

IN THE CRIMINAL COURT OF UNION COUNTY, TENNESSEE

STEPHEN M. WEST,)	
)	
Petitioner,)	
)	
v.)	Case No. 629
)	Post-Conviction
STATE OF TENNESSEE,)	
)	
Respondent.)	

**AMENDED RESPONSE IN OPPOSITION TO MOTION
TO REOPEN POST-CONVICTION AND SUPPLEMENTAL MOTION TO REOPEN
POST CONVICTION PETITION**

Comes now the State, through the District Attorney General’s Office for the Eighth Judicial District of the State of Tennessee and submits this amended response in opposition to the Motion to Reopen Post Conviction Petition and Supplemental Motion to Reopen Post Conviction Petition filed in this case. This amended response includes a response to Petitioner’s Supplemental Motion to Reopen Post Conviction Petition filed on October 22, 2010. Because petitioner has failed to demonstrate any of the statutory grounds to reopen his post-conviction petition, as set forth under Tenn. Code Ann. 40-30-117(a)¹, his application should be denied.

¹ This document corrects the previous document’s misstatement of the applicable Tennessee Code Annotated.

A. Statement of the Case

On March 25, 1987, a Union County, Tennessee, jury convicted West of the first-degree premeditated murders of Wanda Romines and her daughter, Sheila Romines, aggravated kidnapping of both victims, and aggravated rape of Sheila Romines. Finding three statutory aggravating circumstances applicable to each of the murders i.e., that the murders were especially heinous, atrocious or cruel; that they were committed to avoid arrest or prosecution; and that they were committed while the defendant was engaged in committing first degree murder, rape or kidnapping; the jury sentenced him to death for murder. See Tenn. Code Ann. 39-2-203(i)(5), (6) and (7) (1982) (repealed 1989). On appeal, the judgment was affirmed, *State v. West*, 767 S.W.2d 387 (Tenn. 1989), and the United States Supreme Court denied a petition for a writ of certiorari. *West v. Tennessee*, 497 U.S. 1010 (1990).

West filed a petition for post-conviction relief in 1990. Following an evidentiary hearing, the post-conviction court denied relief. The Court of Criminal Appeals affirmed. *Stephen Michael West v. State*, No. 03C01-9708-CR-00321, 1998 WL 309090 (Tenn. Crim. App. June 12, 1998) (reh. denied). The Tennessee Supreme Court granted West's application for permission to appeal and, on May 12, 2000, affirmed the judgment of the Court of Criminal Appeals. *West v. State*, 19 S.W.3d 753 (Tenn. 2000).

On February 20, 2001, counsel for West initiated federal habeas proceedings in the United States District Court for the Middle District of Tennessee. *West v. Bell*, No. 3:01-cv-00174 (M.D. Tenn.). The district court transferred the case to the Eastern District of

Tennessee, which granted a stay of execution on February 23, 2001. *West v. Bell*, No. 3:01-cv-00091 (E.D. Tenn.). West filed a petition for writ of habeas corpus on June 7, 2001, and an amended petition on February 25, 2002. The district court granted summary judgment in favor of the respondent on September 30, 2004. The United States Court of Appeals for the Sixth Circuit affirmed the district court's judgment denying habeas corpus relief on December 18, 2008. *West v. Bell*, 550 F.3d 542 (6th Cir. 2008), *reh'g and sugg. for reh'g en banc denied* (May 20, 2009). The United States Supreme Court denied a petition for a writ of certiorari on March 1, 2010, *West v. Bell*, 78 U.S.L.W. 3493, 2010 WL 680527, and denied a petition for rehearing on April 19, 2010. *West v. Bell*, No. 09-461, 2010 WL 1525945 (U.S. 2010) (copy attached).

On June 15, 2010, the Tennessee Supreme Court set an execution date of November 9, 2010.

On October 8, 2010, 32 days before his scheduled execution, West filed a motion in this court seeking to reopen his state post-conviction proceeding, claiming that a "state or federal court has issued a final ruling establishing a constitutional right that was not recognized as existing at the time of trial but now is required to be recognized and applied to [his] case." (Motion, p. 3). Further, petitioner filed an additional supplemental motion on October 22, 2010, alleging an additional basis for relief. Because none of petitioner's allegations satisfy the criteria for reopening a post-conviction petition under Tenn. Code Ann. § 40-30-117, the motion should be denied.

B. Authority to File a Motion to Reopen

West has already exhausted the one (and only one) petition the legislature has afforded him; his only possible remedy is a motion to reopen. Section 40-30-102(c) provides:

This part contemplates the filing of only one (1) petition for post-conviction relief. In no event may more than one (1) petition for post-conviction relief be filed attacking a single judgment. If a prior petition has been filed which was resolved on the merits by a court of competent jurisdiction, any second or subsequent petition shall be summarily dismissed. A petitioner may move to reopen a post-conviction proceeding that has been concluded, under the limited circumstances set out in 40-30-117.

The "limited circumstances set out in 40-30-117" are that the claim (1) be "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," (2) be "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) "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. . . ." Tenn. Code Ann. 40-30-117(c). West's claims satisfy none of these criteria.

C. Petitioner's claims do not qualify under any statutory ground for reopening a petition for post-conviction relief.

Petitioner contends that his claims are cognizable for reopening under 40-30-117 (a)(1): "The claim . . . 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." Careful analysis of his claims refutes that assertion.

Petitioner first asserts that he is entitled to a re-examination of his ineffective assistance of counsel claims in light of two recent decisions of the United States Supreme Court, *Sears v. Upton*, 130 S.Ct. 3259 (2010), and *Porter v. McCollum*, 130 S.Ct. 447 (2009), which he contends "revised" the proper standard for consideration of his claims. However, the Sixth Amendment right to the effective assistance of counsel had long been recognized at the time of petitioner's trial, see, e.g., *McMann v. Richardson*, 397 U.S. 759 (1970), and West's contention that *Sears* and *Porter* "revised" the standard for such claims wholly lacks merit. The standard for establishing ineffective assistance of counsel was set forth in the Supreme Court's seminal decision in *Strickland v. Washington*, 466 U.S. 668 (1984), and both *Sears* and *Porter* relied squarely on the *Strickland* standard in assessing the pertinent lower court decisions. *Porter*, 130 S.Ct. at 452 ("To prevail under *Strickland*, Porter must show that his counsel's deficient performance prejudiced him."); *Sears*, 130 S.Ct. at 3265-66 (analyzing state-court decision under the standards enunciated in *Strickland*). Neither case revised the pertinent standard or established any new law in the area of the effectiveness of counsel. See also *Wiggins v. Smith*, 539 U.S. 510, 522 (2003) (explaining that earlier decision addressing ineffectiveness claim was "squarely governed" by *Strickland* and "made no new law" in resolving those claims).

In short, the cases cited in Paragraph 8(a)(1) of petitioner's motion to reopen, *Porter v. McCollum* and *Sears v. Upton*, do not abridge nor abrogate the *Strickland* standard for determining whether counsel was ineffective. Moreover, petitioner raises no ground in his

present motion that has not already been adjudicated by both the state and federal courts. The Tennessee Court of Criminal Appeals previously rejected petitioner's claim that counsel was ineffective at trial. *West v. State*, 1998 WL 309090, at *8-9. Although Tennessee Supreme Court granted discretionary review on a different issue, it ultimately affirmed the judgment of the Court of Criminal Appeals. *State v. West*, 19 S.W.3d 753 (Tenn. 2000). See Tenn. Code Ann. § 40-30-106(f), (h). Likewise, in federal habeas corpus proceedings under 28 U.S.C. § 2254, the United States Court of Appeals for the Sixth Circuit concluded that petitioner received constitutionally effective assistance of counsel. *West v. Bell*, 550 F.3d 542, 554, 556 (6th Cir. 2009) ("We are not convinced that all of [counsel's alleged errors] are actually errors, let alone errors that rise to the level of ineffective assistance of counsel. . . . Finally, we note that even if West could prove that his counsel was ineffective for all of the reasons he cited, he has not shown that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'").

Petitioner further asserts that the court should reopen his post-conviction petition to consider whether the execution of a person suffering from severe mental illness is a violation of the Eighth Amendment to the Constitution and Article 1, sections 8 and 16 of the Tennessee Constitution. He correctly recognizes, however, that "the Tennessee Supreme Court has not yet recognized" such a rule, a statutory prerequisite to reopening his post-conviction petition. As such, this court lacks the authority to reopen West's petition, and his motion should be denied.

Petitioner asserts, however, that *Van Tran v. State*, 66 S.W.3d 790 (Tenn. 2001), establishes that a motion to reopen under 40-30-217(a)(1) "is a proper vehicle for establishing that right." But petitioner reads too much into *Van Tran*. In that case, a bare majority of the Court found that petitioner's claim that the execution of the mentally retarded satisfied 40-30-117(a)(1) under the unusual circumstances of the case, where there was compelling evidence that the "execution of mentally retarded individuals violates the evolving standards of decency that mark the progress of a maturing society both nationally and in the State of Tennessee." 66 S.W.3d at 812. No such unusual circumstances exist in this case. Moreover, in his initial motion in the trial court, the petitioner in *Van Tran* relied on Tenn. Code Ann. § 40-30-117(a)(2), alleging that "new scientific evidence establishing that [he] is actually innocent of the offense or offenses for which [he] was convicted," citing an updated version of the I.Q. test. *Van Tran*, 66 S.W.2d at 813. Petitioner's reliance on the majority's decision in *Van Tran* to address *sua sponte* the constitutionality of execution of the mentally retarded under the "unusual circumstances" of that case in order to circumvent the plain language of the Post-Conviction Procedures Act should be rejected outright.

More fundamentally, because West neither asserts nor can he establish that he is mentally retarded, *Van Tran* provides him no relief.² As petitioner correctly acknowledges,

² And even if it did, his present motion, filed nearly nine years after that decision, would be untimely. See Tenn. Code Ann. § 40-30-117(a)(1) ("The motion [to reopen post-conviction proceeding] 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

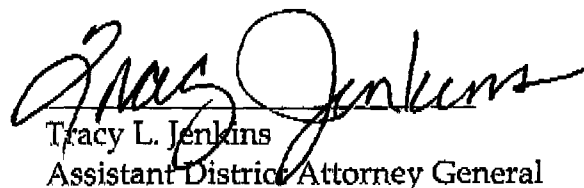
the Tennessee Supreme Court has never extended the holding of *Van Tran* to individuals with severe mental illness. *See, e.g., State v. Taylor*, 2008 WL 624913 (Tenn. Crim. App. 2008) (“We find no law that compels this Court to [conclude that severely mentally ill defendants cannot be executed]”), *Coleman v. State*, 2010 WL 118696, at *21 (Tenn. Crim. App. Jan. 13, 2010) (“The decisions in *Van Tran* and *Atkins* bar the execution of mentally retarded persons. . . . [W]e decline the request to extend the bar to persons with . . . mental illness.”); *State v. Irick*, __S.W.3d __, 2010 WL 3715153 (Tenn. 2010) (“We agree with the State that the present [competency-for-execution] appeal . . . is not the proper proceeding in which to ask this Court to adopt a new constitutional rule barring execution of persons who suffer from severe mental illness . . .). Because no appellate court has announced the rule that petitioner seeks, he cannot meet the statutory criteria for reopening his post-conviction proceeding under Tenn. Code Ann. § 40-30-117(a)(1) and this court lacks jurisdiction to entertain petitioner’s claims. *See* Tenn. Code Ann. 40-30-102(b) (No court shall have jurisdiction unless claim meets criteria for reopening).

Finally, Petitioner filed a Supplemental Motion to Reopen Post Conviction Petition and Memorandum in Support on October 22, 2010. In that document, Petitioner asserts the Tennessee Supreme Court decision of *State v. Frazier*, 303 S.W.3d 674 (2010) provides a basis for reopening his post conviction proceeding. A careful reading of *Frazier* reveals the focus of the case is on the issue of whether a defendant is entitled to conflict free counsel on post-
_____ was not recognized as existing at the time of trial.”).

conviction. The case makes it clear that the right is derived from the post conviction statute itself and is not constitutionally based. "At the outset, there is no constitutional entitlement to the effective assistance of counsel in a post conviction proceeding... There is a statutory right to counsel." *Frazier*, 303 S.W.3d at 680. The Court further observed, "[o]ur Court of Criminal Appeals has interpreted 'this statutory right, even though not a Sixth Amendment right, [t]o include[] the right to be represented by conflict free counsel.'" *Id.* at 681-82 (emphasis added). *Frazier* plainly rests on the court's reading of the Post Conviction Statute and does not create nor establish a new constitutional right; indeed, it makes clear the right to post-conviction counsel derives solely from statute. As in the instances above, the cited case provides no basis for reopening post conviction proceedings as it is not a final ruling of an appellate court establishing a constitutional right not in existence at the time of trial. See TCA 40-30-117(a)(1). Nor does it establish any relief under subparts (a)(2) or (3).


CONCLUSION

Because petitioner failed to satisfy any of the statutory grounds to reopen his post-conviction proceeding, his motion should be denied.


Tracy L. Jenkins
Assistant District Attorney General

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing has been provided to Roger W. Dickson, 832 Georgia Avenue, Suite 1000, Chattanooga, TN 37402 by hand and facsimile. This the 25 day of October 2010.


Tracy L. Jenkins
Assistant District Attorney General