



standards, (2) the ruling in Van Tran v. State, 66 S.W.3d 790 (Tenn. 2001), categorically exempts from the death penalty defendants who are severely mentally ill such as the Petitioner, and (3) the ruling in State v. Frazier, 303 S.W.3d 674 (Tenn. 2010), which finds structural error where a criminal defendant asserts that his attorney had a conflict of interest at the time he represented the defendant. Motion to Reopen, filed October 8, 2010 and Supplemental Motion, filed October 21, 2010.

The statutes governing motions to reopen were summarized in Harris v. State, 102 S.W.3d 587, 590-91 (Tenn. 2003).

Under the provisions of the *Post-Conviction Procedure Act*, a petitioner “must petition for post-conviction relief ... within one (1) year of the final action of the highest state appellate court to which an appeal is taken ....” Tenn. Code Ann. §40-30-202(a)<sup>2</sup>. Moreover, the Act “contemplates the filing of only one (1) petition for post-conviction relief.” Tenn. Code Ann. §40-30-202(c). After a post-conviction proceeding has been completed and relief has been denied, ... a petitioner may move to reopen only “under the limited circumstances set out in 40-30-217.” *Id.* These limited circumstances include the following:

(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 as existing at the time of trial; or

(2) The claim in the motion is based upon a final ruling of an appellate court establishing that such petitioner is actually innocent of the offense or offenses for which the petitioner was convicted; or

(3) The claim 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

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<sup>2</sup>Now Tenn. Code Ann. § 40-30-102.

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.

(Citing *Tenn. Code Ann. §40-30-217(a)(1)-(4)*)(now *Tenn. Code Ann. §40-30-117(a)(1)-(4)*).

The statute further states that

The statute of limitations shall not be tolled for any reason, including any tolling or saving provision otherwise available at law or equity. Time is of the essence of the right to file a petition for post-conviction relief or motion to reopen established by this chapter, and the one-year limitations period is an element of the right to file the action and is a condition upon its exercise. Except as specifically provided in subsections (b) and (c), the right to file a petition for post-conviction relief or a motion to reopen under this chapter shall be extinguished upon the expiration of the limitations period.

Tenn. Code Ann. § 40-30-102(a). As stated above, Tennessee Code Annotated § 40-30-117(a)(1) provides that a motion to reopen may be filed 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.” That subsection also requires that “[s]uch 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 as existing at the time of trial.”

First, this Court finds that the Petitioner’s claim that this Court must reopen and re-evaluate the Petitioner’s claims of ineffective assistance of counsel based upon the opinions in Porter v. McCollum and Sears v. Upton does not satisfy any of the criteria for a motion to reopen

a post-conviction action. Neither of these cases establishes a new standard as asserted by the Petitioner; rather, the United States Supreme Court determined that the lower courts in both cases had unreasonably applied the long-standing standards set forth in Strickland v. Washington, 466 U.S. 668 (1984).


Second, this Court finds that the Petitioner's assertion that he is entitled to a re-opening of his post-conviction petition based on the ruling in Van Tran v. State, 66 S.W.3d 790 (Tenn. 2001), does not satisfy any of the criteria for a motion to reopen a post-conviction action and is time-barred. As this Court stated at the hearing and as the parties agreed, the Van Tran case does not "categorically exempt from the death penalty defendants who are severely mentally ill." The Petitioner is seeking to have this Court make "new law" on this issue rather than apply a new constitutional right which has been already established by a final ruling of an appellate court and which requires retroactive application to the Petitioner's case. As stated above, this does not satisfy the criteria for a motion to reopen. In addition, this Court notes that this motion to reopen was not filed within one (1) year of the ruling in Van Tran as required by the statute and thus would also be time-barred.

Lastly, this Court finds that the ruling in State v. Frazier, 303 S.W.3d 674 (Tenn. 2010), (which the Petitioner asserts created a new constitutional right related to issues of attorney conflicts of interest at the time of representation of the defendant) does not satisfy the criteria for a motion to reopen. As stated at the hearing, in the Court's opinion, the Frazier Court analyzed the post-conviction statute and the statutory rights related to the appointment of counsel in post-conviction cases and, while acknowledging that there is always a Sixth Amendment right to effective assistance of counsel at the time of trial, there is nothing in that opinion which would

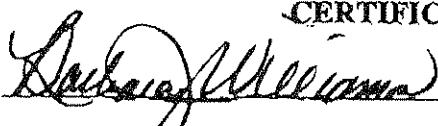
rise to the level of a new constitutional protection that would permit the reopening of the Petitioner's post-conviction petition here.

Accordingly, after full consideration of the pleadings and arguments of counsel, this Court finds that the Motion to Reopen does not meet the statutory criteria and that one of the issues raised is also time barred. Therefore, the Motion to Reopen is hereby DENIED and DISMISSED.

ENTERED this the 27 day of October, 2010.

  
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E. Shayne Sexton  
Criminal Court Judge

**CERTIFICATE OF SERVICE**

I, , Clerk, hereby certify that I have mailed a true and exact copy of same to the Petitioner, and faxed and mailed a true and exact copy of the same to Petitioner's Attorneys, and the District Attorney General's Office this the 27 day of October, 2010.