IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE:	*	KNOX COUNTY
	*	
BILLY RAY IRICK	*	SUPREME COURT NO. 180
	*	
	*	DEATH PENALTY

RESPONSE OPPOSING MOTION TO SET EXECUTION DATE
REQUEST FOR CERTIFICATE OF COMMUTATION
AND
CLAIM OF INCOMPETENCY TO BE EXECUTED

In response to the state's motion to set an execution date, petitioner, Billy Ray Irick, by and through the undersigned attorneys, opposes his execution and seeks commutation of his death sentence pursuant to T.C.A. §40-27-106. In the alternative and/or in addition, petitioner states that he is presently incompetent to be executed and invokes all relevant procedures and rights to ensure the determination of his sanity or incompetency proximately before execution. As explained more fully below, petitioner's bases for commutation include the following: (1) new scientific evidence demonstrating his insanity at the time of the offense, during his original trial and at the present time; (2) the flawed state and federal proceedings which preceded this pleading and which denied petitioner a full and fair hearing as to the issues of his sanity; and (3) petitioner's longstanding and severe mental illness which, under evolving standards of decency, should exclude him from execution. In regard to his present incompetency, petitioner states that in light of his longstanding mental illness and recent psychological evaluations performed by Dr. Malcolm Spica and Dr. Peter Brown demonstrating that he presently suffers from cognitive and psychotic disorders and is presently functioning at the level of a seven to nine year old child, he far exceeds any necessary threshold showing and is therefore entitled to be thoroughly examined to determine if he is presently competent to be executed.

STATEMENT OF RELEVANT FACTS AND COURT PROCEEDINGS

I.
Knox County Criminal Court Proceedings

The indictment and appointment of counsel.

On June 18, 1985, a criminal indictment was issued against the petitioner in regard to the death and rape of seven year old Paula Dyer. The four count indictment charged: (1) felony murder; (2) first degree murder; (3) rape of a minor less than thirteen (13) years old (vaginal); and (4) rape of a minor less than thirteen (13) years old (anal). (IRICK 160-61). The trial court appointed Kenneth Miller and James Varner of the Knoxville, Tennessee bar to represent the petitioner. (IRICK 162)

As explained below, trial counsel filed a notice of insanity which was later withdrawn. The only mental health evidence introduced at trial was presented during sentencing. The *general* facts presented during the guilt/innocence phase of the trial were largely uncontested, except where indicated, and the more relevant of which are set out below.

Facts presented in the guilt/innocence phase of the trial.

At the time of Paula Dyer's death, her mother, Kathy Jeffers, had known the petitioner for approximately two (2) years. (Trial Transcript, p. 544, IRICK 204). She had been introduced to the petitioner when the family was living in Clinton, Tennessee through her then husband, Kenny Jeffers, who had known the petitioner for a much longer period of time. Petitioner actually lived with the Jeffers as an "adopted" member of the family during the next two years, and since petitioner rarely kept a job, he regularly babysat the family's five children when the Jeffers were at work or otherwise out of the home. (Trial Transcript, pp. 545-546, 564, IRICK 205-206, 218). At trial, Mrs. Jeffers stated that her relationship with the petitioner was "like brother and sister" and that he had cared for

the children and had never been a "cause for concern" with them. (Trial Transcript, pp. 544, 564-565, (IRICK 204, 218-19).

Mrs. Jeffers also testified that while living in Clinton, Tennessee, their home had been destroyed by fire and that the petitioner had been responsible for rescuing two of her children. Subsequently, the Jeffers and petitioner, as a family, relocated to Knoxville, Tennessee. (Trial Transcript, p. 544, IRICK 204). However, upon relocating to Knoxville, Mr. and Mrs. Jeffers separated with Mrs. Jeffers and the children moving into a two bedroom house on Exeter Street around the first of March 1985[1] while Kenny and the petitioner moved in with Kenny's parents on Virginia Avenue in Knoxville. (Trial Transcript, p. 546-547, IRICK 206-07). Even after the separation, petitioner continued to babysit and play with the Jeffers children much as he had done before, though not as often. (Trial Transcript, p. 567, IRICK 221).

On the day of Paula Dyer's death, April 15, 1985, Mrs. Jeffers returned to the Exeter Street home at approximately 3:30 or 4:00 p.m. where she saw the petitioner, along with her husband, Kenny, and another friend. (Trial Transcript, pp. 549-550, IRICK 208-09). At approximately 5:00 or 5:30 in the afternoon, Mrs. Jeffers laid down for a nap and did not wake until 8:00 or 8:30 in the evening. During that period of time, the Jeffers children, including Paula, were cared for by the petitioner and Kenny. (Trial Transcript, p. 552, IRICK 211).

After putting the children to bed around 9:00 p.m., Mrs. Jeffers saw the petitioner on her back porch. At first she thought the petitioner was talking to someone, but then realized that "he was talking to himself" and that she could not understand what he was saying. It sounded like "mumbles"

---

[1]During the trial, Kathy Jeffers agreed that she had been at the Exeter residence for "approximately a month and a half" prior to the offense, which occurred on April 15, 1985. (Trial Transcript, pp. 565-566, IRICK 219-20).

to her. (Trial Transcript, pp. 554, 568, IRICK 212,222). After showering, she again saw Irick in the kitchen where they spoke. She learned that earlier in the day the petitioner had been literally chased out of the Virginia Avenue home with a broom by Kenny Jeffers' mother, Linda Jeffers. (Trial Transcript, pp. 568-569, IRICK 222-23). Petitioner told Kathy Jeffers that he was upset with Kenny's mother over the incident and that he would be leaving for Virginia the next day. He further stated his preference to leave that night, but that Kenny wanted him to babysit the children. (Trial Transcript, p. 555-556, IRICK 213-14).

During the conversation described above, Kathy Jeffers testified that petitioner left the kitchen, went to the porch and brought back a quart of beer in a paper bag, from which he was drinking. (Trial Transcript, p. 555, IRICK 213). When asked on direct during the trial whether petitioner was intoxicated "at that point," she testified, "[n]o, I noticed more his being mad than anything else," and further agreed that petitioner spoke "coherently." (Trial Transcript, p. 558, IRICK 216).[2]

Since the Jeffers family did not have a telephone, Mrs. Jeffers testified she left home around 10:00 that evening in order to use a pay phone to call Kenny. She explained to the jury that she wanted Kenny to watch the children since petitioner had stated he didn't want to be there and had been drinking. (Trial Transcript, p. 557, IRICK 215). When she returned from making the phone call, Mrs. Jeffers told the petitioner that she was going to have Kenny come back and watch the children.

When she left for work, the children were still in bed, and the petitioner was on the back porch. (Trial Transcript, pp. 557-558, IRICK 215-16). She arrived at work around 10:30 and would,

---

[2]Mrs. Jeffers' testimony would become the subject of controversy and a continuing Brady claim when post-conviction counsel learned that she had told Knoxville police, in part, that petitioner was "drunk and talking crazy." See p. 22 below.

about an hour later, receive a telephone call from her husband saying that the petitioner could not wake Paula. Paula would be taken to the hospital and pronounced dead from asphyxiation.

Conclusion of guilt/innocence phase of the trial:

During the guilt phase of the trial, counsel attempted to create a reasonable doubt as to the identity of the perpetrator. The defense called no witnesses, and the petitioner did not testify. No mental health evidence was presented during this phase of the trial. On November 1, 1986, a Knox County jury found the petitioner guilty of felony murder and the two counts of aggravated rape while acquitting of first degree murder. (Trial Transcript, pp. 982-83, IRICK 226-27).

Trial Counsel's investigation of Mental Health Issues:

Prior to trial, defense counsel filed an insanity defense notice with the court. From subsequent post-conviction hearings discussed in more detail below, it was learned that defense attorneys had obtained copies of petitioner's mental health records from the Knoxville Mental Health Center, where he had been treated as an outpatient, Eastern State Mental Hospital where he had been treated and hospitalized as a child, records from the Church of God Children's Home in Sevierville, Tennessee where he had lived from ages eight to thirteen, and limited Army records. (P.C. Transcript, p. 98, IRICK 456). Trial counsel consulted with a psychiatrist at Ridgeview Psychiatric Hospital in Oak Ridge, Tennessee (name unknown), Dr. Jack E. Scariano (a neuropsychiatrist with West Knoxville Neurological Associates), Dr. Emily Oglesby, and Dr. Diana McCoy, a psychologist.[3]

[3]In a post-conviction hearing held on December 14, 1995, Mr. Miller testified that he was unable to recall the name of the expert from Ridgeview and perhaps one other expert he consulted. (PC Transcript, p. 177, IRICK 474).

Interestingly, when Dr. McCoy contacted petitioner's mother, his mother said she did not care if her son was helped or not. (P.C. Transcript, p. 110, IRICK 462). Trial counsel had been told by her that, if convicted, her son should be put to death. (P.C. Transcript, p. 27, IRICK 453).

Dr. Emily Oglesby, a neuropsychologist, told trial counsel that her testing was invalid because the petitioner would not cooperate, presumably by refusing to answer questions. (P.C. Transcript, p. 129, IRICK 473). Trial counsel were also provided the opinions of Dr. Clifton Tennison and Dr. Neal W. Dye, who were appointed by the court to conduct competency screenings and who found petitioner to be competent at the time of the offense and to stand trial. After considering the mental health evidence, defense counsel withdrew the insanity defense. (IRICK 180).

Mental health evidence presented during sentencing:

During the trial, the only evidence offered by the defense concerning petitioner's mental state was provided during sentencing. All defense evidence was provided by or through Nina Braswell-Lunn, a clinical social worker at the Knoxville Mental Health Center. Ms. Lunn had worked with and treated petitioner when he was between the ages of six and eight. However, when petitioner was placed at the Church of God home in Sevierville, Tennessee, at the age of eight, Ms. Lunn lost all contact with him; therefore, her testimony and the exhibits that were introduced were restricted to the time period between May 1965 and August of 1967. What is provided below is a summary of information that she provided in testimony and/or through treatment reports.

In March of 1965, at age six (6), Billy, while still in the first grade, was referred to the Knoxville Mental Health Center[4] (hereinafter "the Center") by the school's principal. The principal

---

[4]The name of the facility was subsequently changed to the currently existing Helen Ross-McNabb Mental Health Center.

specifically requested an independent mental evaluation to answer the question of whether Billy's extreme behavioral problems and un-manageability in school were the result of emotional problems or whether Billy suffered from some form of "organic brain damage." Ms. Lunn performed the initial assessment and stated, in part:

> At the present time [age six] he is overly aggressive, is difficult to manage, is very difficult to discipline particularly. He apparently mistreats animals; this is something that is particularly evident with his cat. He is hyperactive all during the night, he talks in the nighttime and rummages about the house. He prowls and meddles a great deal at home and at school. He has for a couple of years been telling people outside the home that his mother mistreats him, that she ties him up with a rope and beats him and he also has told neighbors and other people of his parents being naked in bed and this kind of thing. Both parents show considerable concern over the fact that it seems to them that Billy Ray does not really relate to them, that he is in pretty much of a world of his own. They state that when they correct him or try to talk with him he only gives them a blank meaningless stare.

Later in the initial assessment, Ms. Braswell stated:

> At about the age of three (3) Billy Ray began talking and apparently according to the parents when he began he became fluent rather quickly but he was late in beginning to talk. At around the time of the birth of the younger brother, Jeffrey, Billy was talking enough that he began telling stories of his mother's mistreating him, of tying him up and beating him. Mrs. Irick apparently takes all this very seriously, in effect internalizes the verbal attacks from the boy. I would raise the question of how much of this behavior on Billy Ray's part is actually stimulated by the mother through unconscious mechanisms. It seems very apparent that Ms. Irick is an emotionally unstable person. According to Dr. Harvell, the mother has not been cooperative as far as the boy's behavior in school is concerned but Mrs. Irick on the other hand states that she has had phone calls up to three and four times a week about the boy, has attempted to cope with him there and yet she brings out that she feels rather guilty for inflicting Billy in a sense upon the teachers.

(Trial Exhibit 53, IRICK 249-50).

She further noted that petitioner's problems were apparently already "long standing" (Trial Transcript, p. 1007, IRICK 231) and testified at trial that, in her opinion, Billy's behavior/condition was consistent with abused children. (Trial Transcript, p. 1008, IRICK 232). Approximately a month

later, Dr. Ken Carpenter, the psychiatrist-director of the center, met with Billy and made the following observation, "His reality observations are deficient and the patient has only slight awareness of this. The possibility of brain damage in this case is fairly great." His diagnostic impression was "adjustment reaction of childhood versus organic brain damage versus childhood schizophrenia" and recommended further psychological testing. (Trial Exhibit 55, IRICK 253). Billy continued to be seen and treated at the Center on an out-patient basis.

In May of 1965, while Billy Ray was still just six years old, Dr. John A. Edwards, a clinical psychologist, and the Center's psychiatrist/director, interviewed Billy and concluded that he was most likely "suffering from a severe neurotic anxiety reaction with a possibility of mild organic brain damage." He noted that Billy felt "intense hostility" directed at his family members and had little emotional control. In a remarkably prescient observation, Dr. Edwards noted:

> Billy Ray tends to *fear his own impulses* as well as being threatened from those in his environment; in fact, he seems to be overwhelmed and at the mercy of other people. Has an exceptional fantasy life with some possible atypical thinking.

(Emphasis supplied). (Trial Exh. 57, IRICK 256).

In the fall of 1966, staff at the Center recognized that Billy's home life was unsuitable for a child with such severe mental problems. Ms. Lunn testified that the staff had been very specific about the need for the parents to be involved in Billy's treatment. However, she stated that his mother had "psychiatric problems of her own and was just not able to function in the role of a parent for Billy." She further testified that his father was not supportive of the effort and "we were not able really to keep them [Billy's mother and father] involved in treatment at the Center." (Trial Transcript, p. 997, IRICK 228). Therefore, Ms. Lunn began seeking Billy's hospitalization at Eastern State Mental

Hospital in Knoxville.[5] In a letter to the Church of God Home dated November 14, 1966, Ms. Lunn would write in regard to Billy's earlier placement at Eastern State:

> Billy's mother has become increasingly more disturbed to the point that recently she had to be placed on heavy medication and the possibility of hospitalization for her is still being considered. It was at this time that we decided to hospitalize Billy at Eastern State in an effort, in part, to remove him from the home situation in which his mother's disturbance so strongly affects Billy.

(Trial Exhibit 61, IRICK 261).

Billy was admitted to Eastern State and spent the next ten months (October 24, 1966 - August 30, 1967) as an inpatient, though at that point in time, Eastern State had only limited experience with treating children, at least as inpatients. (IRICK 19). As a consequence, Ms. Lunn continued to treat Billy at Eastern State even after his admission.[6] (IRICK 23).

In January of 1967, after having been treated with Thorazine and other forms of treatment for over two months, Billy's diagnosis[7] was changed to "situational reaction of childhood" by an Eastern State psychologist, and Billy was subsequently transferred from the Intensive Treatment Unit to the children's cottages in the "therapeutic village" where he continued to receive treatment. (IRICK 34). In the spring of 1967, Eastern State sought to place Billy in a residential school, still recognizing that placement in the family home was not an option. In a March 7, 1967 letter, Ms. Lunn, who had continued to treat Billy, explained the decision to place Billy in a residential school, in part, this way,

---

[5]The name of the facility was subsequently changed to the currently existing Lakeshore Mental Health Institute.

[6]While at Eastern State, medical records reflect that Billy received various treatments, including group and individual therapy, as well as regular doses of Thorazine, an anti-psychotic medication which was begun within the first 24 hours of his admission. However, it does not appear that the use of Thorazine was specifically discussed during the trial.

[7]In December 1966, Eastern State, under the direction if its chief clinical psychologist, Dr. Stanley Webster diagnosed Billy as having "psychoneurotic anxiety reaction, moderate, with possible brain damage" though his report was not introduced into evidence. (IRICK 29).

"[a]fter his initial rather positive adjustment at Eastern State Hospital, Billy has recently begun to act out, showing much of the behavior that was shown in the home and the school situation prior to hospitalization." (Trial Exhibit 63, IRICK 264).

In rebuttal to Ms. Lunn's testimony, the state called Dr. Clifton R. Tennison, a psychiatrist then employed at the Helen Ross-McNabb Center (McNabb Center), and who, in January of 1985, had, pursuant to court order, performed a forensics screening for petitioner's competency and mental condition at the time of the offense and at trial. (Trial Transcript, p. 1065, IRICK 233). Dr. Tennison's opinion was based on a review of some of the childhood records described above and a one hour examination session at the city jail during which the petitioner was "very hostile." (Trial Transcript, pp. 1072-1073, IRICK 239-40). He testified that the scope of his responsibilities in performing such an examination was to determine whether there was a basis to find the patient incompetent or whether further testing was needed. Therefore, he said he was looking for evidence of "psychotic disorders, effective disorders, or severe anxiety disorders." (Trial Transcript, p. 1070, IRICK 237).

Based on his examination, Dr. Tennison did not find "any evidence" of mental illness or defect that would have prevented petitioner from appreciating the wrongfulness of his conduct. (Trial Transcript, pp. 1067-1068, IRICK 234-35). While testifying that there was no evidence that petitioner experienced psychotic phenomena; however, petitioner, according to Dr. Tennison, did "endorse vague auditory illusions or mis-perceptions described as hearing sounds or noises which bothered him and sometimes startled him..." but added, "[t]hat doesn't qualify as what we call a discreet hallucination..." (Trial Transcript, p. 1085, IRICK 242).

While declining to give a specific diagnosis since the competency evaluation was of a more limited scope, nevertheless, Dr. Tennison had a "strong diagnostic impression" that petitioner suffered from an anti-social personality disorder. (Trial Transcript, p. 1069, IRICK 236). He testified that a personality disorder was not considered a "mental illness but can serve... as the context in which other mental illness might take place." (Trial Transcript, pp. 1070, 1083, IRICK 237, 241). In addition, Dr. Tennison had other impressions which included "anti-social schizoid, narcissistic, histrionic and impaired judgment." In explaining his impression that petitioner's judgment was impaired, Dr. Tennison stated, in part:

> What I meant - well, I'm looking back. I'm sure that what I was talking about was the fact that I'm there, primarily, to see whether or not there is evidence to support an insanity defense. And the defendant has every opportunity to give me some evidence along those lines and did not. In fact, he was very hostile, very mocking, very sarcastic, very pejorative. And in one sense of the term, when someone is there to try to help you out a little bit, to mock them, and mimic them, and put them off is not extremely good social judgment. The rest of the judgment issues came from the history...

(Trial Transcript, p. 1086, IRICK 243).

In trying to explain the characteristics of an antisocial personality, the following dialogue took place on direct examination:

> Q: Is there a characteristic of the antisocial personality that, sort of, summarizes it so that we, who aren't trained as you are, can understand what we are talking about - what you are talking about?
>
> A: There are several characteristics, and there are many specific factors in a person's history. I can't recall all the factors in the person's history that have to be met in the criteria without having the diagnostic and statistical manual in front of me. The characteristics, though, are primarily based on an unwillingness or an inability to take into account the rights of other people - sort of the basic characteristic of antisocial personality. It is just that - uh - the rights or feelings of other are, generally, disregarded in a person who exhibits the other signs and symptoms of an antisocial personality disorder.

Q: And as a result of that, they ordinarily don't conform their conduct to accepted standards?

A: As a result of that, there would be a long history of illegal activities, perhaps, or less than socially-acceptable activities. Many people with antisocial personality are in jail - or in prisons right now...[8]

(Trial Transcript, pp. 1071-1072, IRICK 238-39).

When questioned further by the trial judge about Dr. Tennison's findings, the following dialogue took place.

Q: Doctor, you said you found evidence of an antisocial personality disorder and that this developed over a long period of time, usually; is that correct?

A: Personality disorders, by definition, are there because of some developmental abnormality in a person. People can only think, and feel, and behave in certain ways. There are only so many things the brain can do. In the course of developing into who you are as an adult, something is missing either in your environment or in your own genetic and biological makeup, then this can - not always - but it can result in what we call a personality disorder. So, yes, it is a long term deeply ingrained fixed way of responding to the environment. It represents in the adult what we call developmental disorders in children.

Q: You said that this personality disorder - this antisocial personality disorder is an unwillingness or an inability to take into consideration the rights of others. And it would seem to me that there is or could be a big difference between unwillingness or inability. Were you able to make a determination with this defendant on whether his disorder is an unwillingness or an inability, or did you not meet with him enough?

A: That's the problem with the personality disorders right there is that we are not able, in any scientific way - using any measures that can hold up to decide whether or not these kinds of personality traits are due to an inability or an unwillingness. There is no way to know. There are very strong theories for both sides, but it makes no difference with regard to treatment...no one knows as far as I'm concerned.

---

[8]According to the state pre-sentence report, petitioner's record consisted of only three public drunkenness convictions and one disorderly conduct - all misdemeanors. (IRICK 271).

(Trial Transcript, pp. 1087-88, IRICK 244-45).

Conclusion of sentencing phase of the trial:

On November 3, 1986, the jury sentenced petitioner to death by electrocution based on his felony murder conviction. In imposing the death penalty, the jury found the presence of the following four aggravating circumstances:

> (1) the victim was less than twelve (12) years of age and the defendant was eighteen (18) years of age, or older;
>
> (2) the murder was especially heinous, atrocious or cruel in that it involved torture or depravity of mind;
>
> (3) the murder was committed for the purpose of avoiding, interfering with or preventing a lawful arrest or prosecution of the defendant; and
>
> (4) the murder was committed while the defendant was engaged in committing the felony of rape.

(IRICK 183-84).

> The following mitigating circumstances were recognized by the court and provided to the jury:
>
> (1) defendant has never been convicted of any felony, and before this case, had never been arrested for any felony;
>
> (2) defendant has never arrested or convicted of any misdemeanor involving moral turpitude;
>
> (3) defendant has a history of a mental impairment that required the defendant to be placed in an institution at a young age;
>
> (4) defendant was under the influence of alcohol or marijuana at the time of the offense; and
>
> (5) defendant has shown remorse.

(IRICK 181-82).

Mental health evidence not presented during sentencing:

In addition to the Center records introduced at trial, trial counsel had also obtained a limited number of records from the Church of God Home ("the Children's Home") where Billy resided from age eight through age thirteen along with records from Eastern State which dealt with his hospitalization, treatment and, among other circumstances, a series of incidents in June of 1972 that led to his removal from the Children's Home and return to Eastern State for hospitalization. These two sets of records were not introduced during petitioner's trial, but a summary of the information is provided below, along with a limited number of records from the McNabb Center which were not presented or described during trial.

In addition to Nina Lunn's letter of November 14, 1966 to Eastern State (described above, p. 11), Dr. Carpenter, also of the McNabb Center, wrote the staff at Eastern State on October 24, 1966 urging admission for Billy. The letter states, in part:

> Please admit this patient at your earliest convenience. He has been under treatment at the Mental Health Center for the past six (6) months and we feel that because of his mother's condition and Billie's [*sic*] *psychosis* that a period of hospitalization would be helpful. Nina Lunn, Billie's [*sic*] therapist here, will attempt to continue with him at least on a weekly basis... (Emphasis supplied).

(IRICK 16).

The letter also goes on to state that Billy's medication included Mellaril (25 mg q.i.d.) and Stelazine (2 mg b.i.d.) which are both anti-psychotic and anti-anxiety medications. In yet another letter dated October 25, 1966, Ms. Lunn had told Eastern State officials :

> At times, he is definitely out of contact; there are comments of a hallucinatory quality. However, these have not been dealt with too seriously in view of this boy's age and tendency toward fantasy...Billy for the most part functions at his mother's will and functions on his mother's emotionality. His ego strengths are quite limited and he is impulse driven...when threatened, he becomes quite negative which is seen as his fear,

> but deep resentment and hostility are not seen as a part of this child's makeup as much so as they are part of the mother's. Mrs. Irick has recently become more intensely disturbed...we are recommending hospitalization at this time due to the apparent need for more extensive care for this child. The mother's condition very likely could become worse and if so, it is possible that she too will need hospitalization. The mother's use of this child in expressing her own deep personal and emotional conflicts is seen as a very real factor in any changes that the boy might be able to make.

(IRICK 17).

When Billy was taken to Eastern State for voluntary admission, he was accompanied by his father and his aunt, who was the mother of another patient being treated at Eastern State. Medical records reflected that the father was unable to supply any admission information and referred the staff to "my wife who knows more about him." (IRICK 23).

It should be noted that Eastern State began treating Billy with Thorazine, a strong anti-psychotic medication, on his first full day at the hospital, which was October 25, 1966. His next dosage of Thorazine appears to be 50 mg on October 28. Beginning the next day, October 29, the records reflect that he was put on a *daily* regimen of 12.5 mg of Thorazine. (See Nurses' Notes beginning at IRICK 98).

On December 1, 1966, Dr. Stanley Webster, Chief Clinical Psychologist of Eastern State, reported, after concluding the first set of comprehensive examinations of Billy, that his psychomotor functioning had considerably "regressed." He found that there were indications of "emotional lability, low frustration tolerance and explosiveness." (IRICK 28-29). After being asked to draw human figures, Billy, according to the report, "stated his intention to draw a naked figure [in the case of the female figure], but then changed his mind and added a dress." The report goes on to state that:

> Other than the clothes, the only difference between the two figures was that the male possessed teeth and the female didn't. This suggests that the patient's father may not be the passive individual that the records indicate.

(IRICK 29).

Dr. Webster's diagnosis was "psychoneurotic anxiety reaction, moderate, with possible brain damage." Id. On December 8, 1966, Billy's dosage was doubled to 25 mg per day. After having his Thorazine dosage doubled to 25 mg per day (IRICK 100), Billy was re-examined on January 12, 1967. At that time, a different physician changed Billy's diagnosis to "situational reaction of childhood." (IRICK 34; see also IRICK 40). Nevertheless, on April 16, 1967, his dosage was once again doubled to 50 mg per day until his discharge. (IRICK 101-104). Therefore, while ultimately disputing Billy was psychotic, Eastern State placed Billy on daily doses of an anti-psychotic and twice doubled his dosage, while sometimes exceeding 50 mg per day when the boy became "agitated." (See letter of Susan Tollerson below).

On August 30, 1967, at the age of eight, Billy was "conditionally discharged" from Eastern State to the children's home which meant that he could return to Eastern State without further admission procedures. In a letter from Susan Tollerson, a psychiatric social worker with Eastern State to Paul Duncan of the children's home, she stated, in part:

> Billy Ray's medication at discharge was Thorazine 50 mg. q.i.d. This prescription may be refilled three times by sending the pink duplicate copy to the Cashier: Eastern State Psychiatric Hospital. A prescription must be obtained following that, but his medication can still be obtained through the hospital if you prefer since this will be at no cost. Often, with the doctor's permission, Billy Ray's medication has been slightly increased when he becomes agitated and we have found this procedure most helpful...

(IRICK 42).

During these years, between the ages of eight and thirteen, Billy was rarely, if ever, visited by his parents. However, in June of 1972, the Children's Home arranged a rare visit to his parents' home for Billy, who was now thirteen years of age. However, the visit and its aftermath went very

badly. During the visit, Billy used an axe to destroy the family television set, clubbed flowers in the flower bed, and, in a very disturbing incident, used a razor to cut up the pajamas that his younger sister was wearing *as* she slept. The razor was later found in his sister's bed. (IRICK 496).

On July 25, 1972 and back at the Children's Home, Billy broke a window in one of the dormitories and gained access to a girl's bedroom. As the young girl slept, Billy was found hovering over her and was promptly removed after she began screaming. Later, a "butcher knife" was found in the girl's bed. Billy was still just thirteen years old. On that same day, Billy was expelled from the Children's Home and returned to Eastern State as an inpatient. Id.

Back at Eastern State, Billy was placed once again on 50 mg of Thorazine. Medical records from this date of his re-admission on July 25, 1972 state, "It is now thought that boy may be really dangerous had been taken off psychotropic drugs at the Children's Home." (IRICK 90). In another report dated August 1, 1972, the staff member recounted the two incidents which occurred in July of 1972 and discussed above, and then stated, "Patient denied remembering doing this." The report went on to state:

> He [Billy] had told mother he wanted to come home and live and mother had said that she would have to talk it over with the Home. When patient returned to the Home, he seemed in a daze and said that his family did not want him and he hated the SOB's. ...Since vacation patient has played with matches and they found knives and bullets with him. He has requested not to go home during vacation any more. He has been moody, withdrawn, and daydreamed a lot....The Home has tried to involve the parents in writing to patient and in coming in for interviews, without success. They display passive resentment toward patient, procrastinating signing vacation forms for him to go home, etc. No one visits patient and no one pays for him.

(IRICK 61).

Billy remained as an inpatient until March 2, 1973 when, at the age of fourteen (14), he was discharged to his parents' home with a diagnosis of "adjustment reaction to adolescence" with a

"guarded" prognosis. (IRICK 79-80). There is no indication of any follow-up treatment or even a subsequent examination of Billy until he was examined for competency to stand trial for the underlying offense. Billy joined the Army in November 1975 at the age of seventeen (17) but was discharged within a short period of time for unstated reasons. After his discharge from the Army, Billy's life seemed to be one of roaming, though there are few, if any, records to provide any detail.

II.
Appellate Proceedings

Following petitioner's conviction and death sentence, his attorneys filed an appeal with the Tennessee Supreme Court. However, none of the issues raised before the Tennessee Supreme Court concerned mental health issues or intoxication. In State v. Irick, 762 S.W.2d 121 (Tenn. 1988), the Tennessee Supreme Court affirmed petitioner's conviction and sentence. *Certiorari* was denied by the United States Supreme Court in Irick v. Tennessee, 525 U.S. 895, 1195 S.Ct. 219, 142 L.Ed.2d 180 (1998). (State and Federal pleadings of petitioner are provided, beginning at IRICK 279 and IRICK 352).

III
State Post-Conviction Trial Proceedings

Post-conviction petition and claims:

On May 3, 1989, a *pro se* state post-conviction petition was filed in the Criminal Court for Knox County, Tennessee (No. 36992) and petitioner was appointed Douglas Trant as counsel. Among the claims submitted in post-conviction proceedings were the following:

1. "Petitioner, Billy Ray Irick, has been denied his constitutional right under the Sixth and Fourteenth Amendments to the United States Constitution to reasonably effective assistance of counsel at both the trial and sentencing phase of his trial, and on appeal, in that counsel representing

petitioner was not within the 'range of competence demanded of attorneys in criminal cases' and trial and appellate counsel's performance was deficient and said performance prejudiced the defense. Counsel's assistance to petitioner was so defective as to require reversal of the conviction or, in the alternative, reversal of the sentence imposed at the separate sentencing hearing." (Petition for Post-conviction Relief, ¶ 6, May 3, 1989).

2. "Trial counsel failed to conduct an adequate or effective pre-trial investigation of the case." (Petition for Post-conviction Relief, ¶ 9(d), May 3, 1989).

3. "Trial counsel failed to conduct proper, adequate or effective strategy and tactics with regard to the case." (Petition for Post-conviction Relief, ¶ 9(e), May 3, 1989).

4. "Trial counsel did not investigate and interview all necessary and essential witnesses." (Petition for Post-conviction Relief, ¶ 9(g), May 3, 1989).

5. "Counsel failed to investigate for witnesses and/or prepare and present them during the penalty phase of trial to demonstrate all aspects of defendant's character and background that would support a sentence less than death." (Amendment to Petition for Post-conviction Relief, ¶ 9(q), September 8, 1989).

6. "Counsel failed to prepare adequately for either the guilt/innocence phase or the penalty phase of trail and to develop and present to the jury a coherent theory of defense at either phase." (Amendment to Petition for Post-conviction Relief, ¶ 9(r), September 8, 1989).

7. "Counsel for the defendant failed to have a neurological examination done of the defendant even though there is evidence of a severe head injury to the defendant during his childhood." (Amendment to Petition for Post-conviction Relief, ¶ 9(u), September 8, 1989).

8. "Counsel for the defendant at trial did not properly investigate the case for trial. ABA standards relating to the defense function, 4.1." (Amendment to Petition for Post-conviction Relief, ¶ 9(ff), September 8, 1989).

9. Among other Brady claims, petitioner alleged that the prosecution failed to produce evidence that "Billy Irick was well on his way to being intoxicated according to Kathy Jeffers when she left for work that evening." (Amendment to Petition for Post-conviction Relief, ¶ 3, January 19, 1993). (For all Post-Conviction Petitions, see IRICK 383, *et seq*).

Mental health evidence including evidence of intoxication submitted to the post-conviction trial court:

During their investigation, P.C. counsel obtained the file of the state district attorney. Within that file was a transcribed statement of Kathy Jeffers, mother of the victim. The statement taken on April 16, 1985, one day after the death of her daughter, was the result of an interview conducted by Detective Wiser and Detective Ashburn of the Knoxville Police Department. During the interview, the following exchange took place concerning her observations of petitioner's sobriety and state of mind when she left the house for work that night:

DW: The room where that you left Paula at...And so, you went to work at Hageman's, and then the next time you saw your husband, where was that at?

KJ: He came in, I was getting ready to go to the phone. The girl I worked with, Donna, was there with me. I was going to call and see if he was at the other truck stop and tell him to go home, that Bill was drunk and talking crazy...

DW: Bill called you?

KJ: No. I went down early for a reason, to find Kenny and ask him to go home and stay with the kids. But he [Kenny] walked in the door of Hageman's..

JA: Bill was drunk when you left home?

KJ: I had to find somebody to stay with the kids.

DW: Yeah, but Bill was intoxicated when you left?

KJ: He wasn't drunk drunk, but he was well on his way.

(IRICK 774).

Despite a proper request by petitioner's trial counsel, P.C. counsel discovered that the statement had never been provided to trial counsel and alleged a Brady violation that was both material and prejudicial.[9]

P.C. counsel also obtained the services of Dr. Pamela Auble, a neuropsychologist, to support a claim that trial counsel had been ineffective in failing to present evidence of petitioner's mental health in mitigation. However, during the hearing, the state trial judge ruled that her testimony was irrelevant and would not be considered because it was based on interviews and testing that occurred

---

[9] The Assistant District Attorney would ask Kathy Jeffers during the trial on no less than five separate occasions about what she had observed regarding petitioner's alcohol intake that evening. (Trial Transcript, pp. 551, 554, 555 and 558-559, IRICK 210m 212, 213, 216-17). While Ms. Jeffers would testify that she saw petitioner drinking beer from a quart bottle wrapped in a brown paper bag, she did not testify in form or substance that petitioner was drunk or "well on his way [to being drunk]." A representative sample of her testimony can be found on pages 558 and 559 of the transcript. A portion of her direct testimony follows:

Q: Now, you said he had been drinking and was talking to himself and seemed angry. Could you tell whether he was intoxicated at that point?

A: No, I noticed more his being mad than anything else.

Q: Was he able to talk with you coherently when he did have a conversation with you?
A: Yes, sir.

Q: Was he able to walk around the house, the kitchen, and to the back porch without stumbling over furniture or falling or anything like that?

A: Yes, sir.

Adding insult to injury, during the penalty phase of the trial, Assistant District Attorney Drake argued to the jury that they should not consider intoxication as a mitigating factor and stated: "I anticipate that the defense is going to suggest that he was acting under the influence of alcohol or marijuana. Where's the proof of it? What does 'under the influence' mean? *No one* has ever said he was intoxicated..." (Trial Transcript, pp. 1096-1097, IRICK 246-47). (Emphasis supplied.)

subsequent to the offense. Her testimony was presented only as a proffer. (P.C. Transcript, pp. 98-103, IRICK 456- 461).

During the proffer, Dr. Auble testified that she had reviewed various medical and mental health records, including records from the Knoxville Mental Health Center/Helen Ross McNabb Center (discussed above), Eastern State/Lakeshore Hospital (discussed above), United States Army (discussed above), his "GED," West Knoxville Neurological Associates, and prison records. (P.C. Transcript, pp. 96-98, IRICK 454-56). From her review of the records, she stated she could not find evidence that a "neurological work up" had been completed at the time of the trial, though one had been started by Dr. Emily Oglesby, who indicated that her testing was invalid because on non-cooperation. (P.C. Transcript, pp. 107-108, IRICK 462-463).

Dr. Auble testified that she evaluated petitioner in January and February of 1990 at the Riverbend facility. While there, she administered 15 tests and spent approximately 21 hours with him. (P.C. Transcript, p. 96, IRICK 454). After describing the various tests that she administered, she opined that petitioner suffered from "a serious mixed personality disorder" with strong paranoia features, possible schizoid features and brain damage could not be ruled out. (P.C. Transcript, pp. 112-113, IRICK 466-467). During cross examination, Dr. Auble discussed, in part, the information provided from the Children's Home and Eastern State regarding the incidents discussed above pertaining to petitioner's sister and the girl in the Children's Home dormitory in the summer of 1972.

The state's rebuttal included calling Ken Miller, one of petitioner's two trial attorneys. Mr. Miller testified that after consulting with Dr. McCoy prior to trial, it was determined that they would not pursue an insanity defense. He further described his concern that petitioner would be viewed as

a sociopath and that in his opinion, his client's responses to questions had at times changed on what he thought would be in his best interest. (P.C. Transcript, p. 178, IRICK 475).[10]

Post-conviction resolution:

On April 1, 1996, the court denied post-conviction relief to the petitioner on all issues. (IRICK 508).

IV.
Post-Conviction Appellate Proceedings and Their Resolution

On appeal to the Court of Appeals, post-conviction counsel submitted the following issues:

1. Whether the petitioner received ineffective assistance of counsel at his trial for first degree murder, felony murder, and aggravated rape, requiring the setting aside of his conviction and sentence of death.

2. Whether the state's violation of its duty under Brady v. Maryland requires a new, fair trial.

3. Whether petitioner's sentence of death by electrocution must be set aside when all of the four aggravating circumstances found by the jury to justify the imposition of the death penalty are clearly invalid.

---

[10]Cf., however, Mr. Miller's statement with Dr. Tennison, the state's witness, who performed the forensic competency screening. As quoted above, on page 13, he stated, in part, "...[a]nd the defendant has every opportunity to give me some evidence along those lines [evidence to support an insanity defense] and did not. In fact, he was very hostile, very mocking, very sarcastic, very pejorative. And in one sense of the term, when someone is there to try to help you out a little bit, to mock them, and mimic them, and put them off is not extremely good social judgment..." (Trial Transcript, p. 1086, IRICK 243).

The Court of Appeals denied post-conviction relief in Irick v. State, 973 S.W.2d 643 (Tenn. Crim. App. Jan. 14, 1998).[11] Subsequently, a petition for review was filed with the Tennessee Supreme Court. The issues stated in that petition follow:

1. Whether defendant was ineffectively assisted at trial because defense counsel failed to investigate available exculpatory evidence.

2. Whether the state's failure to fulfill its Brady obligations requires a new trial.

3. Whether defendant was ineffectively assisted at his sentencing hearing.

4. Whether defendant must receive a new sentencing hearing because the jury improperly considered five aggravating circumstances. (See P.C. appellate brief beginning at IRICK 513).

In his brief to the Tennessee Supreme Court, post-conviction counsel argued that the testimony provided by petitioner's trial counsel "did absolutely nothing to establish the brutal treatment defendant received at the hands of his parents, his mental illness, and possible brain damage." (Supreme Court Application, p. 18, IRICK 571). Subsequently, the Tennessee Supreme Court denied review and later that year, the United States Supreme Court denied *certiorari* in Irick v. Tennessee, 525 U.S. 895, 1195 S.Ct. 219, 142 L.Ed. 180 (1998).

V.
Facts Discovered During Federal *habeas corpus* Proceedings:

Subsequent to the appointment of *habeas* counsel, counsel sought funds to hire investigators and mental health experts. (IRICK 683). While the district court granted funds for investigators, it denied defense counsel funds for the initial appointment of mental health experts on two separate occasions. (IRICK beginning at 690 and 732).

---

[11]However, the Court of Appeals did find that the fourth aggravating factor, the felony murder aggravator, failed to adequately narrow eligibility for the death penalty. Nevertheless, the court found the error to be harmless. Id. at 659.

During counsel's investigation, a *habeas* investigator traveled to Knoxville, Tennessee to interview potential witnesses and among those individuals interviewed was Inez M. Prigmore. Ms. Prigmore had become acquainted with Billy Ray Irick and his family when Billy was approximately fourteen or fifteen years old and living on Bakertown Road in Knoxville, Tennessee. During that period of time Ms. Prigmore lived, on a part time basis, two doors from the Irick home. In her affidavit, she testifies that she personally observed Billy Ray's father, Clifford Irick, to be an excessive drinker and a brutal man and that she could frequently hear Clifford Irick swearing at his wife and children from his residence approximately 1000 feet away. (IRICK 865). She could also hear the sounds of the children being struck within the home and observed Billy, his mother and one or more sisters at various times with bruises on their bodies. On one occasion, she witnessed Clifford Irick hit one of his daughters, who was pregnant at the time, knocking her to the ground. Id.

Finally, she relates that she personally observed Billy Ray's father hit him in the back of the head with a piece of lumber, knocking Billy Ray to the ground. At the time of the incident, Billy Ray was approximately fifteen years of age. When Billy Ray was approximately seventeen years of age, she personally heard Clifford Irick tell Billy to leave the house and to never return.[12] (Id.)

Investigators also found that no one had interviewed Ramsey and Linda Jeffers nor their daughter, Cathy Jeffers (the victim's mother's name is Kathy Jeffers), all of whom had lived with the petitioner in the weeks just preceding Paula Dyer's death. [13] (See IRICK 859, 862, 864). While

---

[12]Cf. Dr. Webster, after analyzing the young Billy's drawings, observed that "the patient's father may not be the passive individual that the records indicate." (IRICK 29).

[13]The *habeas* investigator, Bill Dipillo, first interviewed Linda and Ramsey Jeffers at their home on July 1, 1999. Subsequently, on July 14, 1999, Mr. Dipillo and *habeas* counsel, Howell Clements, interviewed Linda, Ramsey and Cathy Jeffers. Finally, on November 3, 1999, Linda, Ramsey and Cathy Jeffers signed the affidavits which have been made exhibits to this pleading.

interviewing these unsympathetic witnesses, the investigator learned that Billy, just days or weeks before the offense, was caught stalking through Kenny's parents' home late one night after everyone was in bed with a bared machete. Kenny's father, Ramsey, who was also the step-grandfather of the victim, stopped Billy and asked him what he was doing. Billy stated unabashedly that he was going down the hall "to kill" Ramsey Jeffers' son, Kenny, with the machete. Ramsey Jeffers knew of no explanation or possible motivation for Billy's bizarre behavior. Mr. Jeffers convinced Billy to put down the machete and return to his room, but apparently no legal action was taken. (See IRICK 859).

In that same period of time - just days or weeks before Paula Dyer's death - Billy chased a school aged girl with the same machete down a Knoxville public street in broad daylight with the explanation that he "didn't like her looks." (See, e.g., IRICK 859). Mr. and Mrs. Ramsey Jeffers, along with their daughter, Cathy Jeffers, who was also living at the home, stated in affidavits that Billy was frequently "talking with the devil," "hearing voices," and "taking instructions from the devil." (IRICK 858-862). In her affidavit, Cathy Jeffers stated that the petitioner told her, "[t]he only person that tells me what to do is the voice." (IRICK 864). She also recalled an evening when petitioner was frantic that the police would enter the home and kill them with chainsaws. (Id.). This highly revelatory evidence had never been discovered by previous counsel nor had it ever been discussed, alluded to or even admitted by petitioner to the knowledge of *habeas* counsel.[14]

Expert review of later arising evidence:

Upon discovery of this later arising evidence, *habeas* counsel, Howell Clements, using his own funds (a total of $1,750.00), provided the Prigmore and three Jeffers affidavits to two

[14]Petitioner has, to date, denied and/or claimed no memory of the events discussed in the three Jeffers affidavits.

Chattanooga psychologists, Dr. Kenneth S. Nickerson and Dr. William F. Blackerby[15] for their review, along with some of the other records described above. Petitioner was of course in the custody of the Riverbend Maximum Security Institution in Nashville. Given that the funds were out of Mr. Clements' own pocket and were limited, there were insufficient funds available at that time to have either of the two physicians travel to Nashville to personally examine petitioner.

After reviewing the three Jeffers' affidavits and substantial portions of petitioner's mental health history, Dr. Blackerby opined in an affidavit dated September 14, 1999 that petitioner "suffered at the very least from a dissociative disorder, and probably was schizophrenic or intermittently psychotic." (IRICK 868-69). Dr. Nickerson concurred with Dr. Blackerby's conclusions in an affidavit signed November 17, 1999. (IRICK 875-76). They disputed the validity of the earlier evaluations and further opined that the petitioner should be reevaluated based on the newly discovered factual evidence as well as the advances of the mental health sciences relevant to patients such as the petitioner.

Armed with the affidavits of Dr. Blackerby and Dr. Nickerson, as well as the affidavits of Inez Prigmore and the three Jeffers family members, *habeas* counsel again requested for the second time that the federal district court provide funds to hire a mental health expert who could personally examine petitioner and administer the necessary tests to form an expert opinion on petitioner's sanity at the time of the offense and to stand trial. (IRICK 740). Again, the district court rejected their requests. (IRICK 744). Nevertheless, *habeas* counsel submitted all of the affidavits and other documents which were officially made part of the record pursuant to two district court orders

---

[15] Mr. Clements paid Dr. Blackerby $1,000 and Dr. Nickerson $750.00.

expanding the record. (See IRICK beginning at 745, *et seq*; IRICK 847 (Order); IRICK 850 (Motion); and IRICK 857 (Order)).

Subsequent to the dismissal of the *habeas* petition and while the case was on appeal before the Sixth Circuit and United States Supreme Court, counsel contacted Dr. Clifton Tennison mentioned above as the psychologist who had performed the initial mental health screening before petitioner's trial. After reviewing the three Jeffers' affidavits, he stated in his affidavit that he could no longer have confidence in his earlier evaluation because he had not been provided all material evidence.[16] He states, in part:

> The information contained within the attached affidavits [the three Jeffers affidavits] raises a serious and troubling issue of whether Mr. Irick was psychotic on the date of the offense and at any previous and subsequent time. That is, this historical information would have been essential to a determination of a role of a severe mental illness - a mental disease or defect - in his ability to have appreciated the nature and wrongfulness of his behavior, and therefore, to the formation of an opinion with regard to support for the insanity defense. ...
>
> The fact that this information was not provided to me prior to my evaluation of Mr. Irick is very troubling to me as a medical professional and as a citizen with regard to issues of ethics, humanitarian concern, and clinical accuracy. I am concerned that in the light of this new evidence, my previous evaluation and the resulting opinion were incomplete and therefore not accurate...
>
> I further note that behavioral health science greatly advanced since 1985 and especially within the last five to ten years. While the basis screening and assessment procedures for forensic evaluations have remained consistent in principal, diagnostic criteria and categories have changed, scientific data and testing instruments have been improved and expanded, and the clinical handling of evidence and standards for opinions and testimony have changed. Because of such changes and advances, and especially in the light of this new information, it is my professional opinion to a reasonable degree of medical certainty that without further testing and evaluation, no confidence should be placed in Mr. Irick's 1985 evaluations of competency to stand trial and mental condition at the time of the alleged offense.

---

[16] *Habeas* counsel first contacted Dr. Tennison in August of 2009. However, Dr. Tennison did not complete his review of the materials and form an opinion until a few weeks prior to the completion of his affidavit.

(IRICK 896-99).

Initial Classification Psychological Summary from Riverbend Maximum Security Institute.

Since petitioner's conviction and sentence to death in 1986, the state is believed to have withheld evidence of petitioner's insanity. Since the dismissal of his *habeas* petition by the Sixth Circuit Court of Appeals, *habeas* counsel have been taking steps to prepare for the next round of state or federal proceedings. One of those steps was to investigate whether petitioner is currently competent to be executed. In performing that investigation, counsel sought an update of all medical records from Riverbend Maximum Security Institute where petitioner has been incarcerated since his sentence of death. *Habeas* counsel had already received Riverbend records from previous counsel which included, at least, all Riverbend records prior to October 6, 1988, when James Varner, one of Irick's two original trial attorneys, requested medical records from Riverbend. (See Affidavits of Mr. Varner and Mr. Miller with Attachments, IRICK 877-884). These exhibits reflect that on or about October 10, 1988, Riverbend supplied Mr. Varner with allegedly all the medical records in their possession. Id.

After requesting all records from Riverbend on October 29, 2009, *habeas* counsel subsequently received medical records from Riverbend, under a cover letter dated December 16, 2009. Among those records was a document entitled Initial Classification Psychological Summary performed by staff of the Riverbend facility and dated December 12, 1986 - a little more than a month after being sentenced to death. That summary stated, in part:

> The Peabody Picture Vocabulary Test indicates that the subject is functioning within the "borderline" range of intellectual abilities. Inmate Irick scored at the less than third grade level in the reading segment and at the beginning of the fifth grade level in the arithmetic segment of the Revised WRAT. This inmate's Carlson Psychological Survey Profile did not fit any of the type categories and has not yet been identified.

> He did, however, score at very high level in the thought disturbance and self-depreciation scales. The thought disturbance scale reflects "disorganization of thinking, confusion, perceptual distortions and hallucinations, and feeling of unreality. These traits may manifest themselves in unusual affect, including anxiety. High scorers on this scale are indicating unusual problems in dealing with reality because they cannot organize themselves or the work around them. They are emotionally upset, and may be moody, hypochondriacal, and miserable." The self-depreciation scale reflects "the degree to which the person degrades himself and his actions. The high scorer generally does not value himself and refuses credit for any accomplishment. This may be a characteristic personality trait for him or it may be a mood state, reflecting despondency, depression, and possible suicidal tendencies."

(IRICK 278).

After receiving the summary, *habeas* counsel reviewed the records provided to them by previous counsel and, after diligent search, could not find where this document had previously been provided. Subsequently, *habeas* counsel provided the summary to James Varner, Kenneth Miller and Douglas Trant (post-conviction counsel), none of whom remembered ever seeing the document, and with all stating within their attached affidavits that they were confident they would have remembered its substance since the contents support a finding that petitioner was incompetent at all relevant times. (IRICK 877, 878, 881-82, 885-86). The summary was also provided to the Attorney General's office, and while the AG's office has not conceded that the document was withheld, neither has it taken a contrary position.

Beginning in late 2009, *habeas* counsel also approached Dr. Peter Brown for further assistance in evaluating the petitioner. Again, using his own funds, Attorney Howell Clements arranged for the petitioner to be examined by Dr. Peter Brown and Dr. Malcolm Spica.[17]

---

[17]With no funds having been approved from the federal court, Dr. Spica was paid $5,400.00 out of Howell Clements' personal funds.

In November and December of 2009, during the pendency of petitioner's federal *habeas* case, Dr. Malcom Spica administered certain psychiatric tests to the petitioner. Subsequently, on December 7, 2009 and January 21, 2010, the petitioner was interviewed by Dr. Peter Brown. Based on his review of historical documents, the testing performed by Dr. Spica, and his own interviews, Dr. Brown prepared the report which begins at page IRICK 907.

DISCUSSION

A Certificate of Commutation Should Issue

In Workman v. State, 22 S.W.3d 807 (Tenn. 2000), this court, in an order authored by Justice Anderson, and separate orders authored by Justices Drowota, Barker and Birch, addressed the standards by which a certificate of commutation will be reviewed. T.C.A. §40-27-106 provides that the governor may commute the punishment from death to life imprisonment upon a certificate of this court, "that in its opinion, there are extenuating circumstances attending the case, and that the punishment ought to be commuted." Furthermore, Tennessee Supreme Court Rule 12.4(A) states, *in part*:

> Any response in opposition to the motion shall be filed within ten (10) days after the motion is filed and shall assert any and all legal and/or factual grounds why the execution date should be delayed, why no execution date should be set, or why no execution should occur, including a claim that the petitioner is not competent to be executed... (Cites omitted).

Despite disagreement about the role of the court in commutation proceedings, all members of the Workman court agreed on a basic precept in considering the issue of recommending commutation: the court should consider the facts contained in the record, *or facts which are uncontroverted.* Workman, 22 S.W.3d at 808. Therefore, the "extenuating circumstances attending

the case" can be based upon facts in the record or a combination of record facts and new evidence that is uncontroverted. Id. (Citations omitted).

DISCUSSION

I. New scientific evidence demonstrates petitioner's actual innocence by reason of insanity at the time of the offense and at trial.

In the days or weeks just prior to the offense, the petitioner evidenced signs of indisputable insanity, including trying to kill his best friend, Kenny Jeffers, with a machete; chasing a school aged girl down a Knoxville public street in broad daylight while waving a machete and threatening to kill her; talking to "the devil;" hearing voices; taking instructions from the devil; expressing fear that the police would break into his home and kill him; and doing what "the voice" told him to do.

This information has since been reviewed by several psychiatric experts, including Dr. Peter Brown, who has diagnosed petitioner with cognitive and psychotic disorders as well as paranoid and schizoid personality disorders. As explained below, he has further opined that petitioner's severe psychiatric disorders support a finding of not guilty by reason of insanity. Petitioner asserts this as a basis for commuting his death sentence. The same issue may also be raised in a separate motion to reopen his post-conviction case.

While the underlying facts discussed above were only discovered in the federal *habeas* proceedings, nevertheless, petitioner submits that they should be considered by this court. The basis for his position is that the state, at least to this point, has not disputed these facts. The most likely reason being that the sources of the evidence were three members of the victim's step family, who constitute reliable and unsympathetic sources for this information. Furthermore, the affidavits and

other *habeas* facts were, in fact, made a part of the *habeas* record by two federal court orders. (IRICK 847 and 857).

Legal standards applicable to defendant in April of 1985:

(a) The relevant post-conviction statute:

Since petitioner's post-conviction petition was originally filed on May 5, 1989, the presiding court, in any motion to reopen his post-conviction case, would look to T.C.A. §40-30-101, *et seq* (repealed 1995) in addition to the revised Post-Conviction Procedure Act, T.C.A. §40-30-210, *et seq* (1997) for the relevant legal standards such as the applicable burden of proof. *See* Owens v. State, 13 S.W.3d 742, 748 (Tenn.Crim.App. 1999). For petitions such as the present one filed under the old act, the petitioner would only need to prove his allegations by a preponderance of the evidence. State v. Kerley, 820 S.W.2d 753, 755 (Tenn.Crim.App.), permission to appeal denied (Tenn. 1991); Oliphant v State, 806 S.W.2d 215, 218 (Tenn.Crim.App.), permission to appeal denied (Tenn. 1991); Moffitt v. State, 29 S.W.3d 51, 55 (Tenn.Crim.App. 1999). Findings of fact and conclusions of law made by the post-conviction court would be given the weight of a jury verdict, and the reviewing court is bound by those findings unless the evidence contained in the record preponderates otherwise. Butler v. State, 789 S.W.2d 898, 899 (Tenn. 1990); Teague v. State, 772 S.W.2d 932, 934 (Tenn.Crim. App. 1988), cert. denied, 493 U.S. 874, 110 S.Ct. 210, 107 L.Ed. 2d 163 (1989).

(b) The insanity defense available to petitioner in April of 1985:

At the time of the offense, April 15, 1985, Tennessee's law regarding the insanity defense had been defined in Graham v. State, 547 S.W.2d 531 (Tenn. 1977), where it was stated that if, at the time of the offense, the defendant, as a result of mental disease or defect, lacked substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the

law, then the defendant was not guilty by reason of insanity. Id. at 543. See also State v. Thompson, 151 S.W.3d 434, 440 (Tenn. 2004). Furthermore, insanity was not an affirmative defense but was instead an *element of the crime* to be proved beyond a reasonable doubt if the defendant's mental state was called into question at any time during the trial - whether by the defense or prosecution. The Tennessee Supreme Court described the legal landscape at the time as follows:

> Because a defendant is presumed to be sane, the defendant has the initial burden of showing that sanity is an issue. However, if the evidence adduced either by the defendant or the state raises a reasonable doubt as to the defendant's sanity, the burden of proof on that issue shifts to the state. The state must then establish the defendant's sanity to the satisfaction of the jury and beyond a reasonable doubt. (Cite omitted.) 'Sanity thus becomes an element of the crime.' (Cites omitted.) State v. Parks, 891 S.W.2d 607, 615-616 (Tenn. 1995).

Once a reasonable doubt had been raised by evidence adduced by either the defense or prosecution, the defendant was relieved of further proof upon that issue and the burden of proof shifted to the state. Covey v. State, 504 S.W.2d 387, 391 (Tenn. App. 1073); see also Stewart v. State, 60 Tenn. 178 (Tenn. 1873); and King v. State, 91 Tenn. 617 (Tenn. 1892). It was then up to the state to establish the defendant's sanity beyond a reasonable doubt. Covey, 504 S.W.2d at 391, citing Jordan v. State, 135 S.W. 327 (Tenn. 1911) and Davis v. United States, 165 U.S. 373, 17 S. Ct. 360, 41 L.Ed. 750 (1897). Where reasonable doubt was created as to a defendant's sanity, he had to be acquitted. Dove v. State, 50 Tenn. 348, 410 (Tenn. 1871).

(c) Legal standard of competency to stand trial in April of 1985:

The relevant test in April of 1985 for determining whether a defendant was competent to stand trial was whether he had sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he had a rational as well as a factual understanding of the proceedings against him. State v. Johnson, 673 S.W.2d 877, 880 (Tenn. Cr. App. 1984), citing Dusky

v. United States, 362 U.S. 402, 80 S. Ct. 788, 4 L.Ed. 2d 824 (1960). It is a fundamental principle that an accused cannot be tried, convicted, or sentenced while he is mentally incompetent. Berndt v. State, 733 S.W.2d 21 (Tenn. Crim. App. 1987); State v. Stacy, 556 S.W.2d 552 (Tenn. Crim. App. 1977); and Mackey v. State, 537 S.W.2d 704 (Tenn. Crim. App. 1975).

(d) *Dr. Peter Brown's diagnoses and opinions demonstrate that petitioner was insane at the time of the offense and was therefore actually innocent of his convictions and/or the death penalty. Furthermore, his report, dated April 2010, is new, reliable, and not state evidence.*

Dr. Brown's report describes the petitioner as suffering from a severe mental disturbance with both genetic and environmental origins. Historical records indicate that the birth of the petitioner was troubled and that petitioner may have suffered from "cerebral anoxia" and early medical records report a concern with resulting "organic brain damage." (See Report of Dr. Brown, p. 25, IRICK 931). More recent information obtained by federal *habeas* counsel also demonstrates that petitioner's home was violent and unstable based on the eyewitness account of Inez Prigmore, a former neighbor. (Id. at pp. 5-6, IRICK 911-12).

Furthermore, there was a history of "chronic and severe psychiatric disorder" in petitioner's family, including his mother, who had a long history of psychiatric disturbances and treatment, as well as an aunt or cousin. (Petitioner also reported to Dr. Brown that his mother is a "practicing witch" who regularly uses spells and witchcraft directed against others. (Id. at p. 6, IRICK 912)). Since his arrest for the offense, petitioner's mother has been, at best, apathetic towards her son and his attorneys, when not openly hostile. He further reported that the petitioner was, at the time of the offense, consuming marijuana and alcohol and that chronic use of these substances can worsen

emotional and cognitive problems. "In particular, the combination may have combined to heighten paranoid thinking patterns." (Id. at p. 13, IRICK 919).

In personal interviews, petitioner described overarching government led conspiracies against him. He further expressed that he is "constantly endangered in prison" and worried that without sufficient diligence one could get stabbed in the back. Petitioner also believes that other individuals who might have helped him in the past had been bribed or intimidated. (Id. at p. 15, IRICK 921).

Petitioner denies guilt though he cannot provide an account of what happened. Petitioner states, "I can't say yea or nay about who did it...it is just not in me to do this. If I thought I had done this I would kill myself." (Id. at p. 16, IRICK 922). Dr. Brown found no evidence "whatsoever" of malingering or symptom exaggeration. (Id. at p.12, IRICK 918). Dr. Brown has provided the following diagnoses:

DIAGNOSES:

AXIS I:

a. Cognitive disorder NOS

b. Psychotic Disorder NOS, by history, rule out Schizophrenia, Paranoid Type

AXIS II:

Paranoid Personality Disorder

Schizoid Personality Disorder

AXIS III:

No diagnosis

AXIS IV:

Stressors (severely/prolonged): Post-Conviction 1st Degree Murder, Incarceration

AXIS V:

GAF = 48/48 (severe symptoms or impairments)

(Id. at p. 20, IRICK 926)

Dr. Brown found evidence of gross impairment of the executive function, in other words, the capacity to plan, premeditate, weigh out consequences and carry out plans. He states that the evidence of impairment in executive functioning was particularly evident with more complex tasks. (Id. at p. 12, IRICK 918). There were profound deficits in petitioner's verbal fluency and executive function. (Id. at p. 13, IRICK 919). Dr. Brown further explained:

> The deficits in verbal fluency and executive function are likely to interact in a vicious cycle during times of stress. His anxiety will mount as he is unable to formulate a plan or to organize his thinking in words. Coupled with his difficulties in restraining his behavior this will likely lead to worsening anxiety, bizarre thinking and impulsive behavior.
>
> His deficits are further complicated by marked paranoia and, possibly, intermittently florid psychotic symptoms. He is unable to maintain himself as is typical for may paranoid individuals through by avoiding all but the most perfunctory social contacts.
>
> This pattern appears to have been present since early childhood with documentation of a gross failure of formal social development both at home and at school, prolonged psychiatric hospitalizations, repeated school failure, premature discharge from the military, a prolonged period of time when he was a vagrant and his tenuous adaptation to present life through extreme isolation.

Id.

The deficits described above led Dr. Brown to conclude that the past and present test results are "in fact over estimates" of his cognitive abilities, explaining that petitioner's abilities in real life situations will be significantly worse than his performance on paper and pencil tests because "deficits in integrating knowledge into actual thinking and behavior will be disproportionately compromised and complicated and emotionally stressful real-life situations." Id. Even so, he concludes that test

results were approximately consistent with those of a 7 - 9 year old child. Dr. Brown found that petitioner's severe impairments would have existed continuously from childhood and been present "both at the time of the offense and at the time of his trial and are present now." (Id. at p. 1, IRICK 907).

Dr. Brown also expressed the following opinion regarding petitioner's condition and circumstances at the time of the offense:

> The combination of impaired ability to control behavior, command hallucinations and related paranoid delusions constitutes one of the most severe psychiatric emergencies. In this case there is evidence that he reported on multiple occasions in the weeks prior to his arrest that his behavior was being controlled by the devil, that police were coming to kill him and that he had to take action to save himself. This coincided with a dramatic impairment in hygiene and self care. He was observed planning to attack or chasing other individuals with a knife. Chasing a total stranger down the street while screaming and brandishing a machete is not only consistent with other reported symptoms but clearly demonstrates a severe, acute incapacity to control behavior.

(Id. at p. 23, IRICK 929).

PRIOR EVALUATIONS:

Dr. Brown notes that the situation concerning petitioner is not one where the examiners "failed to connect the dots" but rather was a situation where several critical pieces of the puzzle were missing. (Id. at p. 19, IRICK 925). In characterizing the information provided by the three Jeffers family members, Dr. Brown states:

> In the final stages, several adults who lived with him [the Jeffers] reported evidence of the most severe and dangerous, psychotic symptoms: command hallucinations of violence accompanied by persecutory delusions.[18]

(Id. at p. 13, IRICK 919).

---

[18]Dr. Brown further states, "Auditory hallucinations can take a variety of forms. The most potentially dangerous are 'command' sounds or voices that the patient believes cannot be resisted." (Id. at p. 22, IRICK 928).

He predicts that had the previous examiners been provided the information found in the Jeffers and Inez Prigmore affidavits, they would have dramatically altered their conclusions and recommendations. In his opinion, they would have certainly recommended, "at a minimum," psychiatric hospitalization for close assessment and evaluation. (Id. at p. 20, IRICK 926). He further states:

> It is important to remember that rather than claiming a psychiatric illness, Mr. Irick consistently denied psychiatric disturbance. In the absence of the information from the Jeffers family, they [the previous examiners] were left with a hostile and unsympathetic individual who denied any significant psychiatric symptoms and evidently claimed to be unable to remember the events in question.

Id.

Finally, Dr. Brown notes that there have been advances in neuropsychological testing allowing for dramatically improved evaluation of executive functional capacities of individuals such as petitioner. (Id.)

CONCLUSIONS:

Concluding to a reasonable degree of medical certainty, Dr. Brown states:

> There is insufficient information to conclude that Mr. Irick was capable of forming specific intent in the commission of his offense, as defined by Tennessee statute. There is evidence of severe mental illness at the time of the offense and his sanity at the time cannot be established beyond a reasonable doubt.
>
> Specifically, the weight of the available information indicates that Mr. Irick, more likely than not, lacked substantial capacity either to appreciate the wrongfulness of his conduct or to conform that conduct to the requirements of the law due to a severe mental illness. It is more likely than not that he lacks substantial capacity to appreciate the wrongfulness of his acts.
>
> Neuropsychological testing and developmental history indicate that the claimant has severe deficits in his capacity to premeditate, appreciate, make judgments or conform his behavior. It is more likely than not that these deficits have been present since childhood and have continued unchanged throughout his adult life. Test results are

> approximately consistent with those of a seven to nine year child. His severe impairments would have existed continuously from childhood and have been present both at the time of the offense and at the time of his trial and are present now.

(Id. at p. 1, IRICK 907).

Similarly, Dr. Tennison, after being provided with the Jeffers' information, disputed the validity of his own competency screening performed in 1985, stating that it was "incomplete and therefore inaccurate" since his original opinion had been based on a woefully inadequate and/or incomplete personal history. He found the three Jeffers affidavits would have altered the course of his assessment, "most likely resulting in a referral for inpatient completion of the court ordered evaluation." (Affidavit of Dr. Tennison, ¶ 6, p. 2, IRICK 897). Dr. Tennison found the newly discovered evidence included examples of "paranoid delusional thinking" and references to auditory hallucinations, both command and conversational in nature, that had never previously been reported to him. Id. at ¶ 7. In paragraph 9 of his affidavit, Dr. Tennison states:

> While I have had no opportunity to interview Mr. Irick since April 30, 1985, the information contained within the attached affidavits (Exhibits 2 - 4) raises a serious and troubling issue of whether Mr. Irick was psychotic on the date on the date [*sic*] of the offense and at any previous or subsequent time. This historical information would have been essential to a determination of the role of a severe mental illness - a mental disease or defect - in his ability to have appreciated the nature and wrongfulness of his behavior, and therefore to the formation of an opinion with regard to support for the insanity defense.

Dr. Blackerby and Dr. Nickerson, when shown the *habeas* evidence, opined that petitioner was probably psychotic at the time of the offense and at the time of trial and urged further testing. (IRICK 868-69, 875-76). The *habeas* evidence has now been shared with four mental health experts, three of whom opine that petitioner was psychotic during all relevant times and the fourth, Dr.

Tennison, who states that the issue is "serious" and "troubling" and disputes the validity of his own screening examination and opinion performed in 1985. (IRICK 898).

In other words, there is now reliable and compelling new scientific evidence in the form of medical opinions of petitioner's insanity at the time of the offense and at his trial. Dr. Brown's diagnoses and conclusions make the necessary connection between the circumstantial evidence of petitioner's irrational and dangerous behavior and new scientific evidence in the form of medical diagnoses which allows this court to grant him relief based on his insanity at the time of the offense as well as during his trial.

II. Petitioner has been denied a full and fair hearing as to the issue of sanity and, therefore, his conviction and execution violate due process.

With no jury or court having considered the newly arising evidence of insanity, petitioner was deprived of a full and fair hearing since the issue has never been considered on the merits after a full and fair hearing.[19] A "full and fair hearing" never occurred because (1) none of the *habeas* evidence was considered by the jury or reviewed by mental health experts involved or consulted during the

---

[19] The post-conviction statute in force when petitioner first applied, T.C.A. Section 40-30-112 (Acts 1967, ch. 310, § 10; 1971, ch. 96, § 3; T.C.A., § 40-3811), provided, *in part*:

> When ground for relief is "previously determined" or "waived."
>
> (a) A ground for relief is "previously determined" if a court of competent jurisdiction has ruled on the merits after a full and fair hearing.

In addition to Section 40-30-112 of T.C.A. (1989), T.C.A. Section 40-30-115, provided in part:

> (a) The court may grant leave to withdraw the petition at any time prior to the entry of the judgment, may freely allow amendments and shall require amendments needed to achieve substantial justice and a full and fair hearing of all available ground for relief.

case; and (2) the post-conviction trial court erroneously ruled that none of the psychological testimony presented in that proceedings was competent because Dr. Auble had only examined the petitioner after the offense and therefore presumably could not opine as to his mental health at the time of the offense. Both bases are discussed more fully below.

During the guilt/innocence phase of petitioner's trial, no evidence was introduced which had any bearing on petitioner's mental state. During sentencing, mitigation evidence was introduced through Ms. Lunn, but the most proximate evidence introduced which related to petitioner's mental state was dated March 7, 1967, when petitioner was eight (8) years old. While one or more examiners diagnosed petitioner with a psychotic disorder as a child, neither Ms. Lunn nor any of the other examiners consulted by trial counsel had the benefit of the *habeas* evidence or any other evidence of similar substance or gravity. Therefore the jury was deprived of the most relevant and important evidence that might have been considered in the whole case since the issue of guilt (the defense being one of questionable identity of the perpetrator) had little evidentiary support.

At post conviction proceedings, the trial court refused to consider evidence as to petitioner's mental state on the grounds that petitioner's expert witness, Dr. Pamela Auble, had examined the petitioner only after the offense and therefore could not opine as to his mental state which existed before such examinations. Nevertheless, Dr. Auble's proffered testimony was limited to a personal history that included medical records ending on the date of petitioner's discharge from Eastern State on March 2, 1973 at the age of fourteen (14), U.S. Army records from November 1975 when petitioner was seventeen (17) and petitioner's own recollection which included *none* of the *habeas* information.

Without considering the *habeas* evidence, which was the most proximate and probing evidence of petitioner's mental condition, the issue of insanity could not have been the subject of a full and fair hearing. Therefore, petitioner should be allowed a hearing on the issue of insanity - an issue yet to be litigated and decided on its merits. *See*, Swanson v. State, 749 SW2d 731 (Tenn. 1988). Petitioner submits that evidence of his insanity/mental state is very compelling and would result in a different verdict considering such factors as his long-trusted relationship with the family, his affection for the victim, the absence of other criminal behavior, and the bizarre nature of his behavior.

Petitioner has not "knowingly and understandingly" failed to present the issue of insanity for determination in any proceeding before a court of competent jurisdiction.

The "old" post-conviction statute which would still govern, in part, any motion to reopen, provided that a claim is only waived if the petitioner knowingly and understandingly failed to present it. In relevant part, the statute stated:

> 40-30-112. When ground for relief is "previously determined" or "waived."
>
> (b)(1) A ground for relief is "waived" if the petitioner knowingly and understandingly failed to present the issue for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented.

Since the petitioner has told undersigned counsel that he has no recollection of the *habeas* evidence and the source of the evidence came from three unsympathetic members of the victim's step-family, the petitioner did not and could not have *personally* "knowingly and understandingly" waived the issue. Furthermore, the mental incompetence of a petitioner can toll the statute of limitations period for filing post-conviction proceedings. See State v. Nix, 40 SW3d 459, 463 (Tenn. 2001), where it was held that due process requires tolling of the statute of limitations where petitioner shows that he is unable either to manage his personal affairs or to understand his legal rights and liabilities.

Incompetence, sufficient to toll the statute of limitations, is evidenced by petitioner's psychosis which prevented him from understanding his own mental disturbances, the nature and scope of the insanity defense, and his rights in regard to a finding of insanity. Petitioner steadfastly refused to consider himself insane[20] and, further, refused to cooperate with his mental health examiners. Petitioner was often openly hostile and sarcastic to mental health professionals. For instance, and as stated above, Dr. Tennison testified regarding his "impaired judgment":

> ...I'm there, primarily, to see whether or not there is evidence to support an insanity defense. And the defendant has every opportunity to give me some evidence along those lines and did not. In fact, he was very hostile, very mocking, very sarcastic, very pejorative. And in one sense of the term, when someone is there to try to help you out a little bit, to mock them, and mimic them, and put them off is not extremely good social judgment.

Similarly, Drs. Oglesby and Auble found the petitioner to be hostile and/or uncooperative though it would have been in his "best interest" to cooperate or feign insanity. Dr. Brown found that throughout his testing and examination, the petitioner showed no signs of malingering. In fact, the petitioner has *minimized* his deficiencies and has steadfastly refused to believe or to assert that he was insane. (IRICK 917). He has been consistently hostile to mental health examiners and providers throughout his life, including during his incarceration at the Riverbend facility.

Furthermore, the failure of previous counsel to discover the *habeas* evidence does not constitute a waiver made "knowingly and understandingly" by the petitioner. Petitioner's trial and post conviction attorneys investigated his mental state and had him evaluated by several mental health experts. The failure of these earlier experts to detect petitioner's psychosis however is directly related

---

[20] During post conviction proceedings, petitioner testified that he did not want to utilize an insanity defense. (P.C. Testimony, p. 49, IRICK 912).

to the deficient personal history available to them.[21] As previously explained, Dr. Peter Brown in his report stated that the previous examiners had not "failed to connect the dots. Rather, they were faced with a puzzle in which several critical pieces were missing." He further opines that had previous examiners been provided with the information discussed above, their conclusions and recommendations would have been "dramatically altered." (IRICK 926).

In this regard, several unfortunate but significant circumstances prevailed. First, and as discussed above, the petitioner himself was an unreliable source of information. In addition to the reasons stated above, Dr. Brown found that because of petitioner's deficits in verbal fluency, his ability to communicate in "back and forth" conversations is severely impaired and that he has difficulty in discussing events "that are not immediately in front of him (e.g. giving descriptions of any extended past events.)" (IRICK 919).

Second, the petitioner's family was uncooperative and openly hostile to the client. In fact, his mother seems to have been consistently in favor of his execution. When approached by petitioner's trial attorneys, petitioner's mother stated that, if found guilty, he should be executed. When inquiries were made by Dr. McCoy, petitioner's mother stated that she did not care what happened to her son. During federal *habeas* proceedings, petitioner's mother, upon being subpoenaed for a limited deposition, stated in effect that she hoped the same thing that happened to Paula Dyer,

---

[21] In the federal *habeas* proceedings, undersigned counsel included within their grounds for relief, the claim that trial and post-conviction counsel had been ineffective for failing to discover the *habeas* evidence. The federal courts denied the claim without ruling on the merits. Nevertheless, petitioner claims that the standard for ineffectiveness differs from the "knowingly and understandingly" standard of T.C.A. §40-30-112 (1989). Specifically, petitioner asserts that the knowingly and understandingly standard as interpreted by such cases as Swanson is a more forgiving standard and would not prevent the introduction of such evidence where previous counsel acted in good faith and was "reasonably diligent," especially when faced with the obstacles as described above. Finally, petitioner states that it is not inconsistent for him to argue that there has not been a waiver by previous counsel since the ineffective assistance of counsel claim was never ruled upon on its merits.

happened to one of the *habeas* counsel's children, in other words, *that one of his children would be raped and killed.* On one or more occasions, petitioner's mother has also stated that one of the *habeas* counsel was talking to her through her television and wanted nothing more to do with him. Petitioner's brother also threatened *habeas* counsel with physical harm if they "got him off."

Clearly, previous counsel were deprived of a valuable resource of information concerning petitioner's life history and mental state. Furthermore, and as argued below, petitioner was not competent to aid in his defense, *especially* when it came to his underlying mental condition. Even to this day, petitioner does not recall and denies participating in the events described in the *habeas* discovered evidence.

Petitioner's death sentence invokes his fundamental right to life and therefore the constitutional guarantee of due process prohibits his execution without a full and fair hearing regarding his sanity.

In determining whether due process prohibits strict application of post-conviction statute of limitations for claims arising after the limitations period would have normally run, a court must (1) determine when the statute of limitations would normally begin to run, (2) determine whether grounds for relief actually arose after the limitations period would normally have commenced, and (3) if the grounds are "later-arising," determine if, under the facts of the case, a strict application of the limitations period would effectively deny the petitioner a reasonable opportunity to present the claim. Crawford v. State, 151 S.W.3d 179, 183 (Tenn.Crim.App. 2004). "Later arising" claims are not subject to a "bright-line" determination but instead are subject to a case-by-case analysis of whether the petitioner was denied "a reasonable opportunity to have the issue heard and litigated." Wright v. State, 987 SW2d 26, 30 (Tenn. 1999). *See* also, O'Donnell v. State, 905 SW2d 951, 952 (Tenn. 1993) in regard to repealed T.C.A. §40-30-102. For all the reasons stated above, especially in the

previous section, petitioner did not have a "reasonable opportunity" to have the issue heard and litigated. In addition, petitioner refers the court to the next section which describes the various reasons why the state should be estopped from enforcing the statute of limitations. Those facts and legal arguments contained therein are also incorporated here by reference.

When a petitioner's life is at stake, the Tennessee Supreme Court frames the question not as one concerning the right to attack a conviction but instead as one involving a fundamental right to be free from unconstitutional punishment. Howell v. State, 151 SW3d 450, 462 (Tenn.2004). Recognizing that while the State has no duty to enact post-conviction procedures, nevertheless, the "fundamental right of due process" is an "over-arching" issue affecting post-conviction proceedings. Id. at 461. In ensuring due process to a petitioner, the court stated:

> What exactly is required in order to comply with due process in any given situation is often a difficult question. See Seals v. State, 23 S.W.3d 272, 277 (Tenn.2000) (stating that "Due process is flexible and calls for such procedural protections as the particular situation demands.") (quoting Phillips v. State Bd. of Regents, 863 S.W.2d 45, 50 (Tenn.1993)). We have recognized that due process requires a defendant have "an opportunity to be heard at a meaningful time and in a meaningful manner," House v. State, 911 S.W.2d 705, 711 (Tenn.1995) (quoting Mathews v. Eldridge, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)). Also, and perhaps most importantly, we recognize that due process "embodies the concept of fundamental fairness." Seals, 23 S.W.3d at 277. at 461.

Id.

While recognizing that the state has a "legitimate and strong interest in the finality of judgements," the court noted "[h]owever, the petitioner's interest is even stronger - his interest in protecting his very life." Id. at 462. Under the circumstances of this case, procedural due process requires that petitioner be afforded an opportunity to litigate the issue of his sanity for the reasons state above as well as those that follow.

The State should be estopped from enforcing any relevant statute of limitations.

(a) The State failed to timely produce information evidencing petitioner's contemporary insanity in 1988.

As previously stated, the State in October of 1988, when petitioner's case was yet to be decided by the Tennessee Supreme Court on appeal from the original trial, withheld or failed to produce petitioner's Initial Classification Psychological Summary which included the following:

> This inmate's Carlson Psychological Survey Profile did not fit any of the type categories and has not yet been identified. He did, however, score at very high level in the thought disturbance and self-depreciation scales. The thought disturbance scale reflects "disorganization of thinking, confusion, perceptual distortions and hallucinations, and feeling of unreality. These traits may manifest themselves in unusual affect, including anxiety. High scorers on this scale are indicating unusual problems in dealing with reality because they cannot organize themselves or the work around them.

(IRICK 278).

The State's failure to turn over this important document was not discovered until *habeas* counsel requested a record update from Riverbend in December of 2009. Yet had it been turned over as requested in October of 1988, previous counsel would have had valuable mental health information as well as an opportunity to timely raise a claim of insanity in original or post-conviction proceedings as is being brought in this pleading. Bearing in mind the importance of the issue and the State's own role in delaying the presentation of this issue, it should be estopped from invoking the statute of limitations.

(b) The trial court should have declared a mistrial and therefore substantial justice requires that petitioner be allowed to a full and fair hearing as to the issue of insanity and that the state should be estopped from invoking the statute of limitations as a procedural bar.

Finally, the issue of whether petitioner's failure to take into consideration the rights of others was a result of an "unwillingness or an inability" in regard to the previous (and erroneous) diagnosis of "anti-social personality disorder" had been discussed by Dr. Tennison, a witness for the state, and the trial judge, John J. Duncan, Jr., during the sentencing phase of the trial. In response to Judge Duncan's inquiry as to this issue, Dr. Tennison stated:

> That's the problem with personality disorders right there is that we are not able, in any scientific way - using any measures that can hold up to decide whether or not these kinds of personality traits are due to an inability or an unwillingness. There's no way to know. There are very strong theories for both sides, but it makes no different with regard to treatment...no one knows as far as I'm concerned.

While trial counsel had withdrawn petitioner's insanity defense, nevertheless, petitioner contends that Dr. Tennison, having testified that "no one" knows whether petitioner had the ability to "take into consideration the right of others" and conform his behavior to the law, the trial judge should have declared a mistrial based on the issue of insanity based on the criteria enunciated in Graham v. State. Respectfully, this issue constitutes a second grounds for estoppal.

III.

Petitioner's severe mental illness should preclude his execution.

The third basis for commutation raised by petitioner is the uncontroverted evidence of his longstanding severe mental illness. Even the state's own mental health expert at trial, Dr. Clifton Tennison, now doubts that petitioner was competent at the time of the offense or at his trial. Furthermore, Dr. Brown has found that his mental illness has existed since at least the first extant medical records, beginning at age six until the present. At least one psychological evaluation from Riverbend also confirms a high level of thought disturbance reflecting "disorganization of thinking, confusion, perceptual distortions, and hallucinations, and feeling of unreality."

In 2001, the United States Supreme Court held that the Eighth Amendment's ban on excessive and cruel and unusual punishment prohibited execution of individuals who suffer from mental retardation. Atkins v. Virginia, 536 U.S. 304 (2002). The court found:

> A claim that punishment is excessive is judged not by the standards that prevailed in 1685 when Lord Jeffreys presided over the "Bloody Assizes" or when the Bill of Rights was adopted, but rather by those that currently prevail. As Chief Justice Warren explained in his opinion in Trop v. Dulles [citation omitted]: "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man...the Amendment must draw its meaning from the evolving standards of decency that marked the progress of a maturing society." [citation omitted] Id. at 311 -312.

The court concluded that mentally retarded persons frequently know the difference between right and wrong, but because of their impairments, they have diminished capacities "to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses and to understand the reaction of others." Id. at 318. Based on these findings, the court concluded that mentally retarded persons do not want an exemption from criminal sanctions; however, their mental states do diminish their personal culpability. Id.

Three years after Atkins, the Supreme Court banned execution of juveniles in Roper v. Simmons, 543 U.S. 551 (2005). Reasoning much as it had in Atkins, the court held that executing juveniles violated the ban against cruel and unusual punishment.

Subsequent to Atkins and Roper, a number of courts and commentators have found that the same rationale should apply with equal force to those individuals who suffer from a severe mental illness. *See*, e.g., State v. Ketterer, 855 N.E.2d 48 (2006); (Lundberg Stratton, J., concurring "Deterrence is of little value as a rationale for executing offenders with severe mental illness when they have diminished impulse control and planning abilities."); People v. Danks, 82 P.3d 1249 (2004);

Bryan v. Mullin, 335 F.3d 1207 (10th Cir. 2003); State v. Nelson, 803 A.2d 1 (2002); Corcoran v. State, 774 N.E.2d 495, 502-503 (2002).

In this vein, petitioner argues that there is no substantive difference between the execution of the mentally retarded or juveniles and the execution of people with mental illness such as himself who suffers from delusions, command hallucinations, and disoriented thought processes. Dr. Brown has found petitioner's functional capacity to be that of a seven to nine year old child and has further found that petitioner has diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from mistakes, to engage in logical reasoning, to control impulses, and to understand the reaction of others, just as found to be "mentally retarded" and protected under Atkins and the Eighth Amendment. (See above, especially pages 38-40). When under stress, testing indicates a significant drop in IQ and he is caught in a "vicious cycle" in a plummeting ability to reason or control his behavior. (See, IRICK 8, 917-919). He submits that his position is consistent with and supported by Atkins and Roper and constitutionally prohibits his execution.

IV.
Petitioner is presently incompetent to be executed.

A prisoner sentenced to death has the right to assert a claim of present incompetency. See Ford v. Wainwright, 477 U.S. 399 (1986); Panetti v. Quarterman, 551 U.S. 930 (2007); and Van Tran v. State, 6 S.W.3d 257 (Tenn. 1999). By this pleading, petitioner now raises his claim of present incompetency to be executed under the Eighth Amendment to the United States Constitution, the Tennessee Constitution, and the common law of the state Tennessee. Pursuant to this court's

instructions in Van Tran, *supra*, petitioner states that the following physicians are willing and able to examine him for competency to be executed:

Dr. Peter Brown
UNUM Provident
1 Fountain Square
Chattanooga, Tennessee 37402
423/294-8016 (phone)
423/785-2803 (fax)

Clinical services rate: $250.00/hr
Travel rate: $125.00

Dr. Malcolm Spica
220 F. Sanders West Blvd.
Medical Office Bldg. 2
Suite 300
Knoxville, TN 37919
(phone)
(fax)

Clinical services rate: $270.00/hr
Travel rate: $135.00

Furthermore, petitioner states that his claim of present incompetency is made in good faith, grounded in recent psychological testing and examinations performed by Dr. Brown who was engaged by undersigned counsel while petitioner sought review of his federal *habeas* case before the United States Supreme Court. The purpose of said examinations was to review petitioner's mental condition at the time of the offense and at the time of his trial in light of later arising evidence of his insanity discovered during the federal *habeas* proceedings. Nevertheless, Dr. Brown's report, along with the other evidence of severe mental illness found in this pleading, support a threshold finding that petitioner is presently incompetent to be executed.

For instance, Dr. Brown's report describes the petitioner as presently suffering from a severe mental disturbance with both genetic and environmental origins. Historical records indicate that the birth of the petitioner was troubled and that petitioner may have suffered from "cerebral anoxia" with several medical records from petitioner's childhood reporting a concern with resulting "organic brain damage." (See Report of Dr. Brown, pp. 2,11, 25, IRICK 908, 917, 931). Medical records also confirm a history of "chronic and severe psychiatric disorder" in petitioner's family, including his mother, who had a long history of psychiatric disturbance and treatment, as well as an aunt or cousin.

Among the findings relevant to show petitioner's good faith claim is Dr. Brown's finding that petitioner's psychiatric test results "fall within the floridly impaired range and equivocally meet the criteria for [cognitive] disorder." (*See* Id. at p. 23, IRICK 929.) Dr. Brown also reports:

> If personality or emotional and social development is compared to intellectual impairment, then he can reasonably be considered to be 'socially and emotionally retarded' with a functional level corresponding generally to those of a seven to nine year old.

(Id. at p. 26, IRICK 932).

While Dr. Brown's testing was not intended, *per se*, to determine the issue of whether petitioner is currently competent to be executed, nevertheless, Dr. Brown's report and many of his findings demonstrate this petitioner's good faith and the merit of his claim of present incompetency to be executed. Dr. Brown's *present* diagnoses include: (1) cognitive disorder; (2) psychotic disorder; (3) paranoid personality disorder; and (4) schizoid personality disorder. (Id. at p. 20, IRICK 926). Dr. Brown's test results, for the first time, substantiate that petitioner suffers from identifiable "mental illnesses." (Cf. Dr. Tennison's trial testimony where he stated that petitioner suffered from a

personality disorder which is not considered a "mental illness but can serve... as the context in which other mental illnesses might take place." See p. 13 above).

Therefore, with presently undisputed evidence of psychotic and cognitive disorders, petitioner has met any applicable threshold to obtain a hearing on his present competency to be executed as articulated in Ford v. Wainwright and expanded in Panetti v. Quarterman. Petitioner also takes this opportunity to insist that Panetti has necessarily expanded the definition of incompetency as set out in Van Tran, which held:

> Under Tennessee law, a prisoner is not competent to be executed if the prisoner lacks the mental capacity to understand the fact of the impending execution and the reason for it. Id. at 266. As stated in Panetti: We likewise find no support elsewhere in Ford, including in its discussions of the common law and the state standards, for the proposition that a prisoner is automatically foreclosed from demonstrating incompetency once a court has found he can identify the stated reason for his execution. A prisoner's awareness of the state's rationale for an execution is not the same as a rational understanding of it. Ford does not foreclose inquiry into the latter. Panetti, 551 U.S. at 959.

Furthermore, with such differences of competency to be executed standards throughout the country, petitioner states that his execution would violate due process/equal protection as articulated in Furman v. Georgia, 408 U.S. 238 (1972) if he were to be executed when, in a different jurisdiction, he would not.

CONCLUSION

Based on the foregoing, petitioner prays that this court defer setting any execution date; consider his pleadings and exhibits, and find "extenuating circumstances" warranting a commutation of his sentence of death, and/or in the alternative, that the court order hearings and appropriate procedures to determine petitioner's present competency to be executed.

SPEARS, MOORE, REBMAN & WILLIAMS

By: _____

C. Eugene Shiles, Jr., BPR #011678
P. O. Box 1749
Chattanooga, TN 37401-1749
(423) 756-7000

Howell G. Clements by _____

Howell G. Clements, BPR# 001574
1010 Market Street, Suite 404
Chattanooga, TN 37402
(423) 757-5003

Attorneys for Petitioner

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and exact copy of this pleading has been served on counsel for all parties at interest in this cause addressed as follows:

(615/532-7791)
James E. Gaylord
Assistant Attorney General
P.O. Box 20207
Nashville, TN 37202

This 27 day of May, 2010.

SPEARS, MOORE, REBMAN & WILLIAMS

By: _____

F:\Library\users\CLIENTS\129555\0001\response execution 05-17-10.wpd