

Petition, filed June 28, 2010.¹

The statutes governing motions to reopen were summarized in Harris v. State, 102 S.W.3d 587, 590-91 (Tenn. 2003).

Under the provisions of the *Post-Conviction Procedure Act*, a petitioner “must petition for post-conviction relief ... within one (1) year of the final action of the highest state appellate court to which an appeal is taken” Tenn. Code Ann. §40-30-202(a)². Moreover, the Act “contemplates the filing of only one (1) petition for post-conviction relief.” Tenn. Code Ann. §40-30-202©. After a post-conviction proceeding has been completed and relief has been denied, ... a petitioner may move to reopen only “under the limited circumstances set out in 40-30-217.” Id. These limited circumstances include the following:

(1) The claim in the motion is based upon a final ruling of an appellate court establishing a constitutional right that was not recognized as existing at the time of trial, if retrospective application of that right is required. Such motion must be filed within one (1) year of the ruling of the highest state appellate court or the United States Supreme Court establishing a constitutional right that was not recognized as existing at the time of trial; or

(2) The claim in the motion is based upon a final ruling of an appellate court establishing that such petitioner is actually innocent of the offense or offenses for which the petitioner was convicted; or

(3) The claim in the motion seeks relief from a sentence that was enhanced because of a previous conviction and such conviction in the case in which the claim is asserted was not a guilty plea with an agreed sentence, and the previous conviction has subsequently been held to be invalid, in which case the motion must be filed within one (1) year of the finality of the ruling holding the previous conviction to be invalid; and

(4) It appears that the facts underlying the claim, if true, would

¹Although filed on June 28, 2010, this motion to reopen was transferred from Division II to Division I of this Court by order dated July 8, 2010. In addition, the Petitioner has filed a petition challenging his competency to be executed pursuant to Van Tran v. State, 6 S.W.3d 257 (Tenn. 1999).

²Now Tenn. Code Ann. § 40-30-102.

establish by clear and convincing evidence that the petitioner is entitled to have the conviction set aside or the sentence reduced.

(Citing *Tenn. Code Ann. §40-30-217(a)(1)-(4)*)(now *Tenn. Code Ann. §40-30-117(a)(1)-(4)*).

The statutes further state that

The statute of limitations shall not be tolled for any reason, including any tolling or saving provision otherwise available at law or equity. Time is of the essence of the right to file a petition for post-conviction relief or motion to reopen established by this chapter, and the one-year limitations period is an element of the right to file the action and is a condition upon its exercise. Except as specifically provided in subsections (b) and ©, the right to file a petition for post-conviction relief or a motion to reopen under this chapter shall be extinguished upon the expiration of the limitations period.

Tenn. Code Ann. § 40-30-102(a). As stated above, Tennessee Code Annotated § 40-30-117(a)(2) provides that a motion to reopen may be filed based upon a new scientific evidence establishing that the petitioner is actually innocent of the offense or offenses for which the petitioner was convicted.

This Court finds that the Petitioner's claim that he is not competent to be executed does not satisfy any of the criteria for a motion to reopen a post-conviction action. See Van Tran v. State, 6 S.W.3d 257 (Tenn. 1999).

The Petition also contains allegations that certain mental health records and reports establish that he was not competent to stand trial and could have been used to establish an insanity defense to the charges. He alleges that this "scientific evidence" did not come into existence until April 26, 2010, when Dr. Peter Brown rendered his opinion in the psychiatric evaluation of the Petitioner. As a result, he asserts that he filed this petition within one year of

the discovery of the new evidence. He also asserts that this "scientific evidence" satisfies the "actual innocence" requirement of the statute.

Here, the Petitioner has admitted through filings in this Court that in 1999 he received the factual affidavits from persons which are related to the Petitioner's alleged mental health issues around the time of the offense. After receiving these affidavits and in an effort to secure funding in his federal habeas proceedings for new evaluations, the Petitioner, by and through counsel, developed affidavits from Neuropsychologist William Blackerby and Clinical and Forensic Psychologist Kenneth Nickerson in late 1999 which indicated severe mental health issues on the part of the Petitioner and that these mental health issues differed greatly from the prior diagnosis of the Petitioner close in time to the offense. In addition, Blackerby's affidavit also indicated that the Petitioner would possibly not have been in conscious control of his actions at the time of the offense. No funding was authorized in the federal habeas proceedings.

While the Petitioner claims that this "new" scientific evidence was not available until Dr. Peter Brown's evaluation was provided to counsel in April of 2010, this Court cannot agree. From the record, it appears that the affidavits of the mental health professionals in late 1999 and lay persons who had known the Petitioner at the time of the offense would have started the clock running on the Petitioner's time to file a motion to reopen related to the issue of whether "at the time of the offense, petitioner, because of a severe mental disease or defect, lacked the mental capacity to form the necessary intent to commit the relevant offenses and further lacked the capacity to either appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law."


The Petitioner, through counsel, alleges that the petition was filed within the appropriate

period of time but then further states that if any issue exists in the timing of the petition that the statute should be tolled due to his incompetency. This Court, however, cannot agree based on the record as a whole. This Motion to Reopen was filed on June 28, 2010, over 10 years after the affidavits which this Court finds started the clock on time for the Petitioner to file a motion to reopen. Even if this Court assumed that some tolling period was appropriate, a period of over 10 years, especially when counsel has been involved in the Petitioner's case throughout the 10-year period, exceeds the reasonable opportunity which would be afforded by due process concerns.

The issue of whether the allegations in the Petition qualify as "scientific evidence" or satisfy the "actual innocence" requirement of the statute need not be addressed due to this Court's determination concerning the untimeliness of the petition.

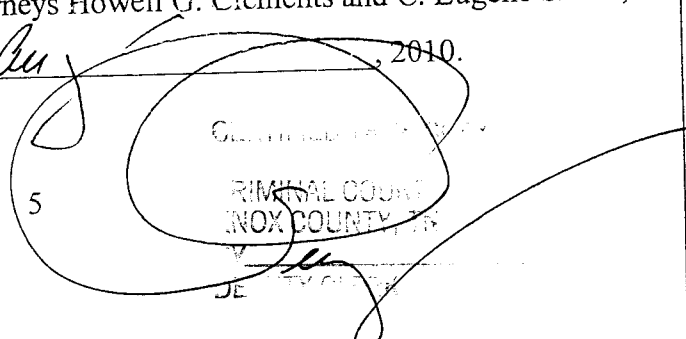
Accordingly, this Court finds that the Motion to Reopen is time barred and is hereby DISMISSED.

ENTERED this the 6 day of August, 2010.


Richard Baumgartner
Criminal Court Judge, Div. I

CERTIFICATE OF SERVICE

I, Scott McGreevey, Clerk, hereby certify that I have mailed a true and exact copy of same to the Petitioner, Attorneys Howell G. Clements and C. Eugene Shiles, and ADA Leland Price this the 18 day of Aug, 2010.

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CRIMINAL COURT
KNOX COUNTY, TN
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