# Respondent's Appendix

# Appendix A

Tennessee Supreme Court’s February 13, 2020 Order denying discretionary review.

FILED
02/13/2020
Clerk of the
Appellate Courts

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

**NICHOLAS TODD SUTTON v. STATE OF TENNESSEE**

**Criminal Court for Morgan County**
**No. 7555**

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**No. E2018-00877-SC-R11-PD**

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# ORDER

Upon consideration of the application for permission to appeal of Nicholas Todd Sutton and the record before us, the application is denied.

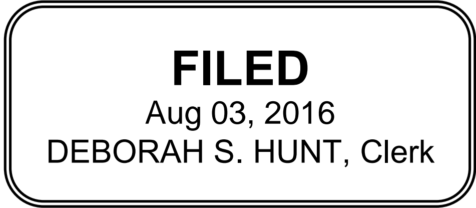
PER CURIAM

# Appendix B

United States Court of Appeals for the Sixth Circuit's August 3, 2016 Order denying leave to file a second or successive habeas corpus petition.

No. 16-5945

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT




In re: NICHOLAS T. SUTTON,

Movant.

O R D E R

Before: BOGGS, BATCHELDER, and KETHLEDGE, Circuit Judges.

Nicholas T. Sutton, a Tennessee death row inmate represented by counsel, has filed an application for permission to file a second or successive petition for a writ of habeas corpus under 28 U.S.C. § 2254. *See* 28 U.S.C. § 2244(b)(3)(A). In support, Sutton relies upon the Supreme Court's decisions in *Johnson v. United States*, 135 S. Ct. 2551, 2563 (2015), which holds that "imposing an increased sentence under the residual clause of the Armed Career Criminal Act violates the Constitution's guarantee of due process," and *Welch v. United States*, 136 S. Ct. 1257, 1265 (2016), which holds that *Johnson* can be applied retroactively to cases on collateral review. Bruce Westbrooks, a warden for the State of Tennessee proceeding through counsel, has filed a response in opposition. Sutton has filed a reply.

A Tennessee state jury convicted Sutton of first-degree murder. Following the penalty phase of trial, the jury found the existence of three aggravating factors and sentenced Sutton to death. The Supreme Court of Tennessee affirmed Sutton's conviction and sentence on direct appeal. *State v. Sutton*, 761 S.W.2d 763, 764 (Tenn. 1988). Sutton filed a petition for post-conviction relief in the trial court. Following an evidentiary hearing, the petition was denied. The Tennessee Court of Criminal Appeals affirmed the decision. *Sutton v. State*, No. 03C01-9702-CR-00067, 1999 WL 423005, at *32 (Tenn. Ct. Crim. June 25, 1999).

In November 2000, Sutton filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in federal district court. Without conducting an evidentiary hearing, the district court denied the petition. We affirmed the decision on appeal. *Sutton v. Bell*, 645 F.3d 752, 765 (6th Cir. 2011).

In February 2013, Sutton filed a motion for relief from judgment pursuant to Federal Rule of Civil Procedure 60(b) in the district court, which construed the motion as an application for permission to file a second or successive habeas corpus petition and transferred the matter to this court. In October 2013, Sutton filed a corrected application with this court. In November 2013, we denied the application.

Sutton now seeks permission to file a successive habeas corpus petition, asserting that one of the three aggravating factors giving rise to his death sentence is unconstitutionally vague.

This case does not raise any issues concerning the propriety of retroactively applying the gate-keeping provisions of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") to any pre-AEDPA conduct as Sutton's initial habeas corpus petition was filed after AEDPA's effective date of April 24, 1996. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 275 (1994); *In re Sonshine*, 132 F.3d 1133, 1135 (6th Cir. 1997).

An application for permission from this court to file a second or successive habeas corpus petition must not involve a claim that has been raised in a prior petition. 28 U.S.C. § 2244(b)(1). A new claim will nevertheless be dismissed unless:

> (A) The application shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (B)(i) The factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) The facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2244(b)(2). The applicant must make a prima facie showing that the application satisfies the statutory requirements. 28 U.S.C. § 2244(b)(3)(C); *In re Green*, 144 F.3d 384, 388 (6th Cir. 1998). A prima facie showing involves the presentation of "sufficient allegations of fact together with some documentation that would 'warrant a fuller exploration in the district court.'" *In re Lott*, 366 F.3d 431, 433 (6th Cir. 2004) (quoting *Bennett v. United States*, 119 F.3d 468, 469 (7th Cir. 1997)).

The *Johnson* decision does not apply to this 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 ("ACCA" or "Act"). In *Johnson*, the Supreme Court found the following language to be unconstitutionally vague when defining a violent felony that can be used to enhance a sentence: "(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*." 135 S. Ct. at 2555-56 (quoting 18 U.S.C. § 924(e)(2)(B)(ii)). By contrast, the jury at Sutton's trial found as an aggravating factor that he had been "previously convicted of one or more felonies, other than the present charge, which involved the use or threat of violence to the person." *Sutton*, 761 S.W.2d at 764 (citing Tenn. Code Ann. § 39-2-203(i)(2) (1982) (repealed)). The elements clause of the ACCA uses similar language as it defines a violent felony as a crime punishable by imprisonment for a term exceeding one year that "has as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i). The *Johnson* decision explicitly noted that the residual clause was the only portion of the ACCA held to be unconstitutional. 135 S. Ct. at 2563 ("Today's decision does not call into question application of the Act to the four enumerated offenses, or the remainder of the Act's definition of a violent felony."), *see also United States v. Pawlak*, 822 F.3d 902, 911 (6th Cir. 2016) ("After *Johnson*, no one disputes that the identical language of the Guidelines' residual clause implicates the same constitutional concerns as the ACCA's residual clause."). Therefore, Sutton is not entitled to relief.

Accordingly, we **DENY** Sutton's application for permission to file a second or successive habeas corpus petition.

ENTERED BY ORDER OF THE COURT

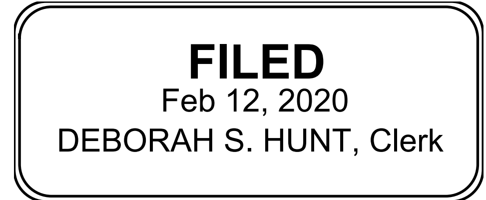
Deborah S. Hunt, Clerk

# Appendix C

United States Court of Appeals for the Sixth Circuit's February 12, 2020 Order denying leave to file a second or successive habeas corpus petition.

No. 20-5127

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT




In re: NICHOLAS T. SUTTON, )
)
Movant )
)
) O R D E R
)

Before: Boggs, Batchelder and Kethledge, Circuit Judges

The Movant's motion under 28 U.S.C. § 2244 for leave to file a second or successive habeas corpus petition is **DENIED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk