

IN THE CRIMINAL COURT OF TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT
AT MEMPHIS, TENNESSEE
DIVISION III

PHILLIP R. WORKMAN,
Petitioner

-vs-

NO. B-81209

STATE OF TENNESSEE,
Respondent

RESPONSE OF THE STATE OF TENNESSEE TO PETITIONER'S
MOTION TO REOPEN HIS PRIOR PETITION FOR POST-CONVICTION RELIEF

Comes now the State of Tennessee, and in Response to Petition's Motion to Reopen Prior
Petition for Post-Conviction Relief, would submit the following:

The petitioner alleges in paragraph 8 of his petition that his grounds for relief are:

The basis for this Motion to Reopen is new scientific evidence that Petitioner did not fire the bullet that killed the victim. This evidence consists of (1) an x-ray demonstrating that the bullet that killed Memphis Police Lieutenant Ronald Oliver did not fragment - it emerged the body intact; and (b) an Affidavit from Dr. Kris Sperry, that because the x-ray establishes this fact, he believes to a reasonable degree of medical certainty that Petitioner did not shoot Lieutenant Oliver.

The State submits that Motions to Reopen are controlled by Tennessee Code Annotated §40-30-217
which states:

§ 40-30-217. Motions to reopen

(a) A petitioner may file a motion in the trial court to reopen the first post-conviction petition only if the following applies:

(1) The claim in the motion is 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. Such 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; or

(2) The claim in the motion is 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) The claim asserted in the motion 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, in which case the motion must be filed within one (1) year of the finality of the ruling holding the previous conviction to be invalid; and

(4) It appears that the facts underlying the claim, if true, would establish by clear and convincing evidence that the petitioner is entitled to have the conviction set aside or the sentence

reduced.

(b) The motion must set out the factual basis underlying its claims and must be supported by affidavit. The factual information set out in the affidavit shall be limited to information which, if offered at an evidentiary hearing, would be admissible through the testimony of the affiant under the rules of evidence. The motion shall be denied unless the factual allegations, if true, meet the requirements of subsection (a). If the court grants the motion, the procedure, relief and appellate provisions of this part shall apply.

(c) If the motion is denied, the petitioner shall have ten (10) days to file an application in the court of criminal appeals seeking permission to appeal. The application shall be accompanied by copies of all the documents filed by both parties in the trial court and the order denying the motion. The state shall have ten (10) days to respond. The court of criminal appeals shall not grant the application unless it appears that the trial court abused its discretion in denying the motion. If it determines that the trial court did so abuse its discretion, the court of criminal appeals shall remand the matter to the trial court for further proceedings.

The petitioner is operating under subsection (2) of newly discovered scientific evidence proving that the petitioner is actually innocent of the crime. The State submit that the petitioner has not established the kind of proof that would satisfy the Court in re-opening his Petition for Post-Conviction Relief. First, the proof does not establish that the petitioner is innocent of the crime. When the petitioner presented this evidence in his federal *habeas corpus* proceeding, the 6th Circuit noted:

The district court correctly found that Dr. Sperry's testimony did "not state that Oliver's wound could not have been caused by petitioner's weapon, nor does it offer an opinion that the wound was caused by the weapons of Stoddard or Parker or that it was consistent with wounds created by such weapons." Furthermore, Dr. Sperry's testimony simply "represents a view arguably different from that given by the state's expert witness at trial." Assuming that Dr. Sperry's observations are credited, Workman has presented no evidence that the prosecution knowingly presented false evidence in this regard. He has simply shown that there may be different interpretations of the physical evidence. As Workman cannot demonstrate falsity, he cannot prevail on this argument.¹

As the Court points out, the petitioner is simply alleging an alternative to the proof at trial. This does not establish actual innocence. Furthermore, since the petitioner has alleged this ground in a prior court proceeding and failed to get relief, he can not present it here on a Motion to Reopen. Under Tennessee Code Annotated §40-30-206(h) this ground has been previously determined.

The petitioner alleges that the finding of the x-ray was important in supporting Dr. Sperry's opinion. It is important to note that Dr. Sperry reached his conclusion in 1995 prior to the finding of the x-ray. His opinion has not changed since the x-ray was found.

In addition, the petitioner has been in possession of his information for over one (1) year.

¹*Workman v. Bell*, 178 F. 3d 759 (C.A. 6 (Tenn.) 1998) at 768.

The Tennessee Post-Conviction Statute requires claims to be brought within one year of final judgment. T.C.A. §40-30-202. Subsection (2) of §40-30-217 does not contain a specific time provision but the entire act refers to a one (1) year Statute of Limitations. Considering that the petitioner has had Dr. Sperry's opinion for over five (5) years it is now too late to raise this claim in a Motion to Reopen.

In *Cone v. State*, 927 S.W. 2d 579 (Tenn.Crim.App. 1995) the Court stated, succinctly

A petitioner may not relitigate a previously determined issue by presenting additional factual allegations. We should not encourage post-conviction petitioners to invent new facts to revive an issue which was unfavorably decided, nor should we allow petitioners to "sandbag" by reserving factual claims until their second or third petition.²

The petitioner is attempting to do this very thing.

Based on the above, the State submits that the petitioner has not established any ground that would support re-opening of his prior Petition for Post-Conviction relief. The State respectfully moves this Honorable Court to deny the petitioner's request and request for stay.

Respectfully submitted,

JOHN W. CAMPBELL
ASST. DIST. ATTY. GENERAL

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing response was caused to be delivered to Robert Hutton, Attorney for Petitioner, on this the _____ day of _____, 2001.

²*Cone*, 972 S.W.2d at