

No. 10-6333
No 10-6338

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

In re:

STEPHEN M. WEST,

Movant.

**RESPONSE IN OPPOSITION TO
MOTION FOR STAY OF EXECUTION**

Petitioner, Stephen West, has filed a motion seeking a stay of his November 9, 2010, execution date pending disposition of his motion to re-transfer in Case No. 10-6333 and application for a certificate of appealability in Case No. 10-6338. However, West is not entitled to injunctive relief in this instance. All of West's filings may be resolved by this Court's determination that he is statutorily barred from re-litigating the merits of his ineffective-assistance claim. Under this circumstance, West could never satisfy the criteria for an injunction, which focuses on: (1) the movant's likelihood of success on the merits; (2) the possibility of irreparable harm to the movant in the absence of an injunction; (3) public interest

considerations; and (4) potential harm to third parties. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 387 F.3d 522, 532 (6th Cir. 2004). For the reasons set forth in the State's response to both of West's filings, there no likelihood, let alone a substantial one, that West will succeed on the merits in either matter. Both the district court and this Court rejected West's ineffective-assistance claim on the merits; the district court's decision to transfer West's Rule 60(b) motion seeking to re-open that claim was proper; and, more importantly, West's attempt to re-litigate the merits of his ineffective-assistance-of-counsel claim is prohibited under 28 U.S.C. § 2244(b)(1) ("A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed."). *See also Gonzalez v. Crosby*, 545 U.S. 524, 532 n.4 (2005) (when a movant asserts that a previous merits ruling on a habeas claim was in error, he is making a habeas claim). West's assertion that this Court's previous merits determination was in error due to the failure to consider all relevant evidence is precisely the type of "habeas claim" that is categorically barred by AEDPA's prohibition on successive applications.

And while it is obvious that West stands to lose his life when his sentence is executed, it is only as lawful punishment for his own brutal conduct. Indeed, the harm from any further delay in the execution of West's sentence falls substantially

on the State. At this juncture, with West having completed state and federal review of his convictions and sentence, the State's interest in finality are "all but paramount." *Calderon v. Thompson*, 523 U.S. 538, 557 (1998). The State must be allowed to "execute its moral judgment in [this] case" and allow "the victims of crime [to] move forward knowing the moral judgment will be carried out." *Id.*, 523 U.S. at 556.

WHEREFORE, West's request for a stay of execution should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing response was filed electronically on November 3, 2010. A copy of the document will be served via the Court's electronic filing process on: Roger W. Dickson, Miller & Martin LLP, 832 Georgia Ave., Suite 1000, Chattanooga, TN 37402; and Stephen Ferrell, Federal Defender Services of Eastern Tennessee, Inc., 800 S. Gay St., Suite 2400, Knoxville, TN 37929.

/s/ Jennifer L. Smith

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