, as he did below, that the prior-violent-felony aggravator is unconstitutionally vague, such a claim is without merit. *Johnson* invalidated the "residual clause" of the Armed Career Criminal Act (ACCA) as violative of the Due Process Clause's prohibition on vague criminal laws. *Johnson*, 135 S.Ct. at 2557, 2563. 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 it "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.

This 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 about how much risk was required to qualify a crime as a violent felony. *Id.* at 2558. As explained by the Court, "[i]t is one thing to apply an imprecise 'serious potential risk' standard to real-world facts; it is quite another to apply it to a judge-imagined abstraction." *Id.*

The rule in *Johnson*, then, is this: a law is unconstitutionally vague if it "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 some result. *Id.* at 2557. But Tennessee's process does not include constructing in a vacuum some idealized or "ordinary" way of committing a criminal offense and then determining whether the constructed version somehow involves something akin to a "serious potential risk of physical injury to another." Rather, as the Court of Criminal Appeals correctly concluded when denying relief on the petitioner's *Johnson* claim, "'trial courts are to look to the actual facts of the prior felony to determine the use of violence when such cannot be determined by the elements of the offense alone.'" *Sutton v. State*, No. E2018-00877-CCA-R3-PD, 2020 WL 525169, at *4 (Tenn. Crim. App. Jan. 31, 2020) (quoting *Nichols v. State*, No. E2018-00626-CCA-R3-PD, 2019 WL 5079357, at *6 (Tenn. Crim. App. Mar. 26, 2019), *perm. app. denied* (Tenn. Jan. 15, 2020)), *perm. app. denied* (Tenn. Feb. 13, 2020).

The Court of Criminal Appeals correctly determined that the rule in *Johnson* does not apply to the prior-violent-felony aggravator, and no writ should issue to retread this ground.

The petitioner attempts to couch his claim in terms of a "notice requirement." (Pet. 4.) At the petitioner's sentencing hearing, the State relied on his prior conviction for first-degree murder to apply the prior-violent-felony aggravator. *Sutton*, 761 S.W.2d at 767. The petitioner now argues in essence that a statute that establishes as an aggravating circumstance a prior felony conviction which involved the "use of violence to the person" did not give him sufficient notice that a first-degree murder conviction would constitute such an aggravating circumstance. That argument does not withstand scrutiny. Murder, by its very definition, involves the use of violence. As applied in the petitioner's case there is absolute clarity. The statute is not vague; there was no lack of notice.

Thus, any complaint regarding the Tennessee Supreme Court's clarifying statutory interpretation has no relevance to his case where application of the aggravator was plain based on the nature of the prior conviction. For that reason alone, this claim fails, and the petition should be denied.

The petitioner nevertheless insists that *Johnson* applies and categorically prohibits an after-the-fact assessment of the underlying conduct of a prior conviction to determine whether the prior conviction qualifies as a sentencing enhancement. This argument, however, misstates the holding of *Johnson*. There, this Court declined to hold that anything other than an elements test for sentencing enhancement purposes was unconstitutionally vague. In other words, it passed no judgment on "laws that call for the application of a qualitative standard such as 'substantial risk' to real-world conduct [because] 'the law is full of instances where a man's fate depends on his estimating rightly . . . some matter of degree.'" *Johnson*, 135 S. Ct. at 2561 (quoting *Nash v.*

United States, 229 U.S. 373, 377 (1913)). This Court also did not question laws "gauging the riskiness of conduct in which an individual defendant engages *on a particular occasion*." *Id*. (emphasis in original). The problem in *Johnson* was applying the residual clause to some idealized standard of a crime instead of to a case-specific situation as Tennessee does. More to the point, *Johnson* did not require an elements-only test for sentencing enhancement based on certain prior offenses.

Further, the petitioner's claim is factually incorrect. He argues that, at the time his death sentence was imposed, "neither the Tennessee legislature, nor its courts, had narrowed the scope of the Tennessee prior violent felony aggravating circumstance." (Pet. 8.) Not so. The Tennessee Supreme Court construed a prior codification of this aggravator with identical statutory language in the 1981 case of *State v. Moore*, 614 S.W.2d 348, 351 (Tenn. 1981).[3] There the Court was faced with the question whether burglary in the second degree and arson constituted felonies involving the use or threat of violence to the person. *Id.* The Court recognized that there are some crimes, such as rape and murder, "which by their very definition involve the use or threat of violence to a person." *Id.* But for those offenses that do "not necessarily in all cases or as a matter of law" involve the use or threat of violence to another person, the Court instructed that it is incumbent upon the State "to show that there was in fact either violence to another or the threat thereof . . . ." *Id.* Accordingly, by the time he committed the offense in 1985, the petitioner had notice of how Tennessee would apply that aggravator in such circumstances, and his claim is wholly without merit.

[3] The only difference between the two codifications was that the prior version used the word "involves" rather than "involve." *Moore*, 614 S.W.2d at 351.

B. A stay is not warranted because the petitioner cannot succeed on the merits.

A stay of execution is an equitable remedy, and "equity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts"—an interest that is shared by "the victims of crime." *Hill v. McDonough*, 547 U.S. 573, 583 (2006). Accordingly, an inmate seeking to stay his execution "must satisfy all of the requirements for a stay, including a showing of a significant possibility of success on the merits." *Id*.

The petitioner is plainly not entitled to a stay of execution. As explained above, he cannot succeed on his *Johnson* claim because *Johnson* does not render Tennessee's prior-violent-felony aggravator unconstitutionally vague. Nor can recasting his claim in terms of "notice" lead to success. The petitioner had notice of the Tennessee Supreme Court's construction of the prior-violent-felony aggravator at the time he murdered Mr. Estep, and that construction did not apply to him because his first-degree murder conviction was inherently violent. His claim fails; a stay is not appropriate.

The petitioner was sentenced to death over three decades ago. The judgment in his federal habeas proceedings became final eight years ago. *Sutton v. Colson*, 566 U.S. 938 (2012) (denying petition for writ of certiorari). At this juncture, the petitioner has long since completed state and federal review of his conviction and sentence, while the State's interest in finality is "all but paramount." *Calderon v. Thompson*, 523 U.S. 538, 557 (1998). This Court should deny the petitioner's application to stay his execution.

CONCLUSION

The petition for writ of certiorari and application for stay of execution should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Brief in Opposition was forwarded by United States mail, first-class postage prepaid, and by email on the 19th day of February, 2020, to the following:

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