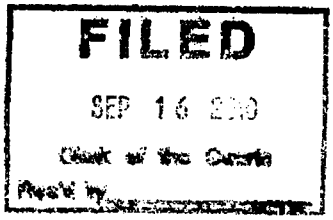
IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

BILLY RAY IRICK v. STATE OF TENNESSEE

Criminal Court for Knox County
No. 36992

No. E2010-01740-CCA-R28-PD



ORDER

The capital Petitioner, Billy Ray Irick, has filed an application for permission to appeal from the order of the Criminal Court for Knox County dismissing as untimely his motion to re-open his prior post-conviction proceeding challenging his convictions and death sentence arising out of the rape and murder of seven-year-old, Paula Dyer. See Tenn. Code Ann. § 40-30-117(c); see also Tenn. S. Ct. R. 28, § 10(B). The State of Tennessee has filed a response in opposition to the application arguing both that the post-conviction court properly determined the motion to have been untimely and that the new evidence claimed to demonstrate the petitioner's insanity at the time of his offenses does not qualify as "new scientific evidence establishing that the petitioner is actually innocent of the offense or offenses for which [he] was convicted." Tenn. Code Ann. § 40-30-117(a)(2). By order entered on July 19, 2010, the Supreme Court of Tennessee directed prison officials to execute the sentence of death on December 7, 2010, "or as soon as possible thereafter within the following twenty-four hours." State of Tennessee v. Bily Ray Irick, No. M1987-00131-SC-DPE-DD, order at 2 (Tenn. July 19, 2010). Upon due consideration of the arguments presented by the parties, together with applicable law, we conclude that the petitioner has not demonstrated that an appeal is warranted.

The Petitioner was found guilty by a jury in 1986 of the aggravated rape by vaginal penetration and aggravated rape by anal penetration of the victim as well as the felony murder of the victim during the perpetration of the two (2) counts of aggravated rape. At the conclusion of a separate sentencing hearing, the jury imposed a death sentence for the felony murder. The Petitioner received two terms of forty (40) years' imprisonment for the aggravated rape convictions, to be served concurrently with one another and consecutively

to the death sentence. On direct appeal, the Supreme Court of Tennessee affirmed these convictions, the sentences imposed for the aggravated rape convictions, and the sentence of death. See State v. Irick, 762 S.W.2d 121 (Tenn. 1988), cert. denied, 489 U.S. 1072 (1989). The Petitioner's timely filed petition for post-conviction relief was denied following a hearing. The denial of relief was affirmed on appeal. See Irick v. State, 973 S.W.2d 643 (Tenn. Crim. App. 1998), *perm. to appeal denied* (Tenn. June 15, 1998), *cert. denied*, 525 U.S. 895 (1998). To date, the Petitioner's efforts to obtain relief in the federal courts has proven unsuccessful. See Irick v. Bell, 565 F.3d 315 (6th Cir. 2009), *cert. denied*, 130 S.Ct. 1504 (2010).[1]

The supreme court's opinion affirming the Petitioner's convictions and death sentence provided the following synopsis of the evidence presented at trial:

> In summary, the State's proof was that Billy Ray Irick was a friend of the child's mother and step-father[, Kathy and Kenneth Jeffers]. He had lived with them for a time, often caring for the five (5) young children in the family while the Jeffers were working. At the time of the incident the Jeffers were separated. Mr. Jeffers and the defendant were living with Jeffers' mother. On the night of the occurrence Mrs. Jeffers left defendant with the children when she went to work. She was somewhat uneasy about this because defendant had been drinking, although he did not seem to be intoxicated. He was in a bad mood because he had been in an argument with Mr. Jeffers' mother earlier in the day. He did not want to keep the children since he planned to leave Knoxville for Virginia that night. Mrs. Jeffers called her husband at the truck stop where he worked to tell him of her fears. He reassured her and said he would check on the children.
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> About midnight Mr. Jeffers received a telephone call from Irick telling him to come home, suggesting there was something wrong with the little girl, saying, "I can't wake her up." When Jeffers arrived at the house defendant was waiting at the door. The child was lying on the living room floor with blood between her legs. After ascertaining she still had a pulse, Jeffers wrapped her in a blanket and took her to Children's Hospital. Efforts to resuscitate her there failed and she was pronounced dead a short time later.

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[1]On August 6, 2010, the Petitioner's federal habeas corpus proceedings were re-opened. See Billy Ray Irick v. Ricky Bell, No. 3:98-cv-666, order (E.D. Tenn. Aug. 6, 2010). However, the order allowing those proceedings to be re-opened does not extend to the claim the Petitioner raised in his state court motion to re-open.

> Physical examinations of her body at the hospital emergency room and during the autopsy were indicative of asphyxiation or suffocation. The cause of death was cardiopulmonary arrest from inadequate oxygen to the heart. There was an abrasion to her nose near one eye and lesions on her right chin consistent with teeth or fingernail marks. Blood was oozing from her vagina, which had suffered an extreme tear extending into the pelvic region. There were less severe lacerations around the opening of her rectum in which semen and pubic hair were found. These injuries were consistent with penetration of the vagina and anus by a penis.

Irick, 762 S.W.2d at 133-34; see also Irick, 973 S.W.2d at 645-646 (quoting from direct appeal opinion).

On June 28, 2010, the Petitioner filed a motion to re-open his state court post-conviction proceeding on grounds that "there exists new scientific evidence that establishes that [he is] actually innocent of the offense or offenses for which [he was] convicted." Specifically, the Petitioner asserted in support of his motion:

> Petitioner seeks to reopen his post-conviction proceedings on the basis of new scientific evidence in the form of psychiatric test results and opinions reported by Dr. Peter Brown. Based upon his examination of the petitioner, and testing data, and his review of facts regarding petitioner's personal history including those facts discovered only during the federal habeas proceedings, Dr. Brown has concluded that, 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. Since at the time of the offense, April 15, 1985, the state was required to establish the petitioner's sanity beyond a reasonable doubt once testimony was introduced raising a question of the accused's insanity, Dr. Brown's report and proposed testimony would establish, by clear and convincing evidence, that the petitioner was not guilty of the offenses and/or the death penalty by reason of insanity. Dr. Brown's report also demonstrates that petitioner is presently incompetent to be executed because his functional capacity is that of a seven to nine year old child and because petitioner is unable to believe/accept his role in the offenses, preventing him from having a rational understanding of the basis for his own execution.

A copy of Dr. Brown's twenty-six (26) page written report of his evaluation of the Petitioner

accompanied the motion. The report is dated April 30, 2010.

In his report, Dr. Brown reached the following conclusions to within a reasonable degree of medical certainty based upon his personal evaluation of the Petitioner and extensive review of documents provided by the Petitioner's federal habeas corpus attorneys:

> 1. 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.
>
> 2. 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 lacked substantial capacity to appreciate the wrongfulness of his acts.
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> 3. Neuropsychological testing and developmental history indicates 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 7-9-year-old 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.

The "severe mental illness" upon which Dr. Brown based his conclusions consisted of a combination of unspecified cognitive, psychotic and personality disorders. Specifically, Dr. Brown diagnosed the Petitioner as suffering from: a cognitive disorder, not otherwise specified; a psychotic disorder, not otherwise specified, that did not constitute schizophrenia, paranoid type; a paranoid personality disorder; and a schizoid personality disorder. Dr. Brown characterized the Petitioner's unspecified psychotic disorder as a condition "for which there is inadequate information to make a specific diagnosis." Dr. Brown acknowledged in his report that "[a] more specific diagnosis cannot be made on the available information." Dr. Brown's conclusion that the Petitioner suffered from an unspecified psychotic disorder at the time of the offense was based primarily upon affidavits obtained in 1999 from Cathy Jeffers, Linda Jeffers and Ramsey Jeffers. Copies of these affidavits from the Jeffers family members accompanied the motion to re-open filed below.

Cathy Jeffers is the sister of Kenneth Jeffers, the step-father of the victim. She asserted in an affidavit dated November 3, 1999, that she had observed the Petitioner in April of 1985 on approximately three (3) or four (4) occasions while he was residing at her parents' residence with her brother. She stated the following in her affidavit:

> Billy Ray Irick continuously mumbled to himself. I remember asking Mr. Irick what he was saying or to whom he was talking too [sic]. I distinctly remember that Billy Ray Irick told me that he was listening and talking to "a voice." He continued by commenting in a stern voice / firm conviction that "the only person that tells me what to do is the voice." I remember that he had a very strange look on his face when he told me about "the voice." Upon hearing this information, I purposely had no further conversations with Mr. Irick about this matter.

She also recounted the following in her affidavit:

> I had slept at my parent's apartment during one evening in April, 1985, when Billy Ray Irick awoke at night, walked and mumbled through the apartment and woke me up to warn me that the police were in the apartment and that they were there to kill us with chainsaws. I told Billy Ray Irick that such was not the case and that he should go back to sleep.

Cathy Jeffers stated in her affidavit that she had never been contacted by anyone associated with the Petitioner's case prior to speaking with the Petitioner's attorneys in July of 1999.

Linda and Ramsey Jeffers are the parents of Kenneth Jeffers. They asserted in affidavits dated November 3, 1999, that they had observed the Petitioner in April of 1985 on several occasions while he was residing at their residence with their son. In both of their affidavits, they stated that "Billy Ray Irick repeatedly said that he did not believe in God" and that he had "repeatedly" told them that he talked every day and night "to the devil and that the devil and/or voices told him what to do." Linda and Ramsey Jeffers both stated in their affidavits that the Petitioner had "repeatedly" told them that his "voices" would "tell him to kill people." Linda Jeffers described as follows in her affidavit what she considered "evidence" of the Petitioner's "voices" telling him to kill people:

> I personally observed that Billy Ray Irick walked through our apartment and mumbled to himself. When I asked him what he was saying or to whom he was talking too [sic], he would answer by stating that he was listening and talking to his "voices."

Sometime immediately before April 15, 1985, I observed that Billy Ray Irick chased a young girl down Virginia Avenue, holding a machete, screaming that he was going to kill the child. He chased her to a nearby apartment where the child entered and fled for safety. When Billy returned to our apartment, I asked him what he was doing and why he chased the child with a machete? To the best of my recall, he told me that he chased the child with a machete because he wanted to kill her because "I don't like her looks."

I distinctly recall that on several occasions, when I was in the company of Billy Ray Irick at our apartment, he would mumble to himself that he wanted to kill people. He would make these comments about total strangers that happened to walk past our apartment.

Ramsey Jeffers described as follows in his affidavit what he considered "evidence" of the Petitioner's "voices" telling him to kill people:

I personally observed that Billy Ray Irick walked through our apartment and mumbled to himself. When I asked him what he was saying or to whom he was talking too [sic], he would tell me that he was talking to his voices.

Sometime immediately before April 15, 1985, sometime at or before midnight, I stopped Billy Ray Irick in our apartment hallway as he walked mumbling to himself towards my son's bedroom with a long bladed machete in his hand. I asked him what he was doing to which he said, "I'm gonna kill Kenny." I was able to take the machete away from him and stopped him from hurting my son.

Sometime immediately before April 15, 1985, I observed that Billy Ray Irick chased a young girl down Virginia Avenue and he had the same previously mentioned machete in his hand. To the best of my knowledge, he chased her into a nearby apartment and screamed that he wanted to kill her. When I asked him what he was doing, to the best of my recall, Billy told me that he chased the young girl with the machete and wanted to kill her because "I don't like her looks."

I distinctly recall that on several occasions, when I was in the company of Billy Ray Irick at my apartment, he would mumble to himself and then comment that he wanted to kill people. He would make these comments about total strangers that happened to walk past my apartment.

Both Linda and Ramsey Jeffers stated in their affidavits that they had never been contacted by anyone associated with the Petitioner's case prior to speaking with the Petitioner's attorneys in July of 1999.

Dr. Brown explained the importance of these affidavits to his diagnosis in his report:

> The information obtained from the Jeffers' family members (i.e., consistent, multiple third-party observation of psychotic symptoms) constitutes the strongest evidence of possible . . .severe psychiatric illness (i.e., paranoid psychosis). Florid psychotic symptoms such as auditory hallucinations, paranoid delusions and gross impairment in activities of daily living can be reliably identified by non professional observers as being outside of the range of normal function. Such reports are typically used in making diagnoses of severe psychiatric conditions, particularly when confirmed by multiple observers on multiple occasions.
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> . . .
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> 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 the 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 the other reported symptoms but clearly demonstrates a severe, acute incapacity to control behavior.

As set forth in the following summary of his own observations of the Petitioner during his evaluation of him, which consisted of spending approximately six (6) hours with the Petitioner over two (2) days in December of 2009 and January of 2010, Dr. Brown was unable to observe any evidence of the Petitioner's experiencing auditory command hallucinations or active delusions similar to that reported by the Jeffers family members:

> There was no evidence of formal thought disorder. His speech was coherent and goal directed. He was able to answer my questions without florid evidence of disorganization.
>
> Thought content is focused on constant fear of being attacked by others or resentment at previous wrongs.

> For example, when talking of his mother he would frequently refer to their last phone call and say that his parents never told him that he was their child (He says that she refused any further contact with him, saying that she was going to devote herself "to her real kids.") He would add "I've never seen any birth certificate."
>
> When I told him that I had seen his birth certificate and that his attorney had a copy of it, he was not mollified in the least. Rather, this became an example of his mother's lying to him: "She said I didn't have one. She told me I was adopted. She never told me the truth. Why would she say that I am not her real child?"
>
> He reports that his mother has put curses on him with her coven. However "I told her that (i.e. curses) only work against you if you believe. I told her to stop wasting her time."
>
> Any disagreement or confrontation is seen as part of a larger conspiracy against him. For example, he believes that the government has systematically portrayed him as "sub-human," in part to legitimatize his execution but, primarily, to assert its power and his vulnerability. He is not capable of [seeing] his own role in events. He is not able to seriously consider alternative explanations or motives. His beliefs are of near delusional intensity.
>
> There was no other immediate evidence of delusions, hallucinations or other psychotic features. He resolutely denies any auditory hallucinations or other psychotic content. People who have reported that he was seen talking to voices or reported hallucinations in the past are dismissed as "crazy" or "lying."

The only evidence in the Petitioner's medical history, also summarized in Dr. Brown's report, of the Petitioner having reported experiencing auditory hallucinations was his self-report to Dr. Clifton R. Tennison, Jr., M.D., who conducted a pretrial evaluation of the Petitioner on April 30, 1985.

After learning of the information contained within the affidavits from the Jeffers family members, Dr. Tennison opined in an affidavit dated February 25, 2010, that the information contained within the affidavits from these lay witnesses "raises a serious and troubling issue of whether Mr. Irick was psychotic . . . on the date of the offense and at any previous or subsequent time." Dr. Tennison stated in his affidavit the "historical

information" contained within the Jeffers affidavits "would have been essential to a determination of the role of a severe mental illness—a mental disease or defect—in [Mr. Irick's] ability to have appreciated the nature and wrongfulness of his behavior, and therefore to the formation of an opinion with regard to support for the insanity defense." Dr. Tennison opined in his affidavit that knowledge of the Jeffers affidavits "would have altered the course of the assessment" he conducted on the Petitioner "most likely resulting in a referral for inpatient completion of the court-ordered evaluation." A copy of Dr. Tennison's 2010 affidavit accompanied the motion to re-open filed below.

The post-conviction court dismissed the Petitioner's motion to re-open as time-barred. The post-conviction court noted first that the petitioner's claim regarding his competence to be executed had been raised improperly in the motion to re-open. See Van Tran v. State, 6 S.W.3d 257, 264 (Tenn. 1999) (holding that a claim of incompetence to be executed does not "satisfy any of the criteria for re-opening a petition for post-conviction relief"). The post-conviction court then concluded that Dr. Brown's report did not constitute "new" scientific evidence establishing that the petitioner was "actually innocent" of his offenses due to his insanity at the time of the offenses and lack of capacity to form the intent necessary to commit the offenses. The post-conviction court noted that, in 1999, the Petitioner had affidavits from two mental health professionals—specifically, Dr. William F. Blackerby, a neuropsychologist, and Dr. Kenneth S. Nickerson, a clinical and forensic psychologist—that "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." As such, the post-conviction court concluded that the time for filing a motion to re-open based upon the evidence contained within Dr. Brown's report began to run in 1999. The post-conviction court determined that even if it were to assume 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." Given the determination regarding the untimeliness of the motion, the post-conviction court specifically declined to reach "[t]he issue of whether the allegations in the Petition qualify as 'scientific evidence' or satisfy the 'actual innocence' requirement of the statute."

The Post-Conviction Procedure Act of 1995 allows for the re-opening of a closed post-conviction proceeding if:

> (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. The motion must be filed within one (1) year of the ruling of the highest state appellate court or the United States supreme court establishing a constitutional

right that was not recognized as existing at the time of trial; or

(2) The claim in the motion is based upon new scientific evidence establishing that the petitioner is actually innocent of the offense or offenses for which the petitioner was convicted; or

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

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

Tenn. Code Ann. § 40-30-117(a). There is no specific limitations period set forth in this statutory provision for the filing of claims based upon new scientific evidence establishing actual innocence. Moreover, the general statute of limitations applicable to petitions for post-conviction relief is not applicable to claims based upon new scientific evidence establishing actual innocence. See Tenn. Code Ann. § 40-30-102(b)(2). Therefore, it is unclear upon what basis the post-conviction court determined that the claim raised in the motion to re-open was time-barred. However, we need not grant the application and remand for a re-opening of the Petitioner's post-conviction proceedings. Even if the diagnoses and conclusions contained in Dr. Brown's report are accepted as true, the report does not establish that the Petitioner is "actually innocent" of the offense or offenses for which he was convicted.

First, the information contained within Dr. Brown's report cannot establish that the Petitioner lacked the capacity to form the intent necessary to commit his offenses due to a severe mental disease or defect. At best, Dr. Brown concluded only that the Petitioner was incapable of "forming specific intent in the commission of his offense[s]" and that he "has severe deficits in his capacity to premeditate" which were present at the time of the offenses. There is nothing in Dr. Brown's report that would support the conclusion that the Petitioner lacked the capacity to form the intent necessary to commit the offenses for which he was convicted—namely, two counts of aggravated rape and one count of felony murder committed during the perpetration of the aggravated rapes. The felony murder for which the Petitioner was convicted and received the death penalty did not require that he have the capacity to "premeditate" or form a "specific intent" to kill. Instead, the State was required to prove only that the Petitioner recklessly caused the death of the victim during the perpetration of the aggravated rapes of the victim. See State v. Kimbrough, 924 S.W.2d 888, 890 (Tenn. 1996). In addition, the aggravated rapes for which the Petitioner was convicted,

and which constituted the underlying felonies for his felony murder conviction, did not require that the Petitioner have the capacity to form any "specific intent." As the United States Court of Appeals for the Sixth Circuit observed in affirming the denial of federal habeas corpus relief in the Petitioner's case, the aggravated rape statute under which the Petitioner was convicted created only a "'general intent' crime, for which a culpable mental state was necessary, but easily inferable from the conduct which comprises the offense.'" Irick v. Bell, 565 F.3d 315, 322 (6th Cir. 2009) (quoting Dykes v. Compton, 978 S.W.2d 528 530 n. 2 (Tenn. 1998); see also Walden v. State, 156 S.W.2d 385, 387 (Tenn. 1941) ("In the crime of rape no intent is requisite other than that evidenced by the doing of the acts constituting the offense.").

Second, the information contained within Dr. Brown's report cannot establish that the Petitioner was insane at the time of the offenses. While we agree with the various courts that have determined that the legal concept of "actual innocence" can encompass innocence as a result of insanity at the time of an offense, see, e.g., Britz v. Cowan, 192 F.3d 1101, 1103 (7th Cir. 1999); Leon Womack v. Khelleh Konteh, No. 3:06 CV 157, 2008 WL 123867, * 5 (N.D. Ohio Jan. 10, 2008); Jervon Herbin v. Robert J. Angelone, No. Civ.A. 00-1630-A, 2001 WL 34803136, * 4 (E.D. Va. May 7, 2001), Dr. Brown's report does not attribute the Petitioner's inability "to appreciate the wrongfulness of his conduct or to conform that conduct to the requirements of the law" to a specific mental disease or defect capable of supporting a defense of insanity.

The statute defining the defense of insanity at the time the Petitioner committed his offenses provided that:

> (a) Insanity is a defense to prosecution if, at the time of such conduct, **as a result of mental disease or defect**, the person lacked substantial capacity either to appreciate the wrongfulness of the person's conduct or to conform that conduct to the requirements of the law.
> (b) As used in this section, "mental disease or defect" does not include any abnormality manifested only by repeated criminal **or otherwise antisocial conduct**.

Tenn. Code Ann. § 39-11-501 (repealed 1995) (emphasis added), *quoted in* State v. Flake, 88 S.W.3d 540, 550 (Tenn. 2002); see also Graham v. State, 547 S.W.2d 531, 539 (Tenn. 1977) (discussing *M'Naghten* rule). Dr. Brown's diagnoses of "a paranoid personality disorder" and "a schizoid personality disorder" cannot as a matter of law constitute the kind of "mental disease or defect" upon which a defense of insanity can be based. See Flake, 88 S.W.3d at 555 (noting that personality disorders "generally are not considered to be severe mental conditions capable of supporting an insanity defense"); see also Jimmy Don Spangler

v. State of Tennessee, No. 968, slip op. at 5 (Tenn. Crim. App., Knoxville, Apr. 2, 1987), *perm. to appeal denied* (Tenn. Jun. 29, 1987) (concluding that psychologist's opinion that defendant suffered "from two unspecified personality disorders" was insufficient to support defense of insanity).

This leaves Dr. Brown's diagnoses of unspecified cognitive and psychotic disorders as the only mental diseases or defects, capable of supporting a defense of insanity, that were linked in the report to the Petitioner's inability "to appreciate the wrongfulness of his conduct or to conform that conduct to the requirements of the law." However, Dr. Brown's conclusions regarding the existence of these disorders are, at best, preliminary. Specifically, Dr. Brown conceded in his report that the Petitioner's unspecified psychotic disorder was a condition "for which there is inadequate information to make a specific diagnosis." He also admitted in his report that "[a] more specific diagnosis cannot be made on the available information." As this court made clear in Ray v. State, 984 S.W.2d 236, 238 (Tenn. Crim. App. 1997), when relying on "new scientific evidence" in a motion to re-open a prior post-conviction proceeding, a petitioner must delineate "evidence *that has already been secured* and which will establish his or her actual innocence." One cannot base a motion to re-open on allegations that "an examination or test *could* establish actual innocence." Id. Because Dr. Brown's report establishes only a likelihood that the Petitioner suffered from unspecified cognitive and psychotic disorders that could have supported the conclusion that he was insane at the time of the offenses, the report was insufficient as a matter of law to support the re-opening of the Petitioner's prior post-conviction proceeding. See Lawrence Allen Hodge v. State of Tennessee, No. 03C01-9708-CR-00332, slip op. at 3 (Tenn. Crim. App., Knoxville, Jun. 3, 1998), *perm. to appeal denied* (Tenn. Oct. 19, 1998) (determining that second petition for post-conviction relief could not be considered motion to re-open based upon "new scientific evidence" establishing that the petitioner was "actually innocent" because mental health records relied upon in petition did not establish petitioner's insanity at the time of his offenses).

In addition, Dr. Brown's report is not really the "new" evidence upon which the motion to re-open is based. Instead, the affidavits from the Jeffers family members upon which Dr. Brown primarily based his conclusions are more appropriately considered the "new" evidence upon which the Petitioner's claims are based. However, the information contained within these affidavits does not constitute "scientific evidence" making the Petitioner's "actual innocence" claim an inappropriate basis upon which to re-open his prior post-conviction proceeding. See Dellinger v. State, 279 S.W.3d 282, 291 n. 7 (Tenn. 2009) (explaining that claims of actual innocence not based on new scientific evidence, that are filed after the running of the statute of limitations on post-conviction claims, may only be brought in a petition for writ of error coram nobis).

Accordingly, the application for permission to appeal from the order of the Criminal Court for Knox County dismissing the Petitioner's motion to re-open is hereby DENIED. Because the record reflects that the Petitioner is indigent, costs on appeal are taxed to the State, for which execution may issue.

JAMES CURWOOD WITT, JR., JUDGE

NORMA MCGEE OGLE, JUDGE

D. KELLY THOMAS, JR., JUDGE