IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

STATE OF TENNESSEE,	)	
	)	
	)	**NO. E2000-00712-SC-DDT-DD**
v.	)	**MORGAN COUNTY**
	)	
NICHOLAS TODD SUTTON,	)	**Capital Case**
	)	**Execution Date: Feb. 20, 2020**
	)	

RESPONSE OF THE STATE OF TENNESSEE IN OPPOSITION TO THE MOTION FOR STAY OF EXECUTION

Thirty-five years ago, while he was incarcerated for murdering his own grandmother, Nicholas Todd Sutton murdered Mr. Carl Estep. Mr. Estep was stabbed 38 times in his chest and neck, creating injuries which "would have caused death in a matter of minutes." *State v. Sutton,* 761 S.W.2d 763, 765 (Tenn. 1988). Sutton now claims a stay is necessary so he can seek discretionary review[1] of a constitutional shackling claim that he waited over thirty years to investigate and a *Johnson* claim which has been repeatedly rejected. Sutton has not—and cannot—establish a likelihood of success on the merits of these claims. The motion for a stay should be denied.

[1] At the time of his motion, Sutton's appeal from the denial of his petition for writ of error *coram nobis* was still pending; it has since been decided in the State's favor. *State v. Sutton*, No. E2019-01062-CCA-R3-ECN, slip op. at *6 (Tenn. Crim. App. Feb. 11, 2020).

I. Procedural Background.

In January 1985, Nicholas Todd Sutton and Thomas Street stabbed Mr. Carl Estep to death, inflicting 38 wounds to Mr. Estep's chest and neck. *State v. Sutton*, 761 S.W.2d 763, 764-65 (Tenn. 1988). At the time of the murder, all three were incarcerated at the Morgan County Regional Correctional Facility. *Id*. at 765. Sutton was serving a life sentence for the first-degree murder of his grandmother, who was his adoptive mother. *Id*. at 767 n.2 (citing *State v. Sutton*, No. 127 (Tenn. Crim. App. Feb. 27, 1981)).

From this proof, Sutton was convicted of first-degree murder. *Id*. at 764. In imposing a death sentence, the jury applied three aggravating circumstances: 1) Sutton was previously convicted of one or more felonies, other than the present charge, which involved the use or threat of violence to the person; 2) the murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind; and 3) the murder was committed while Sutton was in lawful custody or in a place of lawful confinement or during his escape from lawful custody or from a place of lawful confinement. *Id*. (citing Tenn. Code Ann. § 39-2-204(i)(2), (5), (8) (1982) (repealed)). The State relied on Sutton's first-degree murder conviction to support the prior-violent-felony aggravating circumstance. *Id*. at 767. "The jury found no mitigating circumstances sufficiently substantial to outweigh the aggravating circumstances." *Id*. at 764.

On direct appeal, this Court affirmed Sutton's conviction and death sentence. *Id*. at 764, 767. It found that the evidence supported the jury's finding of the prior-violent-felony aggravating circumstance.

Id. at 767. In addressing a separate claim, this Court also noted that the jury "knew that the defendants were inmates and it probably came as no surprise to the jurors that they would be closely watched and guarded." *Id*. at 769.

Sutton subsequently filed a petition for post-conviction relief, raising a plethora of claims. *Sutton v. State*, No. 03C01-9702-CR-00067, 1999 WL 423005, at *1 (Tenn. Crim. App. June 25, 1999), *perm. app. denied* (Tenn. Dec. 20, 1999). In addressing one of those claims, the Court of Criminal Appeals noted the post-conviction court's findings that "[t]he defendants wore certain clothes, their hands were free, and measures were taken to hide from the jury the shackles on their feet." *Id*. at *8. Ultimately, the Court of Criminal Appeals affirmed the denial of post-conviction relief, and this Court declined discretionary review. *Id*. at *32.

Thereafter, Sutton filed a petition for writ of habeas corpus in the federal district court. *Sutton v. Bell*, 645 F.3d 752, 755 (6th Cir. 2011). On appeal, the Sixth Circuit affirmed the denial of habeas relief. *Id*. at 765.

After his three-tier appeals process was completed,[2] this Court scheduled Sutton's execution for November 17, 2015. It then vacated

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[2] Sutton alleges that he "has not completed the 'standard three-tier appeals process.'" (Mot. at 21.) The standard three-tier appeals process is exhausted when a petitioner has pursued at least one unsuccessful challenge to his or her conviction and sentence through direct appeal, state post-conviction, and federal habeas corpus proceedings. *Coe v. State*, 17 S.W.3d 191 (Tenn. 1999). Sutton has completed each of these proceedings at least once; thus, his claim is incorrect.

that execution date pending the outcome of litigation challenging the State's lethal injection protocol. When that litigation concluded, this Court rescheduled Sutton's execution date for February 20, 2020.

In 2016, Sutton asked the Sixth Circuit for authorization to file a second or successive habeas petition, asserting in relevant part that *Johnson v. United States*, 135 S. Ct. 2551 (2015), announced a new rule of constitutional law that applied retroactively to his case. *In re Sutton*, No. 16-5945 (6th Cir. Aug. 3, 2016). The Sixth Circuit denied his request and rejected Sutton's attempt to equate the unconstitutionally vague "residual clause" at issue in *Johnson* with the elements-and-conduct based prior-violent-felony aggravating circumstance applied in Sutton's case. *Id.* It held that *Johnson* did not apply to Sutton's case "because the language of the applicable Tennessee statute is materially similar to the language set forth in the elements clause, rather than the residual clause, of the Armed Career Criminal Act" and that *Johnson* "explicitly noted that the residual clause was the only portion of the ACCA held to be unconstitutional." *Id.*

Around the same time, Sutton also filed a motion to reopen his post-conviction proceedings based on *Johnson*, which the trial court initially granted. *Sutton v. State*, No. E2018-00877-CCA-R3-PD, 2020 WL 525169, at *4 (Tenn. Crim. App. Jan. 31, 2020), *perm. app. filed* (Tenn. Feb. 7, 2020). Sutton then filed an amended petition for post-conviction relief, reasserting the *Johnson* claim and raising a number of other claims for the first time, including a claim "that being shackled during trial within view of the jury violated his right to a fair trial." *Id.* The post-conviction court denied relief, finding that "*Johnson* was

inapplicable to Tennessee's prior violent felony aggravator" and that the shackling claim was "beyond the scope of the preliminary order." *Id*. at *5. On appeal, the Court of Criminal Appeals held that "Tennessee's prior violent felony aggravating circumstance is not void for vagueness under *Johnson*." *Id*. at *7 (citing *Nichols v. State*, No. E2018-00626-CCA-R3-PD, 2019 WL 5079357, at *6 (Tenn. Crim. App. Mar. 26, 2019), *perm. app. denied* (Tenn. Jan. 15, 2020)). It also determined that Sutton was not entitled to relief on his shackling claim. *Id*. at *8.

Sutton also pursued his constitutional shackling claim by filing a petition for writ of error *coram nobis* in 2017, some 29 years after his conviction. The *coram nobis* court denied relief, finding that the petition was untimely, that Sutton had not alleged a basis for due process tolling, that the evidence in question was not newly discovered, and that error *coram nobis* was not the correct procedural vehicle to pursue this constitutional claim. Sutton appealed, and the Court of Criminal Appeals affirmed the denial of relief, holding that Sutton's "claim for relief is not later-arising, [he] is not entitled to equitable tolling, and [his] claim is not cognizable in a coram nobis proceeding." *State v. Sutton*, No. E2019-01062-CCA-R3-ECN, slip op. at *6 (Tenn. Crim. App. Feb. 11, 2020).

II. Sutton's Execution Should Not Be Stayed So He Can Seek Discretionary Review of His Meritless Shackling Claim.

As early as the middle of his trial, Sutton was on notice that the jurors may have seen him shackled. Nevertheless, he chose not to investigate or raise a challenge for years.[3] Now, having been denied relief in both proceedings, he contends that this Court must stay his execution so he can seek discretionary review of a claim he waited nearly three decades to pursue and then litigated at a leisurely pace. However, he cannot establish a likelihood of success on the merits, and his request should be denied.

A. Sutton has not established a likelihood of success on the merits.

This Court will not stay an execution pending resolution of collateral litigation in state court "unless the prisoner can prove a likelihood of success on the merits of that [collateral] litigation." Tenn. Sup. Ct. R. 12(4)(E); *State v. Irick*, 556 S.W.3d 686, 689 (Tenn. 2018). "In order to establish a likelihood of success on the merits of a claim, a plaintiff must show more than a mere possibility of success." *Irick*, 556 S.W.3d at 689 (internal quotation marks omitted).

In this case, Sutton has failed to establish a likelihood of success on the merits, either in his reopened post-conviction or error *coram nobis* proceedings. Neither is an approved mechanism for Sutton to

[3] Sutton has not pursued this litigation diligently. His *coram nobis* petition and reopened post-conviction petition were both denied less than one year before his execution date, but he did not seek expedited review in the Court of Criminal Appeals. *See Sedley Alley v. State*, No. W2006-01179-CCA-R3-PD (Tenn. Crim. App. June 9, 2006) (granting expedited review in similar circumstances).

raise his shackling claim, and there is no constitutional basis for subverting the General Assembly's carefully ordered collateral attack procedures.

1. Sutton's shackling claim is not cognizable in motion-to-reopen proceedings.

Sutton sought to raise this constitutional claim after his post-conviction proceedings were reopened. But the General Assembly has limited petitioners to one petition for post-conviction relief, Tenn. Code Ann. § 40-30-102(c), and it has permitted only a narrow, discrete set of claims to be raised after resolution of a petition: new, retroactive constitutional rights or rules; new scientific evidence of actual innocence; or an invalid prior conviction that enhanced the inmate's sentence. Tenn. Code Ann. § 40-30-117(a).

Sutton does not address how his shackling claim fits within the parameters of Section 117(a), nor can he. In fact, this claim is not grounded in a new constitutional right, scientific evidence of actual innocence, or an invalid previous conviction; thus, it is not cognizable in motion-to-reopen proceedings. And, although the trial court initially found that Sutton had articulated a colorable reopening claim under *Johnson*, that did not grant him free reign to raise and litigate claims not enumerated under Section 117(a). *See Coleman v. State*, 341 S.W.3d 221, 257 (Tenn. 2011). The Court of Criminal Appeals correctly found that Sutton was not entitled to relief on his shackling claim, *Sutton*, 2020 WL 525169, at *8, and he has failed to show how he can even present the merits of this claim in his reopened post-conviction proceeding, let alone establish a likelihood of success.

2. Sutton's constitutional claim cannot be raised in *coram nobis* proceedings.

Sutton also argues that "the visible shackling . . . entitles him to relief under our coram nobis [sic] statute." (Mot. at 12.) This claim fails for a number of reasons. First and foremost, it is a constitutional claim, and this Court has explicitly stated that "the writ of error *coram nobis* is not a procedure for remedying deprivations of constitutional rights." *Nunley v. State*, 552 S.W.3d 800, 829 n.22 (Tenn. 2018). Additionally, the facts underlying Sutton's constitutional claim do not constitute newly discovered evidence. "In order to qualify as newly discovered evidence, 'the proffered evidence must be (a) evidence of facts existing, but not yet ascertained, at the time of the original trial, (b) admissible, and (c) credible.'" *Id.* at 816 (quoting *Payne v. State*, 493 S.W.3d 478, 484-85 (Tenn. 2016)). The *Nunley* Court emphasized that the *coram nobis* statute "presupposes that the newly discovered evidence would be admissible at trial." *Id.*

Here, the evidence was already known at the time of trial. Archived Record, *Sutton v. State*, 751 S.W.2d 763 (Tenn. 1988) at II, 290; XII, 930. More importantly, "[e]vidence of jurors' viewing [Sutton] in shackles and handcuffs does not relate to any evidentiary matter litigated at [his] capital trial or sentencing." *State v. Sutton*, No. E2019-01062-CCA-R3-ECN, slip op. at *7 (Tenn. Crim. App. Feb. 11, 2020). It was therefore irrelevant and inadmissible. Tenn. R. Evid. 402.

The writ of error *coram nobis* is not the appropriate procedural vehicle for this constitutional claim. Regardless, Sutton cannot establish a likelihood of success of the merits via such a proceeding.

3. Due process does not mandate the adjudication of Sutton's shackling claim on the merits.

In attempt to avoid these barriers, Sutton argues that "[d]ue process requires that [he] be allowed to fully litigate his shackling claim on the merits through at least one of the two procedural vehicles he filed." (Mot. at 22.) He relies almost entirely on precedent for tolling the statute of limitations. But error *coram nobis* is not the appropriate procedural vehicle for addressing this claim, regardless of whether the statute of limitations should be tolled. And Sutton identifies no authority for the proposition that due process permits a second post-conviction petition based on a non-statutory ground for reopening.

This lack of authority is not surprising. There are good reasons for treating the statute of limitations differently from the limited bases for reopening. When considering whether due process requires tolling, this Court weighs the competing interests at stake. *See Whitehead v. State*, 402 S.W.3d 615, 623 (Tenn. 2013). A petitioner's interest in that context is his "*opportunity* to attack his conviction and incarceration on the grounds that he was deprived of a constitutional right during the conviction process." *Id.* (emphasis added) (quoting *Burford v. State*, 845 S.W.2d 204, 623 (Tenn. 1992)). This interest may overcome the State's interest in preventing litigation of stale and groundless claims and in avoiding the cost of continuous, generally fruitless litigation. *See id.*

In the context of a motion to reopen, however, a petitioner has had the opportunity to pursue such a collateral attack. Indeed, Sutton took advantage of that opportunity twenty-one years ago when he was afforded a full post-conviction proceeding, during which he was

represented by counsel and had investigators working his case. *See Sutton*, 1999 WL 423005, at *1. Thus, the principal concern addressed by due process tolling—that a petitioner is unconstitutionally deprived of the *opportunity* to attack his conviction or sentence—is not implicated where, as here, a petitioner has collaterally attacked his conviction and sentence.

On the other hand, the State's interest in finality is even stronger in this context than in the statute-of-limitations context. If due process required reopening a petition every time an inmate decided to pursue some new avenue of collateral attack, the one-petition rule would be wholly undone. The General Assembly's considered-and-balanced approach would be transformed into a vehicle for near-constant litigation and delay.

Sutton's case demonstrates this well. Though he was on notice that the jurors may have seen him shackled, he chose not to investigate the claim during his direct appeal or original post-conviction proceeding. He also made no showing that he investigated this claim during his federal habeas proceeding. Instead, he raised this claim for the first time over three decades after the crime and nearly twenty years after the conclusion of his state post-conviction proceedings.

Despite his own lack of diligence, Sutton now claims that due process affords him yet another opportunity to collaterally attack his convictions and sentence and that this Court must delay his execution to facilitate this renewed attack. This is exactly the sort of constant and purposefully piecemeal litigation the General Assembly intended to avoid, and due process does not require vitiating legislative design.

4. Other constitutional provisions do not mandate a hearing on the merits.

Sutton also raises other constitutional theories for subverting the General Assembly's intent. Each is as meritless as his due process theory.

He first argues that, if he cannot litigate his shackling claim on the merits, "his right to equal protection will be violated." (Mot. at 28.) It will not. The one-petition rule, the limited bases for reopening post-conviction proceedings, and the procedural bar preventing constitutional claims from being raised in a petition for writ of error *coram nobis* each apply broadly to all petitioners, and Sutton has been treated no differently from any other individuals seeking to collaterally attack their conviction. *See Phillips v. Ferguson*, 182 F.3d 769, 774 (10th Cir. 1999) (holding that Wyoming's collateral review statute of limitations did not violate equal protection because it "applies equally to all Wyoming defendants"); *Brown v. State*, 928 S.W.2d 453, 456 (Tenn. Crim. App. 1996) (rejecting a petitioner's equal protection challenge to the post-conviction statute of limitations because the petitioner was treated no differently from any other petitioner). Sutton—like any other petitioner—was afforded a full post-conviction proceeding; he simply chose not to investigate or raise this shackling claim at the time.

He next complains that his "[p]ost-conviction counsel's failings" denied him his right to present a defense. (Mot. at 16.) This is a non-sequitur; it has no change of success on the merits. Once a petitioner has been convicted the trial is over, and the constitutional right to present a defense no longer applies. Instead, as the very term makes

clear, the petitioner wishing to challenge his conviction must collaterally *attack* it.

Lastly, Sutton briefly argues that allowing his execution to go forward would deprive him of "meaningful access to the courts." (Mot. at 21.) This claim also fails, as the General Assembly is not precluded from limiting successive post-conviction petitions and grounds for *coram nobis* relief. *See Dellinger v. State*, No. E2013-02094-CCA-R3-ECN, 2015 WL 4931576, at *15-16 (Tenn. Crim. App. Aug. 18, 2015) (rejecting a similar argument in a capital case), *perm. app. denied* (Tenn. May 6, 2016).

III. Sutton's Execution Should Not Be Stayed for Discretionary Review of a Frivolous Claim That Has Been Repeatedly Rejected.

On top of his shackling claim, Sutton argues that he "has more than a possibility of succeeding in his litigation that Tennessee's prior violent felony aggravating circumstance is unconstitutionally vague." (Mot. at 17.) Not so. In support of his claim, he relies heavily on *Johnson* to argue that "the *Johnson* Court's vagueness analysis applies with equal force to the prior violent felony aggravator in [his] case and invalidates it as a basis for his death sentence." (Mot. at 17.) This reliance is misplaced, as *Johnson* has no application here. That case held that a law is unconstitutionally vague if it "requires a court to picture the kind of conduct that the crime involves in 'the ordinary case,' and to judge whether that abstraction presents a serious potential risk" of some result. *Johnson*, 135 S. Ct. at 2257.

In contrast, Tennessee's process does not include constructing in a vacuum some idealized or "ordinary" way of committing a criminal offense and then determining whether the constructed version somehow involves something akin to a "serious potential risk of physical injury to another." Rather, as the Court of Criminal Appeals correctly concluded when denying relief on Sutton's *Johnson* claim, "'under either version of the statute, trial courts are to look to the actual facts of the prior felony to determine the use of violence when such cannot be determined by the elements of the offense alone.'" *Sutton*, 2020 WL 525169, at *7 (quoting *Nichols*, 2019 WL 5079357, at *6); *see also State v. Moore*, 614 S.W.2d 348, 351 (Tenn. 1981). In other words, "[u]nlike the approach to the

ACCA's residual clause, 'our precedent has never required the use of a judicially imagined ordinary case in applying the prior violent felony'" aggravator. *Id.* (quoting *Nichols*, 2019 WL 5079357, at *6). Further, this Court has recently denied an application for permission to appeal raising an identical *Johnson* claim by a similarly situated petitioner. *See Nichols v. State*, E2018-00626-SC-R11-PD (Tenn. Jan. 15, 2020). For these reasons, Sutton cannot establish a likelihood of success on the merits in his *Johnson* claim.

CONCLUSION

Sutton's motion to stay his execution should be denied.

Respectfully submitted,

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