IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

STATE OF TENNESSEE	*	
	*	**M1987-00131-SC-DPE-DD**
Respondent-Appellee	*	
	*	**Trial Court No. 24527**
v.	*	
	*	
BILLY RAY IRICK	*	
	*	**DEATH PENALTY**
Petitioner-Appellant	*	

APPEAL OF KNOX COUNTY CRIMINAL COURT'S JUDGMENT OF COMPETENCY TO BE EXECUTED

BRIEF OF THE PETITIONER-APPELLANT

SPEARS, MOORE, REBMAN & WILLIAMS

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

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

Attorneys for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

JURISDICTIONAL STATEMENT

The Tennessee Supreme Court has jurisdiction to hear this matter pursuant to its own ruling in the case of Van Tran v. State, 6 SW3d 257, 265 (Tenn. 1999).

STANDARD OF REVIEW

The standard of review in this case is whether a reasonable judge, situated as was the trial judge, should have experienced doubt with respect to competency. Clark v. State, 800 SW2d 500, 506 (Tenn.Crim.App. 1990).

STATEMENT OF THE ISSUES

1. Whether the trial court erred in ruling that petitioner's insanity at the time of the offense and associated loss of memory could not, as a matter of law, prevent him from having a rational understanding of the state's reason for sentencing him to death.

2. Whether petitioner's severe mental illness should preclude his execution.

STATEMENT OF THE CASE AND FACTS

Because of the nature of the case, petitioner has combined the "statement of the case" section and the "statement of facts" section, which petitioner's counsel believe are too intertwined to separate. It is counsel's hope that this presentation will actually make the understanding of the long history of both state and federal proceedings and the relevant facts more comprehensible. Petitioner presented a similar section in his response to the state's motion to set an execution date filed with this court earlier this year. References to documents with the prefix "IRICK" can be found in Volumes I and II of "Other Documents."

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)

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).

---

[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).

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" 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

[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.

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, 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] 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.

---

[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).

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 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 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.

(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

---

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

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

---

[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).

continued to treat Billy, explained the decision to place Billy in a residential school, in part, this way, "[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.

(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.

(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. 8), 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).

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). 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 SW2d 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.[8]

---

[8] 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 210, 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?

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 *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

---

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.)

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).[9]

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.

---

[9]Cf., however, Mr. Miller's statement with Dr. Tennison, the state's witness, who performed the forensic competency screening. As quoted above, on page 10, 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).

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.

The Court of Appeals denied post-conviction relief in Irick v. State, 973 SW2d 643 (Tenn. Crim. App. Jan. 14, 1998).[10] Subsequently, a petition for review was filed with the Tennessee Supreme Court. The issues stated in that petition are quoted below:

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).

---

[10]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.

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).

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.[11] (Id.)

---

[11]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).

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. [12] (See IRICK 859, 862, 864). While 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

---

[12]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.

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.[13]

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 Chattanooga psychologists, Dr. Kenneth S. Nickerson and Dr. William F. Blackerby[14] 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 or to administer any tests.

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.

---

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

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

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 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.[15] 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

[15] *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.

> 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.

(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 and 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.

VI. Petitioner's Examination and Diagnosis by Dr. Peter Brown

Beginning in late 2009, *habeas* counsel 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.[16] Subsequently, in November and December of 2009, and still during the pendency of petitioner's federal *habeas* case, Dr. Malcolm Spica administered approximately two dozen psychiatric tests to the petitioner and prepared a report of his findings. (See T Exh. 2, pp. 2-3 for list of tests and scores). 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 906 and admitted as Trial Exhibit 3.

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 Trial Exh. 2, 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).

---

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

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 with "heavy medication," as well as an aunt or cousin. (Id. at p. 25, IRICK 931). (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" and has denied symptoms of mental illness, disparaging those who reported otherwise as "crazy" and/or "lying." (Id. at p. 15, IRICK 921). Dr. Brown found no evidence "whatsoever" of malingering or symptom exaggeration. (Id. at pp.12, 15 and 16, IRICK 918, 921 and 922). Dr. Brown has provided the following 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.[17]

---

[17]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).

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

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.) 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).

VII. Competency Hearing

On May 9, 2010, the state of Tennessee moved to set an execution date. Pursuant to Tennessee Supreme Court Rule 12.4 and T.C.A. §40-27-106, petitioner filed a response with this court requesting a commutation of his sentence and objecting to execution based on his incompetency to be executed. On July 19, 2010, this court denied petitioner's request for commutation and remanded the issue of competency to be executed to the Knox County Criminal Court. (TR 1). Subsequently, petitioner filed a petition to determine competency to be executed on July 22, 2010. (TR 3, *et seq.*). At the same time, petitioner filed a motion for brain imaging tests. (TR 68). The state's response to the petition to determine competency was filed on July 26, 2010 (TR 72) and petitioner filed a reply on July 30, 2010. (TR 80).

On July 30, 2010, the Criminal Court of Knox County, Division I, granted a hearing on the issue of competency to be executed and appointed Dr. Peter Brown on behalf of the petitioner and Dr. Clifton Tennison on behalf of the state to evaluate petitioner's competency. (TR 86). Further, the court granted petitioner's motion for brain imaging tests, setting a deadline of ten (10) days from the entry of the order for the tests to be completed and a report submitted to the court. On August 3, 2010, the petitioner filed a motion to amend or supplement petition to determine competency to be executed by substituting expert and simultaneously filed a notice of filing Dr. William Kenner's *curriculum vitae*. (TR 91 and 100). However, petitioner subsequently struck the motion. (TR 102). On August 6, 2010, the state filed a request to substitute Dr. Bruce Seidner for Dr. Tennison. (TR

107). On August 6, 2010, the court granted the state's request to substitute expert and appointed Dr. Bruce Seidner on behalf of the state of Tennessee to perform a competency evaluation of the petitioner. (TR 105).

Though counsel had arranged for brain imaging tests on Monday, August 9, 2010 and had the petitioner transported from Riverbend Maximum Security Institution to the offices of Dr. David Kessler at Vanderbilt University Hospital, the petitioner suffered from claustrophobia when technicians attempted to perform the imaging tests. (See, TR 103). Therefore, there were no imaging tests performed.

On August 16 and 17, 2010, a competency hearing was held in the Knox County Criminal Court. Petitioner called Dr. Peter Brown who testified that he examined him on December 7, 2009 and January 21, 2010 and further that he relied upon testing performed by Dr. Malcolm Spica in November and December 2009, along with Dr. Spica's report filed as Exhibit 2 to Dr. Brown's testimony. (T, pp. 19-20). Dr. Brown stated that the primary purpose of his examinations at the time had been to determine whether petitioner was competent and/or sane at the time of the offense and not necessarily the issue of competency to be executed. (T, p. 47). However, he testified that his evaluations and time spent with the petitioner had provided him with sufficient information to formulate opinions as to petitioner's mental state, including "the level of rational understanding that [petitioner] reaches." (T, p. 68). It is undisputed that petitioner is not currently receiving psychiatric treatment or medication.

Dr. Brown discussed his four diagnoses, including petitioner's psychiatric disorder which has historically included hallucinations and delusions defined as "fixed beliefs...that are patently false in our culture" though he found no evidence of psychotic episodes since 1985, which occurred at or

near the time of the offense. (T, pp. 23 and 66). According to the testing, petitioner shares many of the same attributes of a person suffering chronic schizophrenia. (T, pp. 36-37). Dr. Brown testified that the hallucinations and delusions experienced by the petitioner were episodic and brought on by emotional conflict. (T, pp. 31-32). He cited the events described in the three Jeffers' affidavits as the best examples of episodic hallucinations experienced by petitioner. (T, pp. 23-24). However, he also testified that the testimony of Kathy Jeffers (Paula Dyer's mother) concerning petitioner's behavior on the day of the offense (which included descriptions of mumbling, and talking to himself when no one was there), Ms. Jeffers' statement to Detective Don Wiser in which she described petitioner as "drunk and talking crazy," petitioner's loss of his job on the day of the offense, and his having been chased out of the Jeffers' home by Linda Jeffers (the step grandmother of the victim) as examples and/or symptoms of emotional conflict capable of triggering an episode of florid psychosis. (T, pp. 40-43).

Dr. Brown testified that one of the effects of florid psychosis with hallucinations and/or delusions is a loss of memory. He said it was very unusual for anyone who experiences a psychotic episode to be able to describe those experiences. (T, pp. 29-30). He explained that hallucinations and/or delusions experienced during psychotic episodes interferes with the "laying down of memories" (T, p. 33) but was not the same as amnesia. (T, pp. 65-66). Instead, the loss of memory is consistent with paranoid psychotic people with florid psychosis who experience "emotional disintegration" which is an extremely painful and "incoherent experience." (T, p. 69). Loss of memory is also associated with "normal" people who experience unusual and/or stressful situations. (T, pp. 69-70).

Dr. Brown testified that from his examinations and questioning of the petitioner, the petitioner has no recollection or memory of the offenses (T, p. 45) and steadfastly denies guilt. (See, Trial Exh. 2, p. 16, or IRICK 922, where petitioner is quoted as stating, in part, "It is just not in me to do this.") What understanding he does have of his current circumstances Dr. Brown states is on the level of a seven to nine year old child. (T, p. 45). Dr. Brown testified that he was confident the petitioner was not malingering or faking symptoms. In fact, petitioner consistently denied mental illness (T, p. 71) and denigrated others who said otherwise, referring to them as "crazy" or "lying." (Trial Exh. 2, p. 15 or IRICK 921).

The state's only witness was Dr. Bruce Seidner. Dr. Seidner testified that he had evaluated petitioner only for issues of present competency and therefore did not and/or could not have any opinions, for instance, regarding Dr. Brown's conclusions as to petitioner's mental state at the time of the offense. (T, pp. 117-118). However, Dr. Seidner described the petitioner as "very disturbed, dis-inhibited and out of control" as a child and having long suffered from "major psychiatric illness and substance abuse" during the rest of his life. (T, pp. 96 and 120). He described the petitioner as "entirely cooperative" and using his "best effort." (See p. 99). Petitioner had "no hesitation" consenting to the evaluation and, according to Dr. Seidner, knew and articulated the purpose of the evaluation. (T, p. 100). In his report, Dr. Seidner generally described the petitioner this way:

> While Mr. Irick is currently stable and does not demonstrate any cognitive or affective defects that impair his functional abilities or competence, his history of conduct problems and mental illness is well documented. The stability and consistency of prison life has allowed him to develop control over the affect storms dissociative experience, and psychiatric disorders that clearly drove the majority of his pre incarceration living.

(Trial Exh. 6, p. 5).

Dr. Seidner further testified there was "no question" that petitioner had experienced "command hallucinations" and "persecutory hallucinations" in the past as recounted in the Jeffers' affidavits. (T, pp. 129-130). He stated that because of petitioner's psychiatric condition, he was susceptible to being overwhelmed and impulsive when not in a structured and relatively solitary environment without obligations. (T, p. 120). He further concluded that petitioner had experienced dissociative episodes which he defined as "...where an individual is conscious and behaving, but has no *self-experience* of that period of being conscious and behaving." (T, p. 136). Dr. Seidner confirmed that the victim of such dissociative episodes would have no memory of them. Id. He concurred with Dr. Brown that there was no evidence of malingering or faking. (T, pp. 99-100, 111). He also found, as did Dr. Brown, that petitioner avoided referring to himself as mentally ill and further denied experiencing hallucinations. (T, pp. 99, 115 and 122).

Dr. Seidner testified that in his opinion, petitioner was competent to be executed based on his knowledge that he was condemned to be executed and that the state's reason for condemning him to death was the rape and death of Paula Dyer. Nevertheless, he testified that the petitioner continued to deny his guilt. (T, pp. 103-104). He stated that under the applicable legal standards, the petitioner did not have to accept his own involvement in the offense to be found to be competent to be executed. (T, pp. 134-136).

SUMMARY OF THE ARGUMENT

It is contended that the petitioner, at the time of the relevant offenses against Paula Dyer, was experiencing a psychotic episode with hallucinations and/or delusions and that he has no memory of the offenses themselves or his role in them, a position which is consistent with current medical understanding of psychotic/dissociative episodes. Furthermore, it is contended that petitioner's general understanding of his pending execution is limited because of his emotional and social functioning at the level of a seven to nine year old child. Regardless of his relative present "competency," the petitioner does not, and cannot, have a rational understanding of his pending execution because he has no memory of the offenses, does not believe that he committed them, and has the emotional and social functioning of a child and, therefore, is not competent to be executed. In the alternative, it is contended that petitioner, because of his undisputed lifelong mental illness, should not be executed consistent with the evolving standards of human decency and seminal cases, such as Atkins and Roper.

ARGUMENT

Issue One: The trial court erred in ruling that petitioner's insanity at the time of the offense and associated loss of memory could not, as a matter of law, prevent him from having a rational understanding of the state's reason for sentencing him to death.

As stated above, the basis for petitioner's claim that he is incompetent to be executed is his insanity at the time of the offense, the associated memory loss of those events, and his emotional and social functioning at the level of a seven to nine year old child. As a consequence, petitioner lacks to ability to rationally understand the events occurring during those episodes and, therefore, the reason for his execution.

Dr. Brown's conclusions regarding petitioner experiencing a severe psychotic episode with hallucinations at the time of the offense are substantiated by eyewitness accounts of reliable, unsympathetic witnesses leading up to the day of the offense, as well as the victim's mother's account of petitioner's behavior within an hour, more or less, before Paula's death. The first eyewitness accounts are from the decedent's step family who testified under oath that petitioner in the days (or at most, a week or so before the offenses) was hearing voices, responding to voices, talking to the devil, taking directions from "the voice," speaking irrationally about wanting to kill people, chasing a young girl down a Knoxville public street in broad daylight while threatening her verbally and with a machete, and threatening to kill his best friend, Kenneth Jeffers, while both of them resided in the victim's step grandparents' home. As with the offenses against Paula Dyer, petitioner denied memory of the events recounted in the Jeffers' affidavits. (Exh. 2, p. 15, third full paragraph, or IRICK 921). As already alluded to above, Kathy Jeffers (Paula's mother) described the petitioner as mumbling to himself and as "drunk and talking crazy" just before Paula's death - also consistent with the

behavior described in the Jeffers' affidavits and someone experiencing a psychotic episode. (See, pp.37- 38 above).

Furthermore, both Dr. Brown and Seidner testified that petitioner had experienced psychotic episodes at or near the time of the offenses against Paula Dyer and that a result and/or characteristic of such episodes is a consequent loss of memory of the event. Dr. Brown both in his report and during the hearing, testified that petitioner had no memory of the offenses against Paula Dyer. (T, p. 45, T Exh. 2, p. 16, or IRICK 922). Dr. Seidner also agreed that petitioner would have suffered memory losses during dissociative episodes such as those described in the Jeffers' affidavits. (T, pp. 130 and 136). Both experts reported that petitioner believed he was innocent and falsely accused - again consistent with petitioner's altered or non-existent memory of the actual offenses and his role in them. Under such circumstances, it is respectfully submitted that it would be impossible for petitioner to have a rational understanding of his execution since he has no memory of the offenses, does not believe he committed the offenses, and even his understanding of his execution, such as it is, is at the level of a seven to nine year old child.

In Panetti v. Quarterman, 551 US 930 (2997), the court stated:

> We likewise find no support elsewhere in Ford, including in his 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.

Id. at 933.

It is respectfully submitted that the trial court did, in fact, foreclose inquiry into petitioner's lack of a rational understanding of the reasons for his execution including, as a matter of law, that

his insanity at the time of the offense an associated loss of memory could not prevent him from rationally understanding the reasons for his execution. Though not explicitly stated, the trial court appears to have agreed with Dr. Seidner's response that a capital defendant could have a rational understanding of his execution even though his medical condition deprived him of any memory of the offenses and even though he is firmly convinced of his own innocence. It is that holding that petitioner respectfully asserts is error and in contravention of Panetti.

Issue Two: Petitioner's severe mental illness should preclude his execution.

Another basis for not finding petitioner competent to be executed 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." (IRICK 884).

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 warrant 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 suffer 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 true of the "mentally retarded." 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). Therefore, petitioner submits that his position is consistent with and supported by Atkins and Roper and constitutionally prohibits his execution.

CONCLUSION

Petitioner respectfully prays that this court find the trial court to have been in error when it found him competent to be executed and that this court reverse and remand the case back to the trial court for entry of an order finding petitioner to be incompetent to be executed. In the alternative, petitioner prays that the court hold that his mental illness prohibits his execution.

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

Attorneys for Petitioner