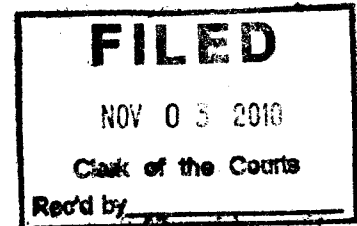


IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

STEPHEN MICHAEL WEST v. STATE OF TENNESSEE

Circuit Court for Union County
No. 629

No. E2010-02258-CCA-R28-PD



ORDER

The capital Petitioner, Stephen Michael West, has filed an application for permission to appeal from the order of the Criminal Court for Union County denying and dismissing his motion and supplemental motion to re-open his prior post-conviction proceeding challenging his convictions and death sentences for the first degree premeditated murders of Wanda Romines and her daughter, Sheila Romines. See Tenn. Code Ann. § 40-30-117(c); see also Tenn. S. Ct. R. 28, § 10(B). By order entered on July 15, 2010, the Supreme Court of Tennessee directed prison officials to execute the Petitioner's death sentences at 10:00 p.m. on November 9, 2010, "or as soon as possible thereafter within the following twenty-four hours." State of Tennessee v. Stephen Michael West, No. M1987-00130-SC-DPE-DD, order at 1 (Tenn. July 15, 2010). Upon due consideration of the application, together with applicable law, we conclude that there is no need for the State of Tennessee to file a response to the application because the Petitioner has not demonstrated that an appeal from the challenged order is warranted.

In 1987, a jury found the Petitioner guilty of two counts of first degree premeditated murder, two counts of aggravated kidnapping, one count of aggravated rape, and one count of grand larceny. The Petitioner's crimes occurred on March 17, 1986. At the conclusion of a separate sentencing hearing, the jury imposed death sentences for both murders. The Petitioner received lengthy terms of imprisonment for his non-capital offenses. On direct appeal, the Supreme Court of Tennessee affirmed all convictions and sentences, including

the death sentences. See State v. West, 767 S.W.2d 387 (Tenn. 1989), cert. denied, 497 U.S. 1010 (1990). The Petitioner's petition for post-conviction relief was denied following a hearing. The denial of relief was affirmed on appeal. See Stephen Michael West v. State of Tennessee, No. 03C01-9708-CR-00321 (Tenn. Crim. App., Knoxville, June 12, 1998), reh'g denied (Tenn. Crim. App., Knoxville, July 22, 1998), aff'd, 19 S.W.3d 753 (Tenn. 2000), reh'g denied (Tenn. June 7, 2000). To date, the Petitioner's efforts to obtain relief in the federal courts have proven unsuccessful. See West v. Bell, 550 F.3d 542 (6th Cir. 2008), reh'g denied (6th Cir. May 20, 2009), cert. denied, 130 S. Ct. 1687 (2010), reh'g denied, 130 S. Ct. 2142 (2010).

On October 8, 2010, the Petitioner filed a motion to re-open his state court post-conviction proceeding on grounds that "[a] state or federal appellate 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 in [his] case." The Petitioner asserted that the decisions from the United States Supreme Court in Porter v. McCollum, 130 S. Ct. 447 (2009), and Sears v. Upton, 130 S. Ct. 3259 (2010), changed the standard under which claims of ineffective assistance of counsel are to be judged. The Petitioner also asserted that article I, sections 8 and 16 of the Tennessee Constitution and the Eighth and Fourteenth Amendments to the United States Constitution prohibit imposition of the death penalty upon those like the Petitioner who are severely mentally ill. The Petitioner asserts that the decision from the Supreme Court of Tennessee in Van Tran v. State, 66 S.W.3d 790 (Tenn. 2001), dictates that he seek to establish his categorical exemption from the death penalty, based upon his severe mental illness, through a motion to re-open his post-conviction proceeding.

On October 22, 2010, the Petitioner filed a supplemental motion to re-open asserting that the decision in Frazier v. State, 303 S.W.3d 674 (Tenn. 2010), also justifies the re-opening of his post-conviction proceeding. The Petitioner asserted that Frazier stands for the proposition that a trial court's failure to inquire into a defense attorney's conflict of interest, of which the court is aware or should have been aware, and failure to determine whether the defendant knowingly and voluntarily waives the right to conflict-free counsel, amounts to a structural error warranting automatic reversal of any conviction obtained while the defendant was represented by conflicted counsel.

In its response in opposition to the motion and supplemental motion, the State argued that neither Porter nor Sears changed or revised the standard under which claims of ineffective assistance of counsel are to be considered. The State also argued that the decision in Van Tran does not stand for the proposition that a motion to re-open is the proper vehicle for the Petitioner to seek to *establish* his constitutional exemption from the death penalty due to his severe mental illness. Finally, the State argued that the decision in Frazier does not create or establish any new constitutional rights but simply makes clear that a defendant is

entitled to conflict-free counsel in a post-conviction proceeding pursuant to the *statutory* right to counsel in such proceedings.

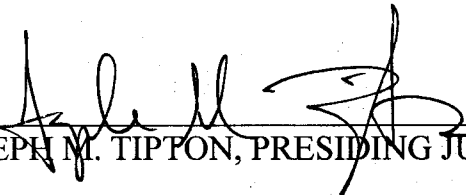
After hearing argument from counsel on October 26, 2010, the post-conviction court denied the motion and supplemental motion to re-open on grounds that the Petitioner had failed to assert any basis for re-opening his post-conviction proceeding. On October 27, 2010, the post-conviction court entered a written order denying and dismissing the motion and supplemental motion. The Petitioner timely filed his application for permission to appeal from the October 27, 2010 order on November 1, 2010.

The Post-Conviction Procedure Act of 1995 provides that a motion to re-open a prior post-conviction proceeding may raise a claim “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.” Tenn. Code Ann. § 40-30-117(a)(1). “The 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[.]” *Id.* “[A] new rule of constitutional criminal law is announced if the result is not dictated by precedent existing at the time the petitioner’s conviction became final and application of the rule was susceptible to debate among reasonable minds.” Tenn. Code Ann. § 40-30-122.

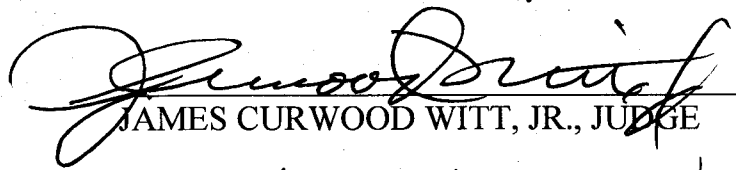
As argued by the State below and determined by the post-conviction court, none of the appellate court decisions cited by the Petitioner justify a re-opening of his post-conviction proceeding. First, the decisions in Sears and Porter applied the standard established in Strickland v. Washington, 466 U.S. 668, 687 (1984), for evaluating claims of ineffective assistance of counsel. They did not revise or change the Strickland standard. *See Sears*, 130 S. Ct. at 3264-67 (applying standard set forth in Strickland); *Porter*, 130 S. Ct. at 452-56 (same); *see also Pinholster v. Ayers*, 590 F.3d 651, 665 (9th Cir. 2009) (noting that the decision in Porter “help[ed] illuminate which applications of Strickland are unreasonable”). Second, the decision in Van Tran established the unconstitutionality of executing the mentally retarded and remanded to the post-conviction court with directions that the petitioner in that case be given the benefit of the newly established constitutional right. *See Van Tran*, 66 S.W.3d at 811-12. The decision in Van Tran does not stand for the proposition that a petitioner can seek to establish a new constitutional right through a motion to re-open. Finally, the decision in Frazier addressed a petitioner’s *statutory* right to conflict-free counsel in a post-conviction proceeding and, thus, cannot be a decision establishing a *constitutional* right not recognized at the time of the Petitioner’s trial. *See Frazier*, 303 S.W.3d at 680.

Accordingly, the application for permission to appeal from the order of the Criminal Court for Union County denying and dismissing the Petitioner’s motion and supplemental

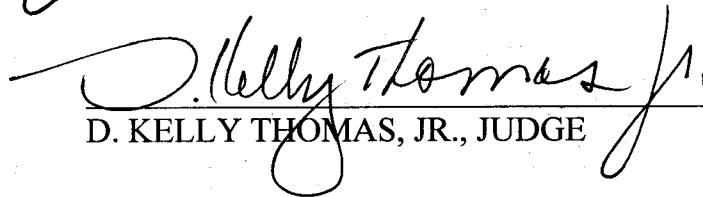
motion to re-open is DENIED. Because the Petitioner is indigent, costs on appeal are taxed to the State, for which execution may issue.



JOSEPH M. TIPTON, PRESIDING JUDGE



JAMES CURWOOD WITT, JR., JUDGE



D. KELLY THOMAS, JR., JUDGE