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

No. 19-7689

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

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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INTRODUCTION

Respondent begins and ends with the same refusal to acknowledge that this Court's decision in *Johnson v. United States*, ___ U.S. ___, 135 S. Ct. 2551 (2015) found the residual clause of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B), unconstitutional on its face as did the Tennessee Court of Criminal Appeals in denying Sutton relief. Instead, it claims the residual clause was held unconstitutional because of the manner in which this Court had previously applied it, *i.e.* through the use of the "ordinary case" comparison. (Br. in Opp'n at 11-12). *Johnson* held no such thing. It determined that the language of the ACCA's residual clause, on its face, was void for vagueness. This refusal is fatal to Respondent's opposition to *certiorari* here. If, as is obvious (and still has not been denied), the language of Tennessee's prior violent felony aggravating circumstance is materially similar to the language of the residual clause, application of the clause to enhance the maximum punishment to which Sutton was exposed for the killing of Carl Estep violated the Fifth and Fourteenth Amendments to the Constitution of the United States unless two conditions had been met. First, the facially-vague language of the statute must have been narrowed by prior judicial decisions. Second, that narrowing must have occurred prior to the killing of Mr. Estep. Because neither condition is present here, Mr. Sutton's *Johnson* claim is meritorious and, for the reasons Sutton stated in his petition and Respondent did not address, *certiorari* review should be granted here.

1. ***Johnson v. United States* strikes down the residual clause of the Armed Career Criminal Act because it is vague on its face, not because the "ordinary case" analysis from *Taylor v. United States*, 128 U.S. 2143 (1990) required the sentencing judge to engage in abstract analyses.**

Respondent's insistence that this Court struck down the ACCA's residual clause because *Taylor's* ordinary case analysis "rendered the residual clause unconstitutionally vague" (Br. in Opp'n at 12), while dogged, does not change what this Court actually held. Under *Johnson*, the language of 18 U.S.C. § 924(e)(2)(B) is void for vagueness because all methods of applying its language "both den[y] fair notice to defendants and invit[e] arbitrary enforcement by judges. *Johnson v. United States*, 135 S. Ct. at 2557. The Court did not merely overturn prior precedent attempting to apply the statute in a manner which confirmed to the Fifth (and Fourteenth) Amendment's requirements, six members of this Court stated in no uncertain terms:

> We hold that imposing an increased sentence under the residual clause of the Armed Career Criminal Act violates the Constitution's guarantee of due process.

Johnson v. United States, 135 S. Ct. at 2563. Justice Thomas, who would have overturned Mr. Johnson's conviction on narrower grounds, specifically noted what the members of the majority had done:

> The majority wants more. Not content to engage in the usual business of interpreting statutes, it holds this clause to be unconstitutionally vague, notwithstanding the fact that on four previous occasions we found it determinate enough for judicial application.
>
> * * *
>
> I cannot join the Court in using the Due Process Clause to nullify an Act of Congress that contains an unmistakable core of forbidden conduct, and I concur only in its judgment

Johnson v. United States, 135 S. Ct. at 2563, 2573 (Thomas, J. concurring in result only). Indeed, Justice Alito, in dissenting from the majority's holding understood it full well:

> The Court's treatment of this issue is startling. Its facial invalidation 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.

Johnson v. United States, 135 S. Ct. at 2581 (Alito, J. dissenting).

Failing to acknowledge the facial invalidity of the residual clause, Respondent offers no argument that the language of Tennessee's prior violent felony aggravating circumstance materially differs from the language of 18 U.S.C. § 924(e)(2)(B) (and Mr. Sutton has already demonstrated how the two statutes are, in fact, materially indistinguishable). Accordingly, like the residual clause, Tennessee's prior violent felony aggravating circumstance is void for vagueness and cannot be applied by any means. *See Johnson v. United States*, 135 S. Ct. at 2581 (Alito, J. dissenting) ("Its facial invalidation 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.").

Respondent, however claims it devised a way to apply their void statute in a way that does not offend the Constitution. What they describe, however, was explicitly rejected in *Johnson*.

2. Tennessee's method of applying its prior violent felony aggravating factor does not satisfy the Fifth and Fourteenth Amendments' dual

requirement that a statute enhancing and or imposing punishment prevent arbitrary application and provide fair notice.

Respondent claims the fact that Tennessee's prior violent felony aggravating circumstance would clearly apply to Sutton's prior offense permitted it to apply the circumstance (notwithstanding the fact it is void on its face) to Mr. Sutton. Further Respondent claims the Tennessee Court in *Moore v. State*, 614 S.W.2d 348 (Tenn. 1981), had stated that some offenses (such as Mr. Sutton's) clearly fell within the scope of the aggravating circumstance, while others did not. (Br. in Opp'n at 13-14). This, however, is the very argument this Court rejected in *Johnson* and Justice Alito observed in dissent was precluded by the majority's opinion. In *Johnson* this Court stated:

> In all events, although statements in some of our opinions could be read to suggest otherwise, our *holdings* squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp. For instance, we have deemed a law prohibiting grocers from charging an "unjust or unreasonable rate" void for vagueness—even though charging someone a thousand dollars for a pound of sugar would surely be unjust and unreasonable. *L. Cohen Grocery Co.*, 255 U.S., at 89. We have similarly deemed void for vagueness a law prohibiting people on sidewalks from "conduct[ing] themselves in a manner annoying to persons passing by"—even though spitting in someone's face would surely be annoying. *Coates v. Cincinnati,* 402 U.S. 611 (1971). These decisions refute any suggestion that the existence of *some* obviously risky crimes establishes the residual clause's constitutionality.

Johnson v. United States, 135 S. Ct. at 2560–61. (emphasis added). Further, as Justice Alito noted in the passage quoted above:

> Its facial invalidation 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.

Id. at 2581. (emphasis added).

Tennessee's prior violent felony aggravating circumstance, like the residual clause of the ACCA, is void and cannot be applied in any constitutional manner. Respondent's argument that a void statute can be applied in a constitutional manner in a case, like Sutton's, where the prior crime "clearly falls" within its grasp was explicitly rejected by this Court. *Johnson v. United States*, 135 S. Ct. at 2561.

Finally, and also left un-addressed in Respondent's BIO, the curative process which Respondent describes, *i.e.*, Tennessee's purported cure for its void statute, does not occur until the trial judge presiding over a defendant's capital trial determines a defendant's prior conviction meets the circumstance's requirements. Then, it is too late. *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).

Mr. Sutton's claim is undoubtedly meritorious.

3. Given the merit of Sutton's claim, the Tennessee courts' repeated disregard for this Court's decision in *Johnson*, and the virtual assurance that Tennessee will continue to deprive capital defendants of the right to due process that *Johnson* elucidates, *certiorari* review, and Sutton's application for a stay of execution pending such review, should be granted.

Sutton's remaining reasons for granting review have not been questioned. Given Respondent's BIO, they are even weightier than when first submitted. In the absence of cogent argument in opposition to the merits of Sutton's claim, the injustice perpetrated upon him as an individual becomes even more apparent. Given Respondent's defense of the Tennessee Court of Criminal Appeals' failure to acknowledge the facial invalidity of Tennessee's prior violent felony, there exists no

doubt that the Tennessee courts will not correct its denials of *Johnson* relief to those other Tennessee death row inmates who have fallen victim to their faulty reasoning, should this Court not act now. Finally, should it not do so, Tennessee will continue to deprive every defendant who walks into a Tennessee courtroom saddled with a prior conviction of the due process rights this Court could not have more clearly elucidated than they have in *Johnson* and its progeny.

Finally, in light of Respondent bemoaning the late date upon which Mr. Sutton comes to this Court, Br. in Opp'n at 15, it must be repeated that, if indeed that timing has been orchestrated at all, it is by the Tennessee courts who, despite being presented with Sutton's *Johnson* claim many years ago, refused to issue a final decision until his execution date lay only days away. (*See* Pet. at 9-10).

CONCLUSION

For the foregoing reasons, for those set forth in his Petition for Writ of *Certiorari* and for those set forth in his Application for Stay of Execution, Petitioners request that this Court grant the Petition for Writ of Certiorari and stay his execution.

Dated: February 19, 2020.

Respectfully submitted,

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