

IN THE CIRCUIT COURT OF ROBERTSON COUNTY, TENNESSEE

NOV 10 2010

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BY MS

EDMUND ZAGORSKI,)
)
 Petitioner,)
)
 v.)
)
 STATE OF TENNESSEE,)
)
 Respondent.)

Case No. 6052
Post-Conviction

**RESPONSE IN OPPOSITION TO MOTION
TO REOPEN POST-CONVICTION AND FOR
APPOINTMENT OF COUNSEL**

The State of Tennessee, through the Office of the District Attorney General for the Eighteenth Judicial District, submits this response in opposition to the Motion to Reopen Post-Conviction Petition filed in this case. 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), his application should be denied. Further, because it is plain from the face of the petition that petitioner had a prior petition that was resolved on the merits and that he does not and cannot satisfy any of the statutory grounds for reopening his post-conviction, his motion for appointment of counsel should likewise be denied. See Tenn. Code Ann. § 40-30-107(a) (providing for appointment of counsel only “if the petition is not dismissed upon preliminary consideration”).

A. Statement of the Case

In 1984, a Robertson County, Tennessee, jury convicted Edmund Zagorski of two

counts of felony murder in the deaths of John Dotson and Jimmy Porter. He was sentenced to death for both murders. The Tennessee Supreme Court affirmed his convictions and sentence on direct appeal, and the United States Supreme Court denied a petition for writ of certiorari. *State v. Zagorski*, 701 S.W.2d 808 (Tenn. 1985), *cert. denied*, 478 U.S. 1010 (1986).

Zagorski filed a petition for post-conviction relief in 1987 and an amended petition in 1989. Following an evidentiary hearing, the trial court denied relief. The Tennessee Court of Criminal Appeals affirmed the trial court's judgment. *Zagorski v. State*, No. 01C01-9609-CC-00397, 1997 WL 311926 (Tenn. Crim. App. June 6, 1997). The Tennessee Supreme Court granted Zagorski's application for permission to appeal under Tenn. R. App. P. 11 and, on December 7, 1998, affirmed the judgment of the Court of Criminal Appeals. *Zagorski v. State*, 983 S.W.2d 654 (Tenn. 1998), *cert. denied*, 528 U.S. 829 (1999).

Zagorski initiated federal habeas corpus proceedings in the United States District Court for the Middle District of Tennessee on December 23, 1999. *Zagorski v. Bell*, No. 3:99-cv-01193 (M.D. Tenn.) (Trauger, J.). The district court granted judgment in favor of the respondent, Warden Ricky Bell, on March 31, 2006. The United States Court of Appeals for the Sixth Circuit affirmed the district court's judgment on April 15, 2009. *Zagorski v. Bell*, 326 Fed. Appx. 336, 2009 WL 996307 (6th Cir. 2009) (reh. denied). The United States Supreme Court denied a petition for a writ of certiorari on April 19, 2010. *Zagorski v. Bell*, 130 S.Ct. 2094 (2010) (reh. denied June 21, 2010).

On September 7, the Tennessee Supreme Court set an execution date of January 11, 2011.

With less than three months before his scheduled execution date, Zagorski has now filed a motion in this court seeking to reopen his state post-conviction proceeding, claiming that his death sentence violates the Sixth Amendment to the United States Constitution as interpreted by the United States Supreme Court in its 1968 decision in *United States v. Jackson*, 390 U.S. 570 (1968). Specifically, he argues that the imposition of a death sentence following the prosecution's offer of consecutive life sentences as part of a plea proposal is unconstitutional. Because petitioner has alleged no circumstance that satisfies the criteria for reopening a post-conviction petition under Tenn. Code Ann. § 40-30-217, the motion should be denied.

B. Authority to File a Motion to Reopen

Zagorski has already exhausted the one (and only one) petition the legislature has afforded him; his only possible remedy is a motion to reopen. Section 40-30-202(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 ' 40-30-217.

The “limited circumstances set out in 40-30-217 [now codified at § 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). Zagorski’s claim satisfies none of these criteria; this court thus lacks jurisdiction to entertain a new post-conviction petition.

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

Petitioner asserts that his claims are cognizable for reopening under § 40-30-117, because he is seeking “recognition of new rights in Tennessee and their retroactive application here.” (Motion, p. 6). He points to the United States Supreme Court’s 1968 decision in *United States v. Jackson* as the basis for his argument that imposition of a death sentence following a pre-trial offer of life imprisonment in connection with a proposed plea agreement is constitutionally prohibited. He rightly acknowledges, however, that Tennessee appellate courts have rejected this claim. See *State v. Mann*, 959 S.W.2d 503, 511 (Tenn. 1997); *McKinney v. State*, No. W2006-02132-CCA-R3-PD, 2010 WL 796939, at 55 (Tenn. Crim. App. Mar. 9, 2010) (perm. app. denied). As the Supreme Court explained in *Mann*:

A defendant who pleads guilty extends a substantial benefit to the criminal justice system, and in exchange, the State is entitled to extend a less harsh sentence than might otherwise be given. *Brady v. United States*, 397 U.S. 742, 752-53, 90 S.Ct. 1463, 1471-72, 25 l.Ed.2d 747 (1970); see also *Corbitt v. New Jersey*, 439 U.S. 212, 219, 99 S.Ct. 492, 497, 58 L.Ed.2d 466 (1978). Likewise, if a plea offer is rejected, the State may prosecute the defendant to the fullest extent possible and seek whatever punishment is appropriate under the law. *Bordenkircher v. Hayes*, 434 U.S. 357, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978). . . .

* * *

Mann's reliance upon *United States v. Jackson*, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968), is misplaced. . . . Unlike the statute at issue in *Jackson*, Tennessee law does not reserve the maximum punishment for murder for those who insist on a jury trial. Indeed, under Tennessee law, the State is free to seek the death penalty following entry of a guilty plea. See Tenn. Code Ann. § 39-13-205(a) (1991 Repl.). Accordingly, we conclude that the defendant's assertion that the State violated his constitutional rights by seeking the death penalty after he rejected the plea offer and exercise his right to a jury trial is without merit.

Mann, 959 S.W.2d at 509, 511.

Likewise, in *Bordenkircher v. Hayes*, 434 U.S. 357 (1978), the United States Supreme Court made clear that there is no element of punishment or retaliation in the "give-and-take of plea bargaining." During plea bargaining in that case, the prosecutor threatened to re-indict the defendant on a more serious charge if the defendant did not plead guilty to the offense originally charged. When the defendant refused the offered bargain, the prosecutor carried out his threat and obtained a new indictment on the more serious charge. On appeal, the Court held that the accused is free to accept or reject a plea proposal and, if advised by competent counsel, an accused's guilty plea is not involuntary in a constitutional sense even if induced by the fear that a harsher penalty would be a possibility following trial. *Id.*

Petitioner has identified *no decision* of an appellate court prohibiting the imposition of the death penalty following failed plea negotiations. To the contrary, the Tennessee Supreme Court has expressly rejected the legal principle he advances here. Under these circumstances, this court lacks the authority to reopen Zagorski's petition, and his motion should be denied.

Petitioner further asserts, however, that *Van Tran v. State*, 66 S.W.3d 790 (Tenn.

2001), establishes that, under § 40-30-117(a)(1), “this Court can properly recognize and apply governing legal principles for the first time, find them to be retroactive, and then grant relief to the individual filing the motion to reopen.” (Motion, p. 7). But petitioner’s argument is inconsistent with the plain language of the statute, which requires that a motion to reopen 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.” (emphasis added). Moreover, 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 violated the Eighth Amendment of the United States Constitution and Article 1, section 16 of the Tennessee Constitution 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.

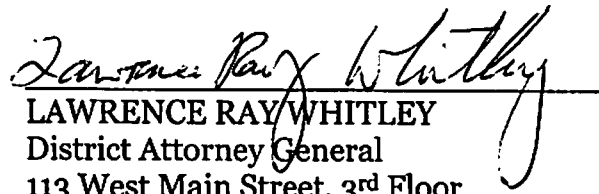
No such unusual circumstances exist in this case. Indeed, petitioner’s case is even less compelling given that he could have, but did not, present his present claim on direct appeal from his conviction and sentence, since the case on which he relies – *United States v. Jackson* – was decided more than 15 years before his capital trial. See Tenn. Code Ann. § 40-30-106(g) (“A ground for relief is waived if the petitioner personally or through an attorney failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented . . .”).

Because no appellate court has announced the rule 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).

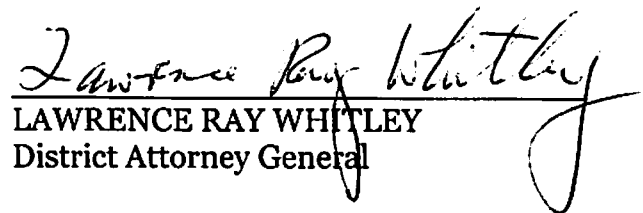
CONCLUSION

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


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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing has been provided to: Donald E. Dawson, Post-Conviction Defender, 530 Church Street, Suite 600, P.O. Box 198068, Nashville, TN 37219-8068, by mail and facsimile, on the 16th day of November, 2010.


LAWRENCE RAY WHITLEY
District Attorney General