No. 20A130

IN THE

Supreme Court of the United States

COREY JOHNSON,

Applicant,

v.

UNITED STATES OF AMERICA,

Respondent.

On Application for Stay

Execution Date: January 14, 2021 at 6:00 P.M. E.T.

REPLY IN SUPPORT OF EMERGENCY APPLICATION OF COREY JOHNSON FOR A STAY OF EXECUTION

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To the Honorable John G. Roberts, Jr., Chief Justice of the Supreme Court of the United States and Circuit Justice for the Fourth Circuit:

Mr. Johnson files this brief reply to address discrete errors and a few important misrepresentations in the government's pleading:

1. *All of § 3596 is plainly directed at implementation.* The government's attempt to separate § 3596(c) from the rest of § 3596 must fail. (Response. at 25 n.2.) Section 3596(a), which the government agrees covers the time of implementation of a death sentence, addresses implementation -- i.e., execution -- "in general." Part (b) prohibits the execution of a pregnant woman. The second sentence of Part (c) concerns incompetency. The government's tortured reading would require that *every sentence* in § 3596 deal with matters that arise at the time of execution *except* for the one addressing mental retardation. This reading strains credulity.

2. *The government seeks to use improper factors to discredit Mr. Johnson's intellectual disability.* The government essentially argues for the application of the rejected *Briseno* factors. The government's principal argument is that Mr. Johnson's status as a "supervisor" under 21 U.S.C. § 848(c) disproves his intellectual disability. (Response at 26-28.) The standard the government advances here is concerningly similar to the factors set forth in *Ex parte Briseno*, 135 S.W.3d 1, 8 (Tex. Crim. App. 2004), including: "formulat[ing] plans and carr[ying] them through," "conduct show[ing] leadership," and committing an offense "requir[ing] forethought, planning, and complex execution of purpose." The Supreme Court in *Moore v. Texas*, 137 S. Ct. 1039, 1046 (2017), repudiated this approach as "wholly nonclinical," *id.* at 1053, and

creating "an unacceptable risk that a person with intellectual disability will be executed" in violation of the Eighth Amendment, *id.* at 1044. The government would have this Court revert to an outdated, non-clinical approach it previously rejected.

In addition, after arguing elsewhere that intellectual disability must have its onset before 18, the government, here, incongruously focuses on Mr. Johnson's conduct as an adult. It disregards entirely the exhaustive records from before he was 18 that clearly indicate his adaptive deficits.

4. *The government wholly ignores Judge Motz's dissent and statement.* The government wholly ignores the opinion of Judge Motz stating that Mr. Johnson's intellectual disability claim "is both timely and raises grave concerns about the propriety of now executing him." It similarly disregards her dissent on his First Step Act claim which belies the government's contentions about delay. "Petitioner Johnson presents a timely and serious challenge under the First Step Act that should be resolved prior to his execution." (APP.346.) Six of her colleagues on the court below would also have granted the stay.

5. *The Court should not allow the execution of a clearly intellectually disabled man.* The government seeks to minimize (Response 23-24) the significance of the fact that the FDPA groups the prohibition on executing someone who is intellectually disabled together with the prohibitions on executing pregnant and incompetent individuals. But the fact that the conditions are not identical in nature does not detract from the plain language and structure of the statute, both of which support

Mr. Johnson's position that Congress intended to have all of the conditions tested at the time the death sentence is implemented.

6. *Corey Johnson's case is unique.* He is the only remaining death-sentenced prisoner with intellectual disability who was tried in federal court before *Atkins* was decided and well before any federal standards or procedures. Under current legal or medical guidelines, Corey Johnson should not be under a sentence of death and must not be executed. Unless he can avail himself of the protection that § 3596 promises he will become the only federal prisoner to have been executed without the benefit of an evidentiary hearing to assess whether he is in fact eligible for the ultimate punishment. As Judge Wynn noted hours ago, "[i]f [Mr.] Johnson's death sentence is carried out today, **the United States will execute an intellectually disabled person**, which is unconstitutional."

CONCLUSION

Mr. Johnson respectfully requests that this Application for a Stay of Execution be granted.

Dated: January 14, 2021

Respectfully submitted,

/s/ Shay Dvoretzky

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CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.2(b), I certify that the document is fewer than 15 pages, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d)

/s/ Shay Dvoretzky
Shay Dvoretzky