

review of the sole issue raised on appeal, the petitioner apparently claims that the “moral certainty” language of the instruction renders it constitutionally invalid.

T.C.A. § 40-30-202(c) provides that no more than one petition for post-conviction relief may be filed attacking a single judgment, and mandates that the trial court shall summarily dismiss any second or subsequent petition if a prior petition was filed and resolved on the merits by a court of competent jurisdiction. The trial court in this case concluded that the petitioner already filed a prior petition which was denied, and, therefore, properly dismissed the petition.

Nevertheless, the petitioner’s claim does not fall within one of the limited circumstances under which a prior petition may be re-opened. See T.C.A. § 40-30-217. The petitioner is apparently relying upon Victor v. Nebraska and Sandoval v. California, 511 U.S. 1, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994), as establishing a constitutional right that was not recognized at the time he filed his first petition. However, more than one year passed between the ruling in Victor and Sandoval and the filing of the petitioner’s second petition. § 40-30-217(a)(1). And contrary to the petitioner’s claim, the United States Supreme Court did not hold unconstitutional the language of the alleged reasonable doubt instruction at issue here. Moreover, as the trial court correctly noted, the courts of this state have continually upheld the constitutionality of instructions with similar language. See State v. Nichols, 877 S.W.2d 722, 734 (Tenn. 1994); Pettyjohn v. State, 885 S.W.2d 364, 365 (Tenn. Crim. App. 1994); Smith v. State, No. 02C01-9511-CR-00342 (Tenn. Crim. App., Apr. 28, 1997).

It is, therefore, ORDERED that the state’s motion to affirm the judgment of the trial court under Rule 20, Rules of the Court of Criminal Appeals, is granted, and the judgment of the trial court is hereby affirmed.

Enter, this the ____ day of August, 1997.

PAUL G. SUMMERS, JUDGE

JOE B. JONES, PRESIDING JUDGE

DAVID G. HAYES, JUDGE