

IN THE CRIMINAL COURT OF TENNESSEE AT MEMPHIS
THE THIRTIETH JUDICIAL DISTRICT
DIVISION III

ROBERT GLEN COE,
Petitioner,

vs.

STATE OF TENNESSEE,
Respondent.

No. P-3577, 6394, 14345

POST-CONVICTION

Death Sentence

FILED
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D. COE, C.

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON MOTION TO
REOPEN POST-CONVICTION PETITION

This matter comes before the Court on a MOTION TO REOPEN POST-CONVICTION PETITION filed by the Petitioner, Robert Glen Coe. Petitioner cites the due process clause of the Fourteenth Amendment, Article VI § 2 of the United States Constitution; Tenn. Code. Ann. § 40-30-217; Tennessee Constitution Article I §§ 6, 8, 9, 14, 16, 17, 32, Article II § 1, Article XI § 16; and Burford v. State, 245 S.W.2d 204 (Tenn. 1992) as authority for filing his motion to reopen.

FINDINGS OF FACT

Petitioner was convicted of first-degree murder, aggravated rape, and aggravated kidnaping in the Criminal Court of Shelby County on February 28, 1981. He was sentenced to death on the murder charge, and to life imprisonment on the remaining charges. The Tennessee Supreme Court affirmed the conviction and sentence, State v. Coe, 655 S.W.2d 903 (Tenn. 1983), and the United States Supreme Court denied certiorari, Coe v. Tennessee, 464 U.S. 1063 (1984).

Coe applied for post-conviction relief in state court in 1984. The trial court denied relief after an evidentiary hearing in 1986, the Criminal Court of Appeals affirmed the denial. The Tennessee Supreme Court denied Coe's request for permission to appeal because he did not timely file for it.

The Court

In 1987, Coe filed his first petition for habeas corpus relief in Federal Court. The court dismissed the petition without prejudice in 1989 because Coe had not exhausted his state

remedies.

Coe filed his second motion for state post-conviction relief in 1989. It was dismissed, and the Criminal Court of Appeals again affirmed. The Tennessee Supreme Court denied permission to appeal, this time on the merits.

Coe filed yet another petition for habeas corpus relief in 1992, and during the pendency of this petition, filed a third post-conviction petition in state court. The third post-conviction petition was denied, and the denial was affirmed by the Criminal Court of Appeals.

Subsequently, The United States District Court for the Middle District of Tennessee granted Coe relief on five of his claims in his habeas corpus petition, and denied relief on the others. Both the State and Coe appealed, and the United States Court of Appeals for the Sixth Circuit reversed the district court in granting Coe relief, and affirmed the district court on its denial of relief to Coe. Coe v. Bell, 161 F.3d 320 (6th Cir. 1998). The Court further denied rehearing in 1999. The Supreme Court of the United States denied certiorari on October 4, 1999.

The Petitioner filed his present motion, which seeks to reopen his Post-Conviction Petitions, on December 9, 1999. An evidentiary hearing was held on December 17, 1999.

BASIS FOR RELIEF

Petitioner seeks to incorporate claims from the three previously denied post conviction petitions into the present motion. However, as the claims in all the previous petitions have been addressed by the Court and denied, this Court will not address the merits of the allegations in the previous petitions¹, but instead will address only those claims newly alleged in the present

MOTION TO REOPEN POST-CONVICTION PETITION.

Petitioner lists the following five allegations of error in his MOTION TO REOPEN

POST-CONVICTION PETITION, filed December 9, 1999:²

¹ See Coe v. State, 1986 WL 14453 (Tenn. Crim. App.); Coe v. State, 1991 WL 2873 (Tenn. Crim. App.), permission to appeal denied by Supreme Court Nov. 12, 1991; Coe v. State, 1997 WL 88917 (Tenn. Crim. App.), permission to appeal denied March 15, 1999.

² The grammar, spelling, capitalization, language and case names and cites in Petitioner's allegations appear in this opinion exactly as they do in Petitioner's Motion to Reopen Post-Conviction Petition. The designation (sic) is not used to identify grammar, spelling.

1. Exculpatory evidence was destroyed in violation of due process under the Tennessee Constitution and the intervening case of State v. Ferguson, 2 S.W.3d 912 (Tenn. 1999), resulting in an unfair guilt and sentencing hearing; See T.C.A. § 40-30-217 (a)(1);
2. The death sentence was tainted by an unconstitutional and improper finding of "heinousness" aggravating circumstance, in violation of the intervening case of State v. Harde, 989 S.W.2d 307 (Tenn. 1999); See T.C.A. § 40-30-217 (a)(1);
3. Discrimination in the selection of the grand jury foreperson, in violation of the intervening case of Campbell v. Louisiana, 523 U.S. 392 (1998); T.C.A. § 40-30-217 (a)(1);
4. The death sentence, including subjecting Robert Coe to numerous execution dates over a 16 year time period from the date he was first sentenced, constitutes cruel and unusual punishment in violation of Article I, §§ 16 and 32 of the Tennessee Constitution; the Eighth Amendment to the United States Constitution; Article 7 of the International Covenant On Political and Civil Rights (ICCPR); The Convention Against Torture and Other Cruel, Inhuman, Or Degrading Punishment or Treatment, Article 16 (1); and Customary International Law, in accordance with Article 5 of the Universal Declaration of Human Rights and Article XXV of the American Declaration of the Rights and Duties of Man; T.C.A. § 40-30-217(a)(1); and
5. In violation of the evolving standards of decency in Tennessee, Article 1 § 16 of the Tennessee Constitution, and the Eighth Amendment, the jury was not allowed to consider

life without parole as an alternative punishment. §40-30-217(a)(2).

Each of Petitioner's averments will be addressed separately.

CONCLUSIONS OF LAW

At the outset, this Court notes that the only authority for filing a motion to reopen a post-conviction petition is Tenn. Code Ann. § 40-30-217. Post-conviction relief is purely a statutory creation. There is no constitutional right to post-conviction relief. Olinphant v. State, 806 S.W.2d capitalization or case cites errors in the allegations.

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215, at 217 (Tenn. Crim. App. 1991). Hence there is no constitutional right to reopen a post-conviction petition.

Tennessee Code Annotated § 40-30-217 outlines the procedure for filing motions to reopen. It states, in pertinent part:

- (a) A petitioner may file a motion in the trial court to reopen the first post-conviction petition only if the following apply:
- (1) The claim in the motion is based upon a final ruling of an appellate court establishing a constitutional right that was not recognized as existing at the time of trial, if retrospective application of that right is required. Such motion must be filed within one (1) year of the ruling of the highest state appellate court or the United States Supreme Court establishing a constitutional right that was not recognized at the time of trial; or
 - (2) The claim in the motion is based upon new scientific evidence establishing that such petitioner is actually innocent of the offense or offenses for which the petitioner was convicted; or
 - (3) The claim asserted in the motion seeks relief from a sentence that was enhanced because of a previous conviction and such conviction in the case in which the claim is asserted was not a guilty plea with an agreed sentence, and the previous conviction has subsequently been held to be invalid, in which case the motion must be filed within one (1) year of the finality of the ruling holding the previous conviction to be invalid; and
 - (4) It appears that the facts underlying the claim, if true, would establish by clear and convincing evidence that the petitioner is entitled to have the conviction set aside or the sentence reduced.
- (b) The motion must set out the factual basis underlying its claims and must be supported by affidavit. The factual information set out in the affidavit shall be limited to information which, if offered at an evidentiary hearing, would be admissible through the testimony of the affiant under the rules of evidence. The motion shall be denied unless the allegations, if true, meet the requirements of subsection (a).

Petitioner has filed an affidavit in support of only one allegation in his petition. The remaining four allegations are not supported by affidavits, thereby rendering Petitioner's motion insufficient as filed. However, in the interest of justice, this Court will examine and address each of Petitioner's allegations of error in support of his motion to reopen.

Petitioner's first allegation to support his motion to reopen his petition is that exculpatory evidence was destroyed in violation of due process under the Tennessee Constitution and the intervening case of Stacy Ferguson, 2 S.W.3d 912 (Tenn. 1999), which resulted in an unfair guilt and sentencing hearing. The Petitioner submits that his first ground for relief falls within Tenn. Code Ann. § 40-30-217(a)(1) due to the recent Tennessee Supreme Court ruling of Ferguson.

The question presented to the Court in Ferguson was what are the factors which should guide the determination of the consequences that flow from the State's loss or destruction of evidence which the accused contends would be exculpatory. The Petitioner is correct in his

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assertion that the Ferguson ruling does hold that the due process principles of the Tennessee Constitution are broader than those of the United States Constitution, and that fundamental fairness, as an element of due process, requires that the State's failure to preserve evidence that could be favorable to the defendant be evaluated in the context of the entire record. However, the critical inquiry announced in Ferguson is whether a trial conducted without the destroyed evidence would be fundamentally fair. The Court adopted a balancing approach to resolve this inquiry. It is a three part analysis.

The first step in the analysis is to determine whether the State had a duty to preserve the evidence. Whatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense. To meet this standard of constitutional materiality, evidence must possess both an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature

... as to be discoverable by other reasonably available

that the defendant would be unable to obtain comparable testimony by other means. Ferguson, 2 S.W.3d 912.

If the proof demonstrates the existence of a duty to preserve and further shows that the State has failed in that duty, the analysis moves to a consideration of several factors which should guide the decision regarding the consequences of the breach. Those factors include:

1. The degree of negligence involved;
2. The significance of the destroyed evidence, considered in light of the probative value and reliability of secondary or substitute evidence that remains available; and
3. The sufficiency of the other evidence used at trial to support the conviction.

Ferguson, 2 S.W.3d 912, at ____.

This Court will now examine the case at hand in light of the considerations mentioned above. Initially, the question is whether the State had a duty to preserve the evidence. The exculpatory nature of the evidence has considerable significance in resolving this question.

The evidence in question consists of clothing and bedding of Donald Gant.¹ At the time

¹ In Petitioner's Memorandum in Support of Motion to Reopen Post-Conviction Petition, Petitioner asserts that other evidence relating to Gant exculpates the Petitioner. That evidence consists of eye witness identifications of Gant as the perpetrator, scratches on Gant's neck, tire tracks at the scene of the crime, and an allegation that Gant had attempted to molest a young girl. However, this evidence was not destroyed or lost, and therefore is not the type of evidence required to support a claim under Ferguson. Additionally, this Court notes that Petitioner claims the aforementioned tire tracks were consistent with Gant's automobile. In Petitioner's habeas corpus proceeding, when questioned about these tire tracks, the witness did say that the tracks were inconsistent with Petitioner's tires. However, contrary to Petitioner's assertion, the witness did not testify that the tires were consistent with tires from Gant's vehicle. To the contrary, the

of the murder, Donald Gant was a suspect. He was held and interrogated by police in the process of their investigation. Testimony from Petitioner's habeas corpus proceeding indicated that clothing along with some bed linens from Gant's home were taken by investigators and purportedly sent to the Tennessee Bureau of Investigation for testing. However, T.B.I. has no record of receiving or testing the clothing of Donald Gant.

Clearly, this evidence was at least material to the preparation of the Petitioner's defense, and might have led jurors to entertain a reasonable doubt about One's guilt. Accordingly, because the clothing and bedding could have shed light on whether Mr. Gant had some

connection to this crime, the State had the duty to preserve the clothing and bedding as potentially exculpatory evidence. In losing this evidence, the State breached this duty. This Court must now determine what consequences should flow from this breach of duty.

The first factor to consider is the degree of negligence involved. The Petitioner alleges that the evidence was destroyed in bad faith. Petitioner correctly states that the evidence was taken from Grant and sent to T.B.I., yet T.B.I. has no record of this evidence. Petitioner concludes that the evidence may have been deliberately destroyed before it reached the T.B.I. laboratory, or that T.B.I. failed to log in the evidence or preserve it. Petitioner asserts that this was critical evidence and that in such a major case, it would appear the evidence was destroyed in bad faith.

This Court refuses to take the leap necessary to conclude that simply because this is a "major case," any loss or destruction of evidence was done in bad faith. The fact that evidence once existed, but has been destroyed does not prove that its destruction or loss was purposeful. Petitioner has presented no evidence whatsoever and has therefore failed to prove that the State acted in bad faith in the destruction of the evidence. Absent any proof to the contrary, the only conclusion this Court can reach is that the evidence was negligently destroyed. This Court further holds that the conduct was simple negligence, as distinguished from gross negligence. However, this lack of bad faith does not end the Court's inquiry into whether the destruction of potentially exculpatory evidence denied the Petitioner the right to a fair trial.

witness testified that, "there was not such identity that I could determine the tread pattern from the photograph [of Grant's car], that was -- except for the fact that the pictures showed tires that were fairly clean and new looking, I couldn't make much more of an identification." Transcript of the Proceedings, April 22, 1996. Volume I, page 199.

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The second factor addresses the significance of the destroyed evidence. Petitioner asserts that this evidence would have directly and unequivocally pointed towards Grant and away from Coe. Because the evidence was destroyed, there is no way of knowing whether tests of the clothing would have exonerated Grant, or incriminated him in the crime. Additionally, this Court

...if the clothing somehow incriminated Grant, it does not follow that Coe

notes that had the tests of the clothing submitted to the

would have been exonerated of the crime. Therefore, this Court finds that in spite of the unavailability of the clothing and bedding, the Petitioner presented his defense in as complete a manner as was possible without the clothing and bedding.

The third factor to consider is the sufficiency of the convicting evidence. Petitioner asserts that the statement from Petitioner and other circumstantial evidence are not sufficient to maintain a conviction in light of the destroyed evidence.

The Petitioner's own confession is one of the strongest pieces of evidence against him. In his statement the Petitioner related in great detail to police how he induced the victim to get into his car, and told the police that he took the victim to the spot where her body was eventually found. Petitioner further stated that he drove around with the victim, stopped the car, exposed himself to the victim, fondled her, started masturbating and got on top of her, but that he did not know if his penis went into her or not. Petitioner stated that when he finished his sex act, the victim told him Jesus loved him, and that this so enraged him that he decided to kill her. The Petitioner stated that at first he tried to choke her, but that she would not die. He then stabbed her in the neck with his pocket knife. After watching her bleed, struggle and jerk for a while, he left her beside the road in a dense thicket and drove away. Coe v. State, 655 S.W.2d 903, at 905 (Tenn. 1983). The reliability of Petitioner's statement was also greatly enhanced by identical fact testimony from other eyewitnesses to the same events.

The circumstantial evidence against Petitioner was abundant. According to the testimony of the Petitioner's brother-in-law, the Petitioner arrived at his home the night of the murder, was nervous and stated to his brother-in-law, "Donnie, I would be better off dead."

Janet Ross, a friend of the Petitioner, testified that approximately two days after the murder, the Petitioner told her and her husband that he was in trouble with the law; that he and his cousin had gone to Camden to get some marijuana and some acid; that his cousin had shot a state trooper, and that he himself had stabbed one in the throat. Id., at 906.

Mrs. Ross further testified that two days after the murder, at Petitioner's request, she and

Petitioner's wife bought some hair dye and that night dyed Petitioner's hair black. The perpetrator had earlier been described as having dirty blond shoulder length hair,

Three days after the murder, the Petitioner went to a used car dealership and traded his 1972 Ford Torino for a 1972 blue Mustang. Later that day, Margaret Stout and Michael Stout, the young boy who was with the victim at the time of her abduction, were driven to the premises of the car dealership where they identified the Torino as the vehicle that the victim had entered when she was abducted.

On the same day he traded his vehicle, the Petitioner bought a bus ticket for Marietta, Georgia. The Petitioner was arrested at the bus station before he could leave. Petitioner had identification tags on his baggage and the name thereon was James Watson.

Four days after the murder, and subsequent to his arrest, Petitioner agreed to accompany two officers in a State car and show them what he had done the day of the murder. Petitioner directed the officers to the church where the victim was abducted, then directed them along the route he took from the church to the murder scene. *Id.*, at 907.

The victim had been raped, sodomized, strangled, and stabbed in the neck, in that order. This is consistent with Petitioner's own statement as to the order of events. As stated by Petitioner, there was relatively little physical evidence, and indeed, his car yielded no evidence of a sexual assault. However, police did find fecal matter beneath Petitioner's foreskin, and stains on the front inside of his pants that matched stains found on the victim's underpants. *Do v. Bell*, 161 F.3d 320, at 327 (6th Cir. 1998).

After examining the record of the evidence used against the Petitioner at trial, this Court finds that any rational trier of fact could have found Petitioner guilty of kidnaping, rape and murder. The evidence in this case clearly satisfies the standard prescribed in *Jackson v. Virginia*, 443 U.S. 307, at 319 (1979), and is sufficient to support Petitioner's conviction.

Therefore, in accordance with the standard set forth in *Ferguson*, although potentially exculpatory evidence was destroyed, this Court concludes that the Petitioner received a fundamentally fair trial and that he experienced no measurable disadvantage because of the unavailability of the clothing and bedding. This issue is dismissed as it is without merit.

Petitioner's second allegation of error in support of his motion is that the death sentence

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was tainted by an unconstitutional and improper finding of a heinousness aggravating circumstance, in violation of the intervening case of State v. Harris, 989 S.W.2d 307 (Tenn. 1999). Petitioner argues that he should be given a new sentencing hearing because the jury rendered an incomplete verdict with respect to the (1)(5) aggravator.

This Court first notes that Harris involved a life sentence and a statutory error rather than a sentence of death and a constitutional error. Although Harris does discuss capital sentencing, it is in the context of the standards which should be employed to narrow the class of persons eligible for the death penalty. Harris does recognize that narrowing requirements and vagueness prohibitions are in place in capital sentencing. Id., at 315.

At the sentencing phase of Petitioner's trial, the jury found that four aggravating factors applied, and which, on the whole, were not outweighed by mitigating factors. These factors are as follows:

1. The victim was under 12 and the defendant over 18;
2. The murder was especially heinous, atrocious, or cruel and involved torture;
3. The murder was committed for the purpose of avoiding prosecution; and
4. The murder was committed while the defendant was engaged in committing and fleeing after committing aggravated rape and aggravated kidnaping.

The aggravating circumstance at issue is the second one listed. The court defined this factor for the jury as follows:

The murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind.

"HEINOUS" means extremely wicked or shockingly evil.

"ATROCIOUS" means outrageously wicked and vile.

"CRUEL" means designed to inflict a high degree of pain, utter indifference to, or enjoyment of, the suffering of others, pitiless.

In Houston v. Dutton, 50 F.3d 381, at 387 (5th Cir. 1995), the Court held that this same Tennessee instruction, minus the appended definitions of the three terms, was unconstitutionally vague. In accordance with Houston and Harris, the United States Court of Appeals held that the instructions in Coe's case were constitutionally infirm due to vagueness. Coe, 161 F.3d 320, at

333. The Court stated:

"The important criterion in a vagueness analysis of an aggravating circumstance is narrowing: "A capital sentencing scheme must, in short, provide a meaningful basis for distinguishing the few cases in which the penalty is imposed from the many cases in which it is not." *Id.*, citing Godfrey v. Georgia, 446 U.S. 420, at 427 (1980).

Narrowing may be accomplished by either providing restrictive definitions of first degree or capital murder, or by utilizing aggravating circumstances at the sentencing hearing. State v.

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Harria, 989 S.W.2d 307, at 315 (Tenn. 1999), citing Lowenfeld v. Phelps, 484 U.S. 231 (1988).

In Tennessee, narrowing is accomplished by use of aggravating circumstances at the sentencing hearing. Cas., 161 F.3d 320.

The aggravator at issue was phrased as, "The murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind." The jury held more narrowly that "the murder was especially heinous, atrocious, or cruel and involved torture."

The United States Court of Appeals held that this distinction, finding torture but not depravity of mind, is significant. The Court reasoned that the vagueness problem of the "heinous atrocious and cruel" instruction was curable with appropriately narrowing language, and that requiring only torture be found resolved this vagueness problem. Cas., 161 F.3d 320, at 335.

At Petitioner's trial, the jury ignored the depravity factor and limited its finding to the narrowing torture factor, confirming that finding in a specific handwritten verdict form. The United States

Court of Appeals found that the jury's discretion was channeled and narrowed appropriately, and that any error stemming from the inclusion of this incomplete aggravator in the weighing process was harmless error and consequently upheld the Petitioner's death sentence. *Id.*, at 336.

In accordance with the holding and reasoning of the United States Court of Appeals, this Court also finds that the aggravating circumstance was narrowed appropriately, and any error stemming from the inclusion of this aggravator was harmless. This issue is therefore dismissed as it is without merit.

Petitioner's third allegation of error in support of his motion is that there was

discrimination in the selection of the grand jury foreperson, in violation of the intervening case of Campbell v. Louisiana, 523 U.S. 392 (1998).

Petitioner claims that the current petition presents him with his first opportunity to raise the issue in this Court. This Court notes that this issue has been decided by the United States Court of Appeals in Coe v. Bell, 161 F.3d 320 (8th Cir 1998). This Court adopts the reasoning of the Court of Appeals in Coe, and reiterates the holding and reasoning of the Court of Appeals.

As stated in his complaint, there is ample evidence that women were under represented on the grand jury. However, as the Court of Appeals held, this Court need not examine whether there was impermissible exclusion of women, because in accordance with Teague v. Lane, 489

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U.S. 288 (1989), Petitioner lacks standing to assert this claim.

The District Court for the Middle District of Tennessee found that Petitioner lacked standing. Petitioner claims that the Supreme Court's recent decision in Campbell entitles him to relief in that it gives him standing.

In Campbell, the Court held that a white criminal defendant had standing to challenge the exclusion of blacks from a grand jury, under both equal protection and due process theories. Campbell, 118 S.Ct. 1419, at 1424 (1998).

Ruling on the equal protection claim, the Campbell Court cited its prior decision in Powers v. Ohio, 499 U.S. 400, at 411 (1991), in which a defendant was found to have third-party standing to raise a Batson challenge to the exclusion from his jury of members of another race. Id. The Court applied Powers, which involved a petit jury, to the grand jury issue in Campbell, and held that "if the grand jury process is infected with racial discrimination, doubt is cast over the fairness of all subsequent decisions, which represents injury in fact for Campbell even though he was not a member of the excluded group." Id., at 1423.

Addressing the issue of standing of Coe, the United States Court of Appeals held that the Powers principle of third-party standing adopted by Campbell represented a new rule, and since the Petitioner's conviction became final seven years before Powers was decided, the state courts had acted reasonably in rejecting the Petitioner's claim of third-party standing. Coe, 161 F.3d

The Court of Appeals next addressed the due process issue. Teague held that unless new constitutional rules of criminal procedure fall within an exception to the general rule, they will not be applicable to those cases which have become final before the new rules are announced.

There are two exceptions to this general rule. The first exception is that a new rule should be applied retroactively if it places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe, or otherwise prohibits imposition of a certain type of punishment for a class of defendants because of their status or offense. The second exception is that a new rule should be applied retroactively if it announces a new "watershed" rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding. Id.

The Court of Appeals held that the first exception clearly did not apply to Petitioner's

case. In regard to the second exception, the Court held that Coe had given no basis to conclude that the gender-balance problem with the grand jury implicated the accuracy of Coe's indictment. Id.

This Court refuses to deviate from the holding of the United States Court of Appeals. Therefore, this Court finds that because Campbell was decided after Coe's final appeal to the Supreme Court was turned away, and because it declared a "new rule" if any, Teague bars retroactive application of Campbell to the Petitioner's claim. This issue is dismissed as it is without merit.

The Petitioner's fourth allegation of error in support of his motion is that the death sentence, including subjecting Petitioner to numerous execution dates over a 16 year time period from the date he was first sentenced, constitutes cruel and unusual punishment.

This Court is bound by our Supreme Court's prior holdings that Tennessee's death penalty statutes are constitutional. See, State v. Keen, 926 S.W.2d 727 (Tenn. 1994); State v. Smith, 893 S.W.2d 908 (Tenn. 1994); State v. Brimmer, 876 S.W.2d 75 (Tenn. 1994); State v. [unclear], 876 S.W.2d 353 (Tenn. 1994); State v. Smith, 857 S.W.2d 1(1993); State v. Caughron,

855 S.W.2d 526 (Tenn. 1993); State v. Boyd, 797 S.W.2d 589 (Tenn. 1990); State v. Teel, 793 S.W.2d 236 (Tenn. 1990); State v. Thompson, 768 S.W.2d 239 (Tenn. 1989). Accordingly, this Court holds without further discussion that this issue is without merit, and is therefore dismissed.

Petitioner's final allegation of error is that the imposition of the death penalty was unconstitutional because the jury was not allowed to consider life without parole as an alternative punishment. Petitioner cites Simmons v. South Carolina, 512 U.S. 154 (1994) in support of this argument. Petitioner's reliance on Simmons is misplaced. In Simmons, the Court held that where the defendant's future dangerousness is at issue, and state law prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is ineligible for parole. *Id.*, at 155.

In the case at hand, the Petitioner was sentenced under Tenn. Code Ann. §39-2402. Under this statute, a person convicted of murder in the first degree could be punished by death or by life in prison. In accordance with this sentencing scheme, a defendant sentenced to life would be eligible for parole at some point, contrary to the defendant in Simmons. Life without parole did not become an authorized punishment until July 1, 1993. Acts 1993, Ch. 473 § 16.

Consequently, the jury was properly instructed and the Petitioner was properly sentenced in accordance with the statute in effect at the time of his trial. Furthermore, the Supreme Court of Tennessee has repeatedly held this sentencing statute to be constitutional. See, State v. Fritchett, 621 S.W.2d 127, at 141 (Tenn. 1981); Cozzolino v. State, 534 S.W.2d 765 (Tenn. 1979).

Therefore, this Court deems that this issue warrants no further discussion, and it is dismissed as it is without merit.

CONCLUSION

Petitioner, Robert Glen Coc, has failed to establish a valid statutory basis for granting his motion to reopen. See Tenn. Code Ann. § 40-30-217. This Court has considered the motion, its accompanying memorandum, and the attached exhibits, and finds that the allegations contained within Petitioner's MOTION TO REOPEN POST-CONVICTION PETITION are without merit and must be dismissed.

It is therefore ORDERED, ADJUDGED, AND DECREED that the Motion to Reopen Post-Conviction Petition is DENIED.

Entered this _____ day of _____, 1999.

John Colton, Judge
Division III